

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



September 19, 2001

Ms. Susan Rocha
Denton & Navarro
1700 Tower Life Building
310 South St. Mary's Street
San Antonio, Texas 78205-3111

OR2001-4206

Dear Ms. Rocha:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152145.

The San Antonio Water System (the "system") received three requests for fifteen categories of information. You inform us that the system will release some of the responsive information to the requestor. You claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted to this office by a third party. Gov't Code §552.304.

We begin by noting that section 552.301(e) of the Government Code requires a governmental body to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You

¹You also raise section 552.022. Section 552.022 does not exclude information from public disclosure, but sets out categories of public information to which the Public Information Act's exceptions to disclosure generally do not apply.

did not provide this office with the information responsive to request categories #5 and #11.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Because you have not submitted information responsive to request categories #5 and #11, we have no basis for determining whether a compelling reason exists for withholding it. Thus, we have no choice but to order the information at issue released pursuant to section 552.302. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below. We caution that the distribution of confidential information constitutes a criminal offense. *See Gov't Code § 552.352.*

Some of the submitted information contained in Information Item No. 2 consists of responses by third parties to the system's RFP for Automotive Meter Reading Systems, which may involve third party property interests. Section 552.305 states in pertinent part:

(d) If release of a person's proprietary information may be subject to exception under Section 552.101, 552.110, 552.113, or 552.131, the governmental body that requests an attorney general decision under Section 552.301 shall make a good faith attempt to notify that person of the request for the attorney general decision. . . .

Gov't Code §552.305(d); *See* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). You do not inform us that you have so notified any of the third parties whose interests may be involved. Because no third party submitted arguments to this office, we have no basis to conclude that this information is excepted from disclosure. *See* Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Again, we caution that the distribution of confidential information constitutes a criminal offense. *See Gov't Code § 552.352.*

We next note that a portion of the submitted materials includes information made public by section 552.022 of the Government Code. This section provides several categories of

information that are not excepted from required disclosure unless they "are expressly confidential under other law." In pertinent part this section reads

(a) Without limiting the amount or kind of information that is public information under this chapter, the 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) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate;

...

(7) a description of an agency's central and field organizations . . . ;

...

(13) a policy statement or interpretation that has been adopted or issued by an agency[.]

The submitted materials include information contained in accounts and vouchers; a completed report and performance audit; information used to estimate the need for or expenditure of public funds; flow charts describing the system's organization; and a statement of purchasing policy. All of the records relating to the performance audit and the report are subject to required release under section 552.022(a)(1), while the accounts and vouchers fall within the scope of subsection (3) of section 552.022(a). The information used to estimate the need for or expenditure of public funds is made public pursuant to section 552.022(a)(5). The purchasing policy is subject to required release under section 552.022(a)(13), while the organizational flow charts fall within the scope of subsection 552.022(a)(7). The submitted information which is within the ambit of

section 552.022 is therefore subject to required public disclosure, except to the extent that any of this information is expressly confidential under other law.

The cancelled checks which fall within the scope of section 552.022(a)(3) contain bank account and routing numbers that are subject to section 552.136 of the Government Code. The Seventy-seventh Legislature recently added section 552.136 to the Public Information Act,² which, among other things, makes account numbers confidential. Senate Bill 694 was passed on May 14, 2001, became effective when it was signed by the Governor on May 26, 2001, and provides, in relevant part, as follows:

Sec. 552.136. CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS.

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value;
or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.136). Accordingly, you must withhold from disclosure the marked account and routing numbers contained within the cancelled checks pursuant to section 552.136 of the Government Code

²The Legislature also enacted two other bills that added a section 552.136 to the Public Information Act. One is House Bill 2589, which makes certain e-mail addresses confidential. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov't Code § 552.136). The other is Senate Bill 15, which makes information maintained by family violence shelter centers confidential. *See* Act of May 14, 2001, 77th Leg., R.S., S.B. 15, § 1 (to be codified at Gov't Code § 552.136). In addition, Senate Bill 694 enacted the same language from House Bill 2589 regarding the confidentiality of e-mail addresses, but codified it as section 552.137 of the Act.

As for the other section 552.022 information, you have not indicated, nor are we aware of, any other law that would make this information confidential. You do not argue section 552.108. Sections 552.107 and 552.111 of the Government Code are discretionary exceptions under the Act and do not constitute "other law" for the purposes of section 552.022.³ Therefore, we find that, with the exception of the bank account and routing numbers, the particular information at issue is public information not excepted from public disclosure under sections 552.022(a)(1), (3), (5), (7) and (13). We have marked the information which must be released.

We further note that the minutes, tape recordings, and agendas of a governmental body's public meetings are specifically made public by statute. *See* Gov't Code § 551.022. Information made specifically public by statute may not be withheld from disclosure by any exceptions to disclosure under the Public Information Act. *See, e.g.,* Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Accordingly, the system must release the marked Board minutes.

