



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 9, 2009

Mr. Anthony S. Corbett
Freeman & Corbett
8500 Bluffstone Cove, Suite B-104
Austin, Texas 78759

OR2009-09453

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# 348457 (your ID #: 080520.01).

The Brushy Creek Municipal Utility District (the "district"), which you represent, received a request for all documents exchanged between all district representatives, including all consultants, employees, board members, and two specified entities concerning the "District Defined Areas since October 1, 2008, excepting the second Bond Application for the Defined Area."¹ You state that you will make some of the requested information available to the requestor. You claim that portions of the submitted information are excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.²

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

¹You inform us that the district sought and received clarification of the request from the requestor. See Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

²We 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). 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.

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 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 a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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).

You claim that with the exception of the communications you have marked as non-privileged, the submitted information consists of communications made for the purpose of facilitating the rendition of professional legal services. You state that the communications were between district employees and attorneys representing the district. You further state that the communications were intended to be confidential, and that the confidentiality of the communications has been maintained. Upon review, we find that with the exception of the communications you have marked as non-privileged, the district may withhold the submitted information under section 552.107 of the Government Code. We note, however, that some of the individual e-mails you seek to withhold under section 552.107 contained in the submitted e-mail strings consist of communications with non-privileged parties. Accordingly, to the extent these non-privileged e-mails exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107. We have marked these non-privileged e-mails.

We note that the marked non-privileged e-mails include e-mail addresses subject to section 552.137 of the Government Code, which excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the

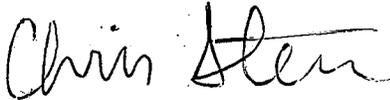
e-mail address is of a type specifically excluded by subsection (c).³ *See* Gov't Code § 552.137(a)-(c). Accordingly, if the district maintains the non-privileged e-mails separate and apart from the submitted e-mail string, the district must withhold the e-mail addresses we have marked under section 552.137, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b). The remainder of the non-privileged e-mails must be released to the requestor.

In summary, with the exception of the communications you have marked as non-privileged, the district may withhold the submitted information under section 552.107 of the Government Code. However, to the extent the non-privileged e-mails we have marked exist separate and apart from the submitted e-mail string, the separate e-mails must be released, with the exception of the e-mail addresses we have marked, which must be withheld under section 552.137 of the Government Code.⁴

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 at (512) 475-2497.

Sincerely,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴We note that the information that may be released contains confidential information to which the requestor has a right of access. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual or authorized representative asks governmental body to provide information concerning that individual). Therefore, if the district receives another request for this information from an individual other than this requestor, the district should again seek our decision.

Ref: ID# 348457

Enc. Submitted documents

c: Requestor
(w/o enclosures)