



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 7, 2003

Mr. Anthony S. Corbett
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OR2003-7098

Dear Mr. Corbett:

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# 188938.

The Brushy Creek Municipal Utility District (the "District"), which you represent, received twelve requests for information from the same requestor. You state that the District will release to the requestor all responsive documentation for which you do not seek a decision from this office. However, with respect to five of the requests, you assert portions of the requested information are excepted from disclosure under sections 552.105, 552.107, and 552.111 of the Government Code. We reviewed the representative sample of information you submitted and considered the exceptions you claim.¹

Initially, we note some of the requested information you seek to withhold is subject to section 552.022 of the Government Code, which provides, in pertinent part, as follows:

[T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

¹ We 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.

....

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Thus, information contained in the submitted attorney fee bill must be released under section 552.022 unless it is expressly confidential under other law. Sections 552.105 and 552.107, discretionary exceptions under the Act, do not constitute other law for the purposes of section 552.022.² See Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, Gov't Code § 552.107(1)), 564 (1990) (governmental body may waive statutory predecessor to Gov't Code § 552.105); see also Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the District may not withhold any of the information in the submitted fee bill under section 552.105 or 552.107 of the Government Code.

However, the Texas Supreme Court has determined that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); see also Open Records Decision Nos. 676 (2002), 677 (2002). Accordingly, we will address the confidentiality of the submitted fee bill under Rule 503 of the Texas Rules of Evidence.

Texas Rule of Evidence 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, Gov't Code § 552.107(1)), 551 (1990) (statutory predecessor to Gov't Code § 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to Gov't Code § 552.111); see also *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103). Therefore, discretionary exceptions do not constitute other law that makes information confidential.

representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is “confidential” if 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).

Thus, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body: (1) must show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) must identify the parties involved in the communication; and (3) must show the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the information is privileged and confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

You contend that the submitted fee bill is a privileged attorney-client communication. After reviewing your arguments and the attorney billing statement submitted to this office, we believe that you have demonstrated some of the entries contained therein constitute confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. Accordingly, we have marked the information the District may withhold under Rule 503 of the Texas Rules of Evidence. The District must release the remainder of the fee bill in accordance with section 552.022(a)(16) of the Government Code.

With respect to the remaining information, we address your claimed exceptions, including section 552.105. Section 552.105 provides as follows:

(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.

Gov't Code § 552.105. This provision 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).

In this instance, you state that the submitted information labeled Category 2 relates to the location of real property for the District's water line project. You inform us that the District "has not yet announced to the public the specific location of the pipeline route or water treatment plant and related facilities." Further, you explain that the "District has not yet secured the parcels of property or easement interests related to the project." You advise us that disclosure of information related to the proposed location of property for the project would harm the District's negotiating position. Based on your representations and our review of the submitted information, we conclude the District may withhold the information we have marked under section 552.105 of the Government Code.

Next, for information labeled Category 3, you assert section 552.107(1) of the Government Code, which protects information coming 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. 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. 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. *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).

Here, we agree the information you have labeled Category 3 constitutes communications. You explain that the communications involve the District’s legal counsel, its representatives, and District staff members, including the general manager. Further, you advise us that the communications were not intended for disclosure to third parties. Based on your representations and our review of the information, we conclude you have demonstrated the information you seek to withhold under section 552.107 constitutes confidential communications made for the purpose of facilitating the rendition of professional legal services to the District. Accordingly, the District may withhold the information we have marked under section 552.107(1) of the Government Code.

Additionally, we address your arguments under section 552.111 of the Government Code. This provision excepts from required public disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This exception applies not only to internal memoranda, but also to memoranda prepared by consultants of a governmental body. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981). 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. Generally, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision No. 615 at 5 (1993).

The submitted information which you have labeled “Category 1” consists of information regarding the District’s long-term water project and the District’s obligation to comply with certain EPA Phase II storm water regulations. Upon review, we agree that a portion of the

Category 1 information reflects the policymaking processes of the District. Therefore, we conclude that the District may withhold the information we have marked pursuant to section 552.111 of the Government Code.

Last, we address the applicability of section 552.137 of the Government Code. This provision states the following:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78th Leg., R.S., H.B. 2032, § 1 (to be codified as amendment to Gov't Code § 552.137). Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their

release. Section 552.137 does not apply to a business's general e-mail address or a government employee's work e-mail address. Also, e-mail addresses encompassed by subsection 552.137(c) are not excepted from disclosure under section 552.137.

The submitted information subject to release contains e-mail addresses of members of the public. You do not inform us that any member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, we conclude the District must withhold the e-mail addresses we have marked under section 552.137(a) of the Government Code.

In summary, the District must release the attorney fee bill under section 552.022(a)(16) of the Government Code; however, the District may withhold the information we have marked under Rule 503 of the Texas Rules of Evidence. The District must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The District may withhold the remaining information we have marked under sections 552.105, 552.107, and 552.111 of the Government Code. The District must release the remainder of the submitted information to the requestor.

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,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 188938

Enc: Submitted documents

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