OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 18, 2003

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

OR2003-4979

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# 184451.

The Brushy Creek Municipal Utility District (the "district"), which you represent, received a request for all engineer's reports submitted to the district's general manager or members of its board of directors since January 1, 2003. You state that you have released a portion of the requested information to the requestor. However, you claim that the remaining requested information is excepted from disclosure under sections 552.105 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1]

Initially, we note that the submitted information contains a completed report that is subject to section 552.022 of the Government Code. This section provides, in relevant part:

> (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

[1]We assume that 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). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

> public information and not excepted from required disclosure under this chapter *unless they are expressly confidential under other law*:
>
> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1) (emphasis added). Accordingly, you must release the report under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 or is expressly confidential under other law. You argue that the report is excepted from disclosure under sections 552.105 and 552.111. However, these exceptions are discretionary exceptions under the Public Information Act and do not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 470 (1987) (statutory predecessor to section 552.111 is discretionary exception). Consequently, you may not withhold the report under section 552.105 or 552.111 of the Government Code. As you make no additional arguments, we conclude that you must release the completed report we have marked.

In regard to the remaining information that is not subject to section 552.022, section 552.105 of the Government Code 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 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information excepted under section 552.105 that pertains to such negotiations may be excepted so long as the transaction is not complete. Open Records Decision No. 310 (1982). A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision No. 357 at 3 (1982) (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. Open Records Decision No. 564 (1990).

You state that the submitted documents marked as Category 2 "relate to the location of real property for the District's water line project" and that the district "has not yet announced to the public the specific location of the pipeline route or water treatment plant." You further

state that the submitted Category 2 information references "the name of landowners, contain[s] real property descriptions or otherwise refer[s] to the proposed location of property to be acquired for the project" and that release of this information "would harm the District in connection with its negotiations for purchase of the real property interests from the landowners." Based on your representations and our review of the submitted information, we have marked the information to which you have demonstrated the applicability of section 552.105, and you may withhold this information accordingly. However, the remaining information does not pertain to the location of real or personal property or to the appraisal or purchase price of real or personal property. Thus, section 552.105 is inapplicable to this information, and it may not be withheld under this section.

Section 552.111 of the Government Code 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. *City of Garland v. Dallas Morning News,* 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency's policymaking functions 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. ORD 615 at 5-6. 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; ORD 615 at 4-5.

We note that the information at issue involves Naismith Engineering, Inc., a private entity. Section 552.111 can encompass communications between a governmental body and a third party acting as a consultant. *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), 561 at 9 (1990) (predecessor to section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (predecessor to section 552.111 applies to memoranda prepared by governmental body's consultants). After reviewing the information at issue, we find that some of it constitutes interagency or intraagency communications consisting of advice, recommendations, and opinions reflecting the policymaking processes of the district. Therefore, you may withhold the information we have marked under section 552.111. We find that you have not demonstrated the applicability of section 552.111 to any of the remaining information, and it must be released.

In summary, we conclude that you may withhold the information we have marked under sections 552.105 and 552.111 of the Government Code. All remaining information must be released.

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 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,

W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 184451

Enc: Submitted documents

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