



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 10, 1996

Mr. Roger Beecham
Passman & Jones
2500 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270

OR96-0012

Dear Mr. Beecham:

As counsel for the Dallas County Water Control and Improvement District No. 6 (the "district"), you ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 34591.

The district received a request for the following information:

1. Copies of all invoices paid by the district since May 1, 1995, including who submitted the invoices, the services or goods paid for and the exact amounts paid;
2. The salaries of any individuals hired by the district since May 1, 1995, including that of Rick Lundsford as a special engineering consultant, approved by the district's board of directors at a regular meeting on May 23, 1995;
3. Copies of any proposed departmental budget or budgets for fiscal year 1995-1996 that have been considered, are being considered or are scheduled to be considered by the district's board of directors, including the exact amounts proposed to be spent and for what purpose. Also, the exact figures of proposed revenues and the sources of those revenues to fund the proposed budget items for fiscal year 1995-1996.

You say the district does not object to the release of the information about the salary of the one individual whom the district has hired since May 1, 1995. The district

asserts that section 552.103 of the Government Code excepts the remaining requested information from required public disclosure. The district also asserts that the attorney-client privilege, section 552.111 of the Government Code, and Texas Rule of Civil Procedure 166b(3)(b) except portions of the requested information from required public disclosure.¹

We begin with the section 552.103 claim. To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). Section 552.103 applies to information that relates to a contested case conducted before an administrative agency under the Administrative Procedure Act (the "APA"), Government Code chapter 2001. *See id.*

You assert that section 552.103 applies because litigation in which the district is a party is both reasonably anticipated and pending. You inform us that the city council of the city of Balch Springs passed Resolution No. 385 to file an application with the Texas Natural Resources and Conservation Commission ("TNRCC") for a certificate of convenience and necessity (a "CCN") and to cancel any other entities' CCN, including that of the district. You also inform us that the district filed an application with TNRCC for a municipal wastewater discharge permit. You state that the city of Balch Springs is protesting this application. You assert that the disclosure of the requested information "could assist Balch Springs in obtaining evidence in support of its anticipated application to obtain a CCN and combating the district's CCN within the wastewater discharge permit proceeding that is currently pending."

We will assume that the hearing on the district's application for a permit to discharge wastewater is conducted before the TNRCC under the APA. However, we do not believe that the district has adequately explained how information about the fee paid Mr. Rick Lundsford, the district's budget information, or the bulk of the district's invoices since May 1, 1995, relate to an issue in the district's pending wastewater discharge permit proceeding or to an issue in the anticipated Balch Springs permit proceeding.² However, with regard to the attorney fee bills, apparently portions of the description of the services rendered concern the district's wastewater treatment plant permit application. We believe these portions relate to the pending proceeding concerning the district's application for a wastewater discharge permit. We, therefore, conclude that

¹In reaching our conclusion here, 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) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of any other records to the extent that those records contain substantially different types of information than that submitted to this office.

²Nor have you established that the district would be a party to a proceeding regarding the Balch Springs application for a CCN.

the district may withhold those portions of the fee bills pursuant to section 552.103 of the Government Code.³ We have marked the fee bills accordingly.⁴ The district may not withhold any of the remaining requested information pursuant to section 552.103.

Section 552.111 of the Government Code excepts from required public disclosure the following information:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See* Open Records Decision No. 615 (1993). An agency's policymaking functions do not encompass routine internal administrative and personnel matters. *See id.* Disclosure of such matters does not inhibit free discussion among agency personnel as to policy issues. *See id.*

You say the district has not created a draft of the 1995-1996 budget, and that the budget will not be finalized and approved until August, 1995. However, you have submitted the budget requests of the district's sewer and water departments. You contend these requests are "working papers that clearly have the opinions and advice of the district with regard to the final budget".

We believe the budget requests are proposals relating to the district's policymaking process. We therefore conclude that the district may withhold the budget requests from required public disclosure based on section 552.111 of the Government Code.

