



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 3, 2005

Mr. Lewis L. Isaacks
Gay, McCall, Isaacks, Gordon & Roberts
777 East 15th Street
Plano, Texas 75074

OR2005-04878

Dear Mr. Isaacks:

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# 225392.

The North Texas Municipal Water District (the "district"), which you represent, received three requests from two requestors for information relating to the East Fork Reuse Project (the "project"). The first request is for information relating to land leased from a named family for the project and for certain materials and items identified in a letter, including an engineer's opinion of probable cost and information regarding (1) determination of construction costs; (2) determination of the amount of borrowed funds; (3) assessment of right-of-way costs; and (4) verification that the re-use supply will be available during drought conditions. The second request is for (1) a preliminary engineering report; (2) feasibility studies; (3) applications for water rights; (4) financial estimates relating to costs of water; (5) information relating to acquisition of land; and (6) certain financial information. The third request is for a list of the property owners whose land will be crossed by the project. You inform us that the district has no information that is responsive to parts of these requests.¹ You also state that the district has released some of the requested information. You have submitted information that the district seeks to withhold under sections 552.103, 552.105,

¹We note that the Act does not require the district to release information that did not exist when it received these requests or to create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information. We also have considered the correspondence we received from one of the requestors. See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

Initially, we address the requested list of property owners whose land will be crossed by the project. You indicate that the district holds or has access to that information. However, you have not submitted such a list of property owners to this office. Under section 552.301(e) of the Government Code, a governmental body must submit to the attorney general the specific information that it seeks to withhold or a representative sample if the information is voluminous. See Gov't Code § 552.301(e)(1)(D). Although you claim exceptions to disclosure under sections 552.103, 552.105, and 552.111 of the Government Code, these are discretionary exceptions. See Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 564 (1990) (statutory predecessor to section 552.105 subject to waiver), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver), 470 at 7 (1987) (statutory predecessor to Gov't Code section subject to waiver). A governmental body's failure to comply with section 552.301 results in a waiver of sections 552.103, 552.105, and 552.111. Therefore, to the extent that the district holds or has access to the requested list of property owners, that information may not be withheld under sections 552.103, 552.105, or 552.111 and must be released. See Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

We note that the submitted documents contain information that falls within the purview of section 552.022(a)(5) of the Government Code. Section 552.022(a)(5) provides that "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[,]" are not excepted from required disclosure unless they are made expressly confidential by law. The submitted information in Item 1 falls under this category of information. You claim this information is excepted from disclosure under sections 552.103, 552.105, and 552.111 of the Government Code. However, these are discretionary exceptions to disclosure that protect the governmental body's interests and are therefore not other law that makes information expressly confidential for purposes of section 552.022(a). See Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d at 475-76; Open Records Decision Nos. 665 at 2 n.5, 663 at 5, 564, 542 at, 470 at 7. Therefore, the information in Item 1 may not be withheld under section 552.103, 552.105, or 552.111, and must be released.

Next, we address your claim under section 552.111 with regard to the remaining submitted information. This section excepts from public disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the

agency.” Gov’t Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *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 (1993), 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, and opinions that reflect the policymaking processes of the governmental body. *See* Open Records Decision No. 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. The 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). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office also has concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter’s advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You state that the remaining submitted information consists of preliminary drafts of documents and other communications that relate to policy issues concerning water supply, planning, and development. Based on your representations and our review of the information at issue, we find that you have demonstrated that the information falls within the scope of section 552.111. Therefore, the district may withhold the remaining submitted information under this exception.²

²As we are able to make this determination, we do not address your other arguments against disclosure.

In summary: (1) to the extent that the district holds or has access to the requested list of property owners whose land will be crossed by the project, the district must release that information; (2) the information in Item 1 must be released; and (3) the district may withhold the remaining submitted information under section 552.111 of the Government Code.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,

A handwritten signature in black ink, appearing to read "Cindy Nettles". The signature is fluid and cursive, with the first name "Cindy" written in a larger, more prominent script than the last name "Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/JWM/jev

Ref: ID# 225392

Enc: Submitted documents

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