



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 8, 2011

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR2011-11422

Dear Mr. Ramirez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 426274.

The Lower Colorado River Authority (the "LCRA") received a request for four categories of information, including (1) the final bond package information for series 2001A, 2003, 2004D, and 2006, the reimbursement letters from 2000 to the present, and debt allocation spreadsheets; (2) all records related to the issuance of bonds and debt as stipulated in the 2008 contract between the City of West Lake Hills (the "city") and the LCRA for wastewater transportation and collection; (3) all records related to defeasance of any bonds or debt following and specifically related to any divestiture of any LCRA utility system in the last 10 years; and (4) all records reflecting all assets that compromise the city's wastewater system. The requestor informs us it does not seek information protected by section 552.117(a)(1) of the Government Code. You state some of the requested information has been or will be released. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by the requestor's attorney.

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and, therefore, does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note Exhibits C-21, C-23, and C-24 fall within the scope of section 552.022(a)(5) of the Government Code, which provides for the required public disclosure of "all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate," unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(5). Although you seek to withhold Exhibits C-21, C-23, and C-24 under the deliberative process privilege encompassed by section 552.111 of the Government Code, this section is a discretionary exception that protects a governmental body's interest and is, therefore, not "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (governmental body may waive deliberative process privilege as incorporated in predecessor to section 552.111). Therefore, the LCRA may not withhold Exhibits C-21, C-23, and C-24 under section 552.111 of the Government Code. As you raise no other exceptions to the disclosure of this information, we have marked it for release. However, we will consider the applicability of section 552.111 to the remaining exhibits not subject to section 552.022(a)(5).

You raise section 552.107(1) of the Government Code for Exhibits C-1 to C-7, C-9 to C-20, and C-22. Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* Tex. R. Evid. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* Tex. R. Evid. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must

explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You inform us the records contained in the exhibits at issue are communications made by and between LCRA employees and attorneys which were made for the purpose of facilitating professional legal services to LCRA employees. You also inform us these communications were not intended to be disclosed to third parties and have remained confidential. Based on your representations and our review, we find the LCRA has demonstrated the applicability of the attorney-client privilege to Exhibits C-1 to C-7, C-9 to C-20, and C-22. Thus, the LCRA may withhold this information under section 552.107(1) of the Government Code.²

You seek to withhold Exhibits C-8, C-23, and C-24 under section 552.111 of the Government Code. This section excepts from disclosure “an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2 (1993)*. The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); *Open Records Decision No. 538 at 1-2 (1990)*.

In *Open Records Decision No. 615*, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See Open Records Decision No. 615 at 5 (1993)*. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See Open Records Decision No. 631 at 3 (1995)*.

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*

²As our ruling for this information is dispositive, we need not address your remaining argument against disclosure.

v. Tex. Attorney Gen., 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* Open Records Decision No. 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You state Exhibits C-8, C-23, and C-24 are intra-agency communications consisting of advice, opinions, or recommendations relating to the purchase, sale, or financing of water and wastewater systems the LCRA is authorized to own and operate. Based on your representations and our review, we agree Exhibits C-8, C-23, and C-24 contain advice, opinions, and recommendations that implicate the LCRA's policymaking processes. Therefore, the LCRA may withhold this information, which we marked, under section 552.111 of the Government Code. However, we find the remaining information in Exhibits C-8, C-23, and C-24 consists of facts which are severable from the advice, opinions, or recommendations. Accordingly, no portion of the remaining information in these exhibits may be withheld under section 552.111.

In summary, the LCRA may withhold Exhibits C-1 to C-7, C-9 to C-20, and C-22 under section 552.107(1) of the Government Code. The LCRA may also withhold the information we marked in Exhibits C-8, C-23, and C-24 under section 552.111 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/eb

Ref: ID# 426274

Enc. Submitted documents

c: Requestor
(w/o enclosures)
