



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

May 15, 2003

Mr. Anthony S. Corbett  
Freeman & Corbett, L.L.P.  
2304 Hancock, Suite 6  
Austin, Texas 78756

OR2003-3264

Dear Mr. Corbett:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181048.

The Brushy Creek Municipal Utility District (the "district"), which you represent, received two requests from the same requestor for the following information:

District identification number 030403.01:

Request an opportunity to inspect and select for copying all documents sent by or received by all lawyers representing District interests since 18 February 2003. Please include all documents to and/or from the District Engineer, the General Manager, all other District employees, all Consultants and Contractors, all members of the Board of Directors, and all Land Developers and Home Builders. Please include all E-Mail. I am not interested in the E-Mail address of non-governmental people.

District identification number 030403.02:

1. Request a copy of the General Manger's report as presented to the Board of Directors during the 27 February 2003 meeting.

2. Request an opportunity to inspect and select for copying all documents sent by or received by the General Manager since 18 February 2003 to or from the District Counsel, the District Engineer, All members of the Board of Directors, all land developers and home builders and their legal or engineering representatives.

You state that some of the responsive information will be released to the requestor. You also indicate that some responsive information is the subject of Open Records Letter No. 2003-2997 (2003), issued May 5, 2003. You claim that the remainder of the responsive information is excepted from disclosure under sections 552.105, 552.107, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

First, you indicate that the first request, seeking all documents sent or received by district lawyers since February 18, 2003, encompasses information that was the subject of Open Records Letter No. 2003-2997 (2003).<sup>2</sup> This office determined that part of the information at issue in Open Records Letter No. 2003-2997 is excepted from disclosure under section 552.103 of the Government Code. However, we further determined that the remaining requested information at issue in Open Records Letter No. 2003-2997 is not excepted under section 552.103 and must be released. We note that section 552.007 prohibits a governmental body from selectively disclosing information that is not confidential by law. *See Gov't Code 552.007.* You do not inform us of any change in the law, facts, or circumstances upon which Open Records Letter No. 2003-2997 is based. We therefore make the following determination: to the extent Open Records Letter No. 2003-2997 required the district to release information that is also responsive to the present requests, the district must release such information in compliance with Open Records Letter No. 2003-2997. To the extent Open Records Letter No. 2003-2997 allowed the district to withhold information that is also responsive to the present requests, the district may continue to rely on our decision in Open Records Letter No. 2003-2997 with respect to such information. *See Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (attorney general decision constitutes first type of previous determination under Gov't Code § 552.301(a) where (1) precisely the same records or information previously were submitted under Gov't Code § 552.301(e)(1)(D), (2) same governmental body previously requested and received a ruling, (3) prior ruling concluded that same records or information are or are not excepted*

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<sup>1</sup> We assume that the "representative sample" of records submitted to this office is truly representative of the requested records at issue. *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 that those records contain substantially different types of information than that submitted to this office.

<sup>2</sup>In Open Records Letter No. 2003-2997 (2003), this office considered your request for a decision regarding two requests for information pertaining to water quality. You refer to the requests at issue in that decision by district identification numbers 022103-01 and 022803-01.

from disclosure, and (4) law, facts, and circumstances on which prior ruling was based have not changed).

Next, you seek to withhold a portion of the submitted information under section 552.107(1) of the Government Code as information protected by 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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that 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. 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. *In re Texas 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 a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (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. Finally, 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that 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). Upon review, we find that a portion of the submitted documents consists of confidential communications between the staff and representatives of the district and the district’s attorney. We have marked the information that the district may withhold under section 552.107(1) of the Government Code.

You also contend that some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office

reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Open Records Decision No. 615 at 5-6 (1993). The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; Open Records Decision No. 615 at 4-5. We note that section 552.111 is applicable to communications that involve a governmental body's consultants. See Open Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant). Section 552.111 is not applicable, however, to communications with a party with which the governmental body has no privity of interest or common deliberative process. See Open Records Decision No. 561 at 9 (1990). You state that the information you seek to withhold under section 552.111 relates to policy deliberations among district staff and consultants concerning the district's water supply planning and development. Upon review, we agree that some of the submitted documents contain advice, recommendations, opinions, and other material reflecting the policymaking processes of the district. We have marked the information that the district may withhold pursuant to section 552.111.

Next, you contend that some of the submitted information is excepted under section 552.105 of the Government Code. Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Section 552.105 was designed to protect a governmental body's planning and negotiating position with respect to particular transactions. Open Records Decision No. 564 at 2 (1990). This exception protects information relating to the location, appraisals, and purchase price of property only until the transaction is either completed or aborted. Open Records Decision

Nos. 357 at 3 (1982), 310 at 2 (1982). You state that some of the submitted information, which you have marked, relates to the location of real property that the district is currently considering acquiring for a water line and treatment plant project. You further explain that the district has not yet secured the parcels of property or easement interests related to the project, and that the district has not announced to the public the specific location of the proposed pipeline route or water treatment plant and related facilities. You also assert that release of this information “would harm the [d]istrict in connection with its negotiations for purchase of the real property interests from the landowners in question, and from other landowners.” Based upon your representations and our review of the information in question, we agree that portions of the submitted information are excepted from disclosure under section 552.105. We have marked information that the district may withhold pursuant to section 552.105 of the Government Code.

In summary, to the extent that information responsive to the present requests is identical to information that was the subject of Open Records Letter No. 2003-2997, the district must comply with Open Records Letter No. 2003-2997 in responding to the present requests. We have marked documents in the submitted information that the district may withhold pursuant to sections 552.105, 552.107, and 552.111 of the Government Code.<sup>3</sup>

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the

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<sup>3</sup>Based on this finding, we do not reach your arguments under section 552.137 of the Government Code.

governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 181048

Enc: Submitted documents

c: Mr. John C. McLemore  
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(w/o enclosures)