



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 10, 2010

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

OR2010-03453

Dear Mr. Freeman:

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# 372444.

The Gulf Coast Water Authority (the "authority"), which you represent, received a request for: 1) all correspondence, board or committee/subcommittee meeting minutes/notes, or other documentation regarding the option water contract between the authority and the City of Sugarland (the "city") dated July 17, 1997; 2) all correspondence, board or committee/subcommittee meeting minutes/notes, or other documentation from December 2008 through December 2009; 3) any correspondence, board or committee/subcommittee meeting minutes/notes, or other documentation regarding the proposed Freese and Nichols, Inc. Shannon Plant Evaluation and Reliability Study, as discussed by the authority and the city; 4) all current or proposed authority water supply contracts with customers/water purchasers downstream of the city; 5) pumping records for the Brazos River Shannon Pump Station for the past seven years; and 6) pump station maintenance records for the Brazos River Shannon Pump Station for the past three years. You state the authority has made or will make responsive information related to the last five categories of requested information available to the requestor. You claim the submitted information, which relates to the first category of requested information, is excepted from disclosure under sections 552.107

and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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 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 pet.). 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 state the Category 2 documents are communications between the authority’s current and former legal counsel and authority officials, employees, or consultants. You state the communications convey the legal counsels’ advice and opinions concerning a proposed

¹We 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.

contract and/or legal issues related to the authority's activities. You state the confidentiality of the communications has been maintained. Therefore, based on your representations and our review of the information at issue, the authority may withhold the Category 2 documents under section 552.107 as privileged attorney-client communications.

You assert the Category 1 documents are excepted from disclosure under the deliberative process privilege encompassed by section 552.111. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). 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. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You state the Category 1 documents relate to deliberations of authority personnel regarding internal policy issues concerning the authority's water supply planning and development as it relates to the city and other authority customers. We agree portions of the Category 1 documents, which we have marked, constitute advice, opinions, recommendations, or other material reflecting the policymaking processes of the authority. However, you have not

demonstrated how some of the remaining information at issue, which is purely factual, consists of advice, opinions, or recommendations about a policymaking decision. Additionally, some of the Category 1 documents are meeting notes involving a third party. You have not explained how the authority shares a privity of interest or common deliberative process with this third party. *See id.* Therefore, the authority may not withhold the remaining Category 1 information under section 552.111.

In summary, the authority may withhold the Category 2 documents under section 552.107 of the Government Code. The authority may withhold the portions of the Category 1 documents we have marked under section 552.111 of the Government Code. The remaining Category 1 information must be released.

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, toll free, at (888) 672-6787.

Sincerely,



Jessica Eales
Assistant Attorney General
Open Records Division

JCE/eeg

Ref: ID# 372444

Enc. Submitted documents

c: Requestor
(w/o enclosures)