You claim that a portion of the submitted information is protected from public disclosure under the informer's privilege. The informer's privilege, incorporated into the Open Records Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988).

The informer's privilege does not, however, apply to information that does not describe alleged illegal conduct. Open Records Decision No. 515 at 5 (1988). For example, the informer's privilege aspect of section 552.101 does not protect memoranda and written statements complaining of a fellow employee's work performance when those statements do

³Discretionary 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, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

not reveal the suspected violation of specific laws to the officials charged with enforcing those laws. *See* Open Records Decision Nos. 579 at 8 (1990), 515 at 3 (1988).

The system has not established that the information at issue contains a report of a violation of any law reported to the police or a similar law-enforcement agency. We therefore find that the informer's privilege is inapplicable here.

You also argue section 552.111 of the Government Code. Section 552.111 excepts from required public disclosure interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ); Open Records Decision No. 615 at 5 (1993). The purpose of this section is “to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.) (emphasis added). However, an agency's policymaking functions do not encompass internal administrative or personnel matters, as disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000); *Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (records relating to problems with specific employee do not relate to making of new policy but merely implement existing policy); Open Records Decision No. 615 at 5-6 (1993). *But see* Open Records Decision No. 631 (1995) (finding personnel matters of a broader scope were excepted from disclosure under section 552.111). After reviewing the submitted information, we believe that most of it relates to internal administrative and personnel matters rather than to policy matters of the system. We have marked the information that the system may withhold from disclosure under section 552.111.

You contend that some of the documents we have marked for release are excepted from disclosure under section 552.107. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except purely factual information from disclosure. *Id.* Section 552.107(1) does not except from disclosure factual recounting of events or the documentation of calls made, meetings attended, and memos sent. *Id.* at 5. You have not identified any of the parties to the communication at issue as an attorney. You have not explained how the information at issue reflects either confidential communications from a client to an attorney or an attorney's legal advice or opinions. Thus, we find that the information here at issue may not be withheld from public disclosure under section 552.107.

Section 552.117 may also be applicable to some of the submitted information. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the system may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the system must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The system may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential.

The submitted information contains e-mail addresses obtained from the public. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential.⁴ Senate Bill 694, as passed May 14, 2001, signed by the Governor May 26, 2001, and made effective immediately, provides in relevant part:

Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.

- (a) 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.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.137). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The system must, therefore, withhold the e-mail addresses under section 552.137.

⁴House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

Finally we note that the submitted information contains Texas driver's license numbers. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

The system must withhold the Texas driver's license numbers under section 552.130.

In summary, we have marked information that the system may withhold from disclosure under section 552.111. For those employees who timely elected to keep their personal information confidential, the system must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The system must withhold the Texas driver's license numbers under section 552.130. Bank account and routing numbers must be withheld under section 552.136. E-mail addresses are confidential and must be withheld under section 552.137. The remainder of the submitted information must be released 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 Department of Public 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 General Services 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. 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 152145

Enc. Submitted documents

c: Mr. Brian Collister
KMOL-TV
1031 Navarro Street
San Antonio, Texas 78205
(w/o enclosures)

copy

CAUSE NO. GN103192

SAN ANTONIO WATER SYSTEMS
BOARD OF TRUSTEES and EUGENE
HABIGER,

Plaintiffs,

V.

GREG ABBOTT, ATTORNEY GENERAL
OF TEXAS,

Defendant.

§ IN THE DISTRICT COURT OF
§
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§
§ 201st JUDICIAL DISTRICT

FILED
05 OCT -7 AM 8:51
Marian Rodriguez-Santolucito
DISTRICT CLERK

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for entry of an agreed final judgment. Plaintiff San Antonio Water Systems Board of Trustees ("SAWS"), and Defendant Greg Abbott, Attorney General of Texas appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. (Eugene Habiger sued in his official capacity and is no longer with SAWS; therefore he is being dropped from this lawsuit.) This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the requestor, Brian Collister, KMOL-TV, was sent reasonable notice of this setting and of the parties' agreement that SAWS must withhold some of the information at issue; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. Some of the information still at issue, specifically those documents represented by Bates numbers in parentheses in Exhibit A to this Judgment are excepted from disclosure by Tex. Gov't Code § 552.116, except as provided in ¶ 3 of this Judgment.

2. SAWS may withhold from the requestor the information enumerated in ¶ 1 of this Judgment.

3. SAWS no longer contests the disclosure of and represents that it has disclosed the documents represented by Bates numbers that are shaded or that are not specifically enumerated in parentheses, in Exhibit A to this Judgment.

4. All costs of court are taxed against the parties incurring the same;

5. All relief not expressly granted is denied; and

6. This Agreed Final Judgment finally disposes of all claims between Plaintiffs and Defendant and is a final judgment.

SIGNED this the 7 day of Oct, 2005.

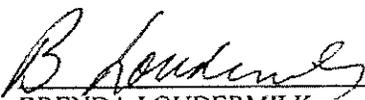


PRESIDING JUDGE

APPROVED:



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