



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 7, 1995

Mr. Patrick W. Lindner
Davidson & Troilo
301 Congress Avenue, Suite 1400
Austin, Texas 78701

OR95-546

Dear Mr. Lindner:

You have asked this office to determine if certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 30812.

The Cameron County Fresh Water District No. 1 (the "district") received a request for a variety of records concerning the district, including information about legal bills, documents showing travel costs and related expenses, and minutes from public meetings.¹ You indicate the district has already released to the requestor minutes of

¹The district submitted letters to this office from two requestors. Your request for a decision from this office was in response to a December 2, 1994, request from the first requestor. However, other requests for information were made in January 1995 and in February 1995 by an attorney representing ratepayers appealing a district rate change. The attorney apparently asked the district to provide information in connection with a pending meeting between district officials and the ratepayers. In a letter written February 7, 1995, which was sent to this office, the attorney indicates he is seeking this information under Chapter 552.

We note that a number of the second requestor's questions were submitted in the form of interrogatories, which would have required the district to compile new information. The Open Records Act is not a substitute for the discovery process under the Texas Rules of Civil Procedure. *See* Attorney General Opinion JM-1048 (1989) at 3 ("the fundamental purposes of the Open Records Act and of civil discovery provisions differ"); Open Records Decision No. 551 (1990) at 3-4 (discussion of relation of Open Records Act to discovery process). The district does not have to compile new information. *See* Gov't Code § 552.002 (defining a "public record"); *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex Civ. App.--San Antonio, 1978, writ dismissed w.o.j.) (official could not be compelled to produce documents not in his possession); Open Records Decision Nos. 452 (1986) at 2-3, 342 (1982) at 2 (Open Records Act applies only to documents already in existence).

public meetings.² However, you contend that the other requested records are excepted from disclosure under sections 552.101, 552.103(a), and 552.107(1) of the Government Code.³

(Footnote continued)

As to other responsive documents, we assume that these have either been released to this second requestor or that they are the same documents that are the subject of this informal open records letter.

²According to a letter from William Schweinle, Jr., submitted to this office as Exhibit E, there may have been some confusion concerning access to tape recordings of public meetings. Tape recordings made by the governmental body of a public meeting are public documents. *See* Gov't Code § 551.022; Attorney General Opinion JM-1143 (1990). The tape recordings are available to the public prior to adoption of the minutes by the governmental body. *See* Open Records Decision No. 225 (1979).

We believe that there may also have been some confusion over the chapter 552 requirements to produce public documents and to seek a decision from this office concerning exceptions from disclosure. One of the letters submitted to this office is from L. Eric Friedland to the requestor, dated December 6, 1994, and discusses an "agreement to extend the normal ten (10) day statutory response time to your Open Records Act Request." Although section 552.301 requires the governmental body to seek a decision from this office and raise exceptions it considers applicable within ten days, it does not require that a governmental body provide the requestor information within ten days of the request. *See* Open Records Decision No. 467 (1987).

Section 552.221 provides that the governmental body must "promptly produce" public information. In Open Records Decision No. 467 (1987) at 6, this office stated that

the act prohibits unreasonable delays in providing public information while recognizing that the functions of the governmental body must be allowed to continue. The interests of one person requesting information under the Open Records Act must be balanced with the interests of all the members of the public who rely on the functions of the governmental body in question. Accordingly, a governmental body may take a reasonable amount of time to comply with a request for public information. What constitutes a reasonable period of time depends on the facts in each case. The volume of information requested is highly relevant to what constitutes a reasonable period of time.

However, taking needed time to produce documents does not toll the ten day limit in which a governmental body must seek a decision from this office. Failure to seek a decision within ten days as required by section 552.301 results in the presumption that information is public. Gov't Code § 552.302.

Although your letter requesting a decision states that the district received the first open records request letter as of November 29, 1994, since the first request letter submitted to this office was dated December 2, 1994, we assume that this assertion was a mistake. We assume that the first request letter the district actually received was the December 2, 1994 letter. You sought a decision from this office within ten days of receipt of the December 2, 1994 letter.

³In a letter dated December 21, 1994, you also asserted that section 552.104 is applicable to the information at issue. Since the request was received by the district on December 2, 1994, this exception was not raised in a timely fashion and therefore was waived. *See* Gov't Code §§ 552.301, .302;

You contend that information pertaining to a possible donation to the district is excepted from disclosure under section 552.101, which provides an exception from disclosure for "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You cite Open Records Decision No. 259 (1980) which determined that since the governmental body could discuss certain prospective donations in a closed session, *see* Gov't Code § 551.073, records about such a donation would be excepted from disclosure under chapter 552. However, that opinion was explicitly overruled by Open Records Decision No. 590 (1991) at 2, which determined that even if information about pledges and donations has been discussed in a closed meeting under section 551.101, records concerning the donors are not therefore made confidential. Additionally, in this situation the identity and other information about the potential donor has already been made public, since a newspaper article submitted to this office identified the potential donor and indicated that details about the donation had been discussed in a public hearing.

