



November 5, 2001

Ms. Shelly Eversole
Winstead, Sechrest & Minick
100 Congress Avenue, Suite 800
Austin, Texas 78701

OR2001-5089

Dear Ms. Eversole:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154326.

The Brushy Creek Municipal Utility District (the "district"), which you represent, received a request for "the opportunity to inspect all documents, including E-mail, sent to, or received from, Naismith Engineering, not listed on attached spreadsheet, related to long term water facilities." You indicate that the public documents responsive to the request will be made available for inspection. You also indicate that you have submitted a representative sample of the requested e-mails as exhibit D.¹ You claim that the submitted information, attached as exhibits B, C, and D, is excepted from disclosure under sections 552.105, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the progress reports, submitted as exhibit C, are subject to section 552.022 of the Government Code. Section 552.022 provides, in pertinent part:

- (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 We 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.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The district must release any of the requested information that falls within section 552.022(a)(1), unless that information is expressly confidential under other law or is excepted under section 552.108. *See id.* Section 552.111 of the Government Code is a discretionary exception under the Public Information Act and does not constitute "other law" for purposes of section 552.022. *See Open Records Decision No. 663 (1999)* (governmental body may waive section 552.111). Therefore, the district must release the progress reports in exhibit C.

Next, we address your section 552.111 arguments for the draft reports in exhibit B. Section 552.111 excepts from disclosure "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." In *Open Records Decision No. 615 (1993)*, this office re-examined 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. An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *Open Records Decision No. 615 at 5-6 (1993)*. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the advice, opinion, or recommendations. *Open Records Decision No. 615 at 4-5 (1993)*. However, a preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. *Open Records Decision No. 559 at 2 (1990)*.

You state that the two draft reports in exhibit B were prepared by Naismith Engineering "to advise the District regarding the proposed Lake Georgetown Facilities." You further state that "the District plans to release the Engineering Report, in its final form, to the public." Based on these representations and our review of the submitted information, we agree that the district may withhold the draft reports in exhibit B under section 552.111.² *See Open Records Decision No. 462 (1987)* (information created for agency by outside consultant falls within purview of section 552.111). However, any factual information severable from the advice, opinion, or recommendations that is not included in the final form of any such draft must be released to the requestor.

² Because section 552.111 is dispositive, we do not address the district's section 552.105 claim.

Next, you state that the engineer correspondence in exhibit D also “contain the deliberations of [the] District on policy issues important to the District.” We have marked those portions of the engineer correspondence in exhibit D that the district may withhold pursuant to section 552.111.

Next we address your section 552.107 arguments. Section 552.107(1) of the Government Code provides in relevant part that information is excepted from required public disclosure if:

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Gov't Code § 552.107(1). 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). You state that certain portions of exhibit D are e-mails to and from the district’s legal counsel. Based on our review of the e-mails in Exhibit D, we conclude that the e-mails to and from the district’s counsel contain information that reveals client confidences or legal advice or opinion and are therefore excepted from disclosure under section 552.107(1) of the Government Code. We have marked the information excepted under section 552.107(1).

We note that exhibit D contains e-mail addresses that have been provided by members of the public to the district for the purpose of communicating electronically with the district. 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.³ 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.

³House 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.

(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 exhibit D. The district must, therefore, withhold e-mail addresses of members of the public, which we have marked, in exhibit D under section 552.137.

In summary, the district must release the progress reports in exhibit C. The district may withhold the draft reports in exhibit B and the portions of exhibit D that we have marked under section 552.111 of the Government Code. In addition, the district may withhold the e-mails in exhibit D from or to district counsel under section 552.107(1) of the Government Code. Finally, the district must withhold e-mail addresses of members of the public in exhibit D under section 552.137. The district must release the remaining information in exhibit D.

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 Dept. 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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/DKB/sdk

Ref: ID# 154326

Enc: Marked documents

c: Mr. John C. McLemore
8400 Cornerwood Drive
Austin, Texas 78717-5340
(w/o enclosures)