ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 21, 2004

Ms. Lisa Cowling Tschirhart
Staff Counsel
Brazos River Authority
P.O. Box 7555
Waco, Texas 76714-7555

OR2004-3233

Dear Ms. Tschirhart:

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# 199942.

The Brazos River Authority (the "authority") received a request for copies of correspondence from November 17, 2003 through February 5, 2004 related to a consultant who appeared on a particular agenda and regarding "Mesa Water's recently announced memorandum of understanding with the [authority]." In addition, the requestor seeks "all invoices coded to activity number 3145, the Mesa Water Initiatives," as well as "any reports from authority staff or contract employees done as a result of the Mesa Water Initiative." You claim that some of the requested information is excepted from disclosure under sections 552.104 and 552.107 of the Government Code. We have considered the exceptions you have raised and have reviewed the submitted information.

First, we note that you have not submitted copies of any responsive invoices to this office for review, nor do you tells us that you have released any such information to the requestor. Therefore, to the extent it exists, you must immediately release such information to the requestor if you have not already done so. *See* Gov't Code §§ 552.006, .301(a), .302.

Next, we note that some of the submitted documents are not responsive to the instant request for information, as they were created after the date that the department received the request. This ruling does not address the public availability of this information, which the authority

need not release in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

We will now address your arguments against disclosure of the submitted information. Section 552.107(1) of the Government Code 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 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).

Upon review of your arguments and the submitted information, we agree that the information you have submitted at Tab 2 is protected by the attorney-client privilege, and therefore, this information may be withheld from the requestor under section 552.107(1). We also note that a portion of the information you have submitted at Tab 3 is identical to information

submitted at Tab 2, and therefore, this information is excepted from disclosure under section 552.107(1) as well. We have marked this information.

Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. *Id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *Id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *Id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You assert that the authority has specific marketplace interests in the information at issue. You state that the authority was created pursuant to Article XVI, Section 59 of the Texas Constitution as a conservation and reclamation district, and sells raw water and provides various water services within the Brazos River Basin. You further state that the authority receives no state or federal appropriations, other than loans or grants, and that the remainder of its income comes from its sales of water and provision of water services within its basin. You state that the authority is currently attempting to negotiate a contract with Mesa Water, Inc. ("Mesa") for the provision of certain water services. You state that the information in Tab 3 reveals internal debates among authority staff and significant points of the authority's negotiating position with Mesa. You assert that revealing this information to the requestor or any other party allows that party to publicize points of the authority's negotiating position with Mesa, which would put the authority at a significant disadvantage in finalizing any agreement with Mesa..

Based upon your arguments and our review of the information at issue, we find that you have demonstrated that release of most of the remaining information in Tab 3 would result in a specific threat of actual or potential harm to the authority's interests in a particular competitive situation. Therefore, you may withhold the remaining information in Tab 3 under section 552.104, except for the information we have marked to be released.

To summarize, you may withhold all of the information in Tab 2, as well as additional information we have marked in Tab 3, under section 552.107(1). You may withhold the remaining information in Tab 3 under section 552.104, with the exception of the documents that we have marked to 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).

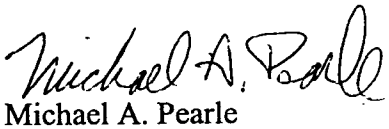
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 199942

Enc. Submitted documents

c: Mr. Robert Elder
Austin American-Statesman
P.O. Box 670
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(w/o enclosures)