You submitted to this office a letter from the donor, marked as Exhibit H, stating that some information supplied to the district by the donor is excepted from disclosure under section 552.110. You did not raise this exception on the donor's behalf, nor did the donor provide information sufficient to show that the information is protected under section 552.110. *See* Open Records Decision No. 402 (1983). Additionally, the information submitted to this office as responsive to the request does not appear to be the type of information that is protected under section 552.110.

It may be that none of the information submitted to this office as responsive to the request is the information for which the donor asserts section 552.110 protection.⁴ However, should there be documents at issue for which the donor has asserted section 552.110 protection, you should resubmit to this office the marked documents for a determination by this office, in accordance with section 552.305, and release any other documents at issue. The letter submitted to this office, however, may not be withheld from disclosure.

You also contend that documents concerning travel and legal expenses are excepted from disclosure under section 552.103(a). We note initially that the markings on each bundle of documents submitted to this office indicate that several bundles contain documents responsive to the request for information about travel expenses, marked as

(Footnote continued)

Open Records Decision Nos. 592 (1991) at 8 (Gov't Code § 552.104 may be waived by the governmental body), 515 (1988) (governmental body may not raise additional exceptions after ten day deadline).

⁴We note that only a small portion of the information submitted to this office as being responsive to the request appears to have been submitted by the donor.

"Request #4." One bundle had documents responsive to the inquiry about travel expenses. The documents in the other bundles do not appear responsive to the inquiry about travel expenses, nor did you specifically mark any of the documents in the other bundles as being responsive. We assume that these non-responsive documents were mistakenly marked as being responsive to the request.

We also note that included in the documents submitted to this office were minutes from public meetings. You may not withhold from disclosure the records of public meetings such as minutes and district resolutions. See Open Records Decision No. 221 (1979) at 1 ("official records of the public proceedings of a governmental body are among the most open of records").

As to your section 552.103(a) argument, to show the applicability of this exception a governmental entity must show that (1) litigation is pending or reasonably anticipated in a judicial or quasi-judicial proceeding and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Our review of the responsive information you seek to withhold indicates it includes invoices for district officials' travel from 1993 to the date of the request. The information at issue also includes itemized billing records and invoices covering the district's legal expenses from 1992 to the date of the request.⁵

You indicate that, pursuant to section 13.043 of the Water Code, district ratepayers have filed an appeal of the district's water and sewer rates to the TNRCC. You state:

As in all utility rate cases at the TNRCC, the District's revenue requirement is in issue. The District's revenue requirement includes all of its expenses, including the expenses of the District's Board of Directors for travel and the District's legal fees are at issue in the case.

⁵A newspaper article indicates that at least one legal bill or invoice that may be at issue has already been made public. However, an affidavit submitted to this office appears to indicate that this information was not voluntarily disclosed by the district, but rather was obtained by an individual who took the information from a trash can. Since this information would not appear to have been voluntarily disclosed by the district, we do not need to discuss a selective disclosure of documents, which generally is prohibited under section 552.007. See Open Records Decision Nos. 400 (1983) (once "voluntary disclosure" of non-confidential information has occurred, the information is generally available to the public), 387 (1983) at 3 ("[this office] has never held that information which is not voluntarily released by a governmental body, but which nevertheless comes into the possession of another party, is henceforth automatically available to everyone").

You appear to argue that all of the district's revenue and expenditure records, even dating back several years, are generally related to the rate appeal. However, there is no indication that the ratepayers have particularly brought into question the district's legal and travel expenses, nor is it apparent to this office from the information provided that these bills are particularly related to that appeal.

You contend that in addition to the pending rate appeal, the district also has reason to anticipate other litigation. You assert that the requestor is "obviously conducting a fishing expedition to discover some document upon which the requestor can grant his client's wish and file suit against the District." You seek to withhold these same documents from disclosure by arguing that the district is anticipating litigation. It is not apparent to this office, nor have you adequately explained, what type of lawsuit the district is anticipating. However, we note that a requestor's suspected motives are not relevant to an inquiry under chapter 552. Gov't Code § 552.223; Open Records Decision No. 542 (1990). Isolated threats of litigation, without more, do not constitute reasonably anticipated litigation. Open Records Decision No. 351 (1982) at 2. Even several public threats to file suit, without other steps being taken, do not show that litigation is reasonably anticipated. Open Records Decision No. 331 (1982).

You have shown that district ratepayers are appealing the district's water and sewer rates. You have not, however, shown how the specific records at issue are related to the subject of the litigation. Since the district has not met its burden of showing the applicability of section 552.103(a) to these particular records of travel and legal expenditures, they may not be withheld from disclosure under section 552.103(a).⁶ We will address your argument that the attorney billing records are excepted from disclosure under section 552.107(1).

You contend that the requested attorney billing records show information protected by the attorney-client privilege.⁷ Section 552.107 excepts information from required public disclosure if:

- (1) 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 Rules of the State Bar of Texas; or

⁶We also note that section 552.022(3) provides that "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds" is generally public.

⁷The Seventy-fourth Legislature has significantly amended the Open Records Act effective September 1, 1995. See Act of May 29, 1995, H.B. 1718, 74th Leg., R.S. (to be codified at Government Code chapter 552). We do not address in this ruling whether these recent amendments will affect requests for this information that are made on or after September 1, 1995.

- (2) a court by order has prohibited disclosure of the information under section 552.107(1).

Rule 1.05(b)(1) of the Texas State Disciplinary Rules of Professional Conduct prohibits a lawyer from revealing confidential client information. Rule 1.05(a) defines "confidential information" to include both "privileged information" protected under Rule 503 of the Texas civil and criminal rules of evidence and Rule 501 of the Federal Rules of Evidence, and "unprivileged information," including all other client information held by a lawyer. In Open Records Decision No. 574 (1990), this office held that section 552.107(1) excepts from disclosure only "privileged information" but that the exception does not apply to all client information held by an attorney for a governmental body. The only information excepted from disclosure under section 552.107(1) is information reflecting client confidences and attorney advice, recommendation, and opinion given within the context of an attorney-client relationship. See Open Records Decision No. 589 (1991).

You submitted to this office billing statements that were marked to show the portions you seek to withhold under section 552.107(1). You have marked virtually all of the descriptions, including information about communications with third parties rather than with representatives of the governmental body and information that may even be a matter of public record. Information that is clearly not confidential because it reports communications with a third party or because it is a matter of public record, such as the events at a hearing, is not excepted from disclosure under section 552.107(1). Open Records Decision No. 574 (1990) at 5. Information that does not contain a client confidence or attorney advice, opinion, and recommendation such as a memo of "a factual recounting of events in a lawsuit" is not excepted from disclosure. *Id.* Simple documentation of telephone calls made, research done, meetings attended, or memos sent is not protected under section 552.107(1). *Id.* at 7. The privilege is also limited to communications with those governmental representatives who fit within the "control group" as discussed by the Texas Supreme Court in *National Tank Co. v. Brotherton*, 851 S.W.2d 193 (Tex. 1993).

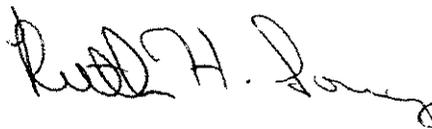
Most of the information you marked does not fall within the section 552.107(1) privilege. We have marked a representative sample of the fee bills as a guide to show the type of information that is actually excepted from disclosure under section 552.107(1). You may withhold from disclosure the type of information that we bracketed in these sample documents. All of the other information at issue must be disclosed.

You rely upon Open Records Letter Nos. 94-855 (1994) and 94-856 (1994) for your argument that virtually all of the descriptions of legal work in the itemized bills can be withheld from disclosure. In both of those decisions, the governmental body had submitted itemized legal bills that directly related to pending or reasonably anticipated litigation. This office determined that because those bills were related to pending or reasonably anticipated litigation, the descriptions could be withheld from disclosure

under section 552.103(a) until the litigation concluded. However, as previously discussed, you have not shown how all of the district's legal bills from three different law firms, dating from 1991 and 1992 to the time of the request, are related to the pending litigation. Since the decisions you cite addressed itemized legal bills in the context of section 552.103(a), they are not applicable to your section 552.107(1) argument.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling may be relied upon as a previous determination under section 552.301 as to the minutes of public meetings. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/MAR/rho

Ref.: ID# 30812

Enclosures: Marked documents

cc: Mr. William E. Schweinle, Jr.
Ellison, Schweinle & Parish, P.C.
3800 First City Tower
1001 Fannin Street
Houston, Texas 77002
(w/o enclosures)

Mr. William D. Dugat III
Bickerstaff, Heath & Smiley
San Jacinto Center, Suite 1800
96 San Jacinto Boulevard
Austin, Texas 78701-4009
(w/o enclosures)