In your July 19, 1995, letter to this office, you assert that the attorney-client privilege protects from disclosure the attorney fee bills. Section 552.107(1) of the Government Code essentially incorporates the attorney-client privilege found in the Texas and federal rules of evidence. *See* Open Records Decision No. 630 (1994) at 3. However, the district received the request for information on June 28, 1995. Section 552.301(a) of the Government Code provides that:

A governmental body that receives a written request for information that it considers to be within one of the [act's]

³We note that if the opposing parties in the anticipated litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

⁴The fee bills from your firm apparently contain entries that do not pertain to the district's permit application. The district may not withhold these entries from required public disclosure based on section 552.103.

exceptions. . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions. *The governmental body must ask for the attorney general's decision within a reasonable time but not later than the 10th calendar day after the date of receiving the request.* (Emphasis added).

Although the district sought our decision within the ten-day period mandated by section 552.301(a), the district failed to raise section 552.107(1) until after the statutory ten-day deadline had passed. Because the district did not request an attorney general decision regarding whether the requested information falls within section 552.107(1) within the deadline provided by section 552.301(a), it has waived that exception. *See* Open Records Decision No. 630 (1994). Therefore, the district may not withhold the fee bills pursuant to section 552.107(1) of the Government Code.

You state that some of the invoices are those of engineering companies that are consulting experts of the district. You assert that any invoices or bills which contain the expert's identity, opinion or impressions are excluded from discovery pursuant to Texas Rule of Civil Procedure 166b(3)(b). The Open Records Act does not encompass discovery privileges. *See* Open Records Decision No. 575 (1990). Thus, the district may not withhold the engineering company invoices pursuant to Texas Rule of Civil Procedure 166b(3)(b).

With regard to the request for information about the salary of Mr. Rick Lundsford, you first say that because Mr. Lundsford is one of the district's experts, any information that he provides the district would be confidential and not subject to public disclosure. You then apparently assert that because Mr. Lundsford is not a salaried employee, the district cannot comply with a request for information about his salary.

A governmental body must make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561 (1990). While it may be true that the district does not pay Mr. Lundsford a salary since he is not a district employee, it is clear that the requestor is seeking information about the fee the district is paying for Mr. Lundsford's consultation services. Thus, the district cannot avoid providing information about the district's payment to Mr. Lundsford based on the requestor's possible mistaken characterization of that information as a "salary" rather than a "consulting fee." Moreover, a governmental body should ask for clarification if it cannot reasonably understand a request. *See* Open Records Decision No. 304 (1982).

You have raised no law to support your claim that the information about Mr. Lundsford's consulting fee is confidential. Among the documents you submitted to this office, we do not find any information about the fee for Mr. Lundsford's services. When a governmental body fails to supply requested information to this office, the information is presumed to be public. *See* Open Records Decision No. 195 (1978); *see also* Gov't Code

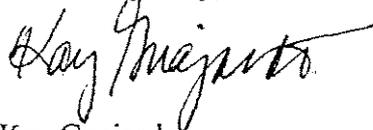
§ 552.303 (requiring governmental body to supply requested information to attorney general). We, therefore, conclude that the district may not withhold from required public disclosure any information concerning the fee the district paid Mr. Lundsford.

We also note that the information you submitted contains some private information, such as the information that identifies annuitants, individuals who have purchased health insurance, and individuals who are taking prescription drugs. See Open Records Decision No. 600 (1992). The district must withhold all private information from required public disclosure pursuant to section 552.101 of the Government Code. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); see also Gov't Code § 552.352 (providing penalties for the distribution of confidential information).

In addition, the district must withhold the home address and telephone numbers of public employees and former employees who have elected, prior to the date of this request, to restrict access to this information in compliance with Government Code section 552.024. See Gov't Code § 552.117. A social security number in the file is confidential only if the number was obtained or is maintained by the district pursuant to any provision of law that was enacted on or after October 1, 1990. 42 U.S.C. § 405(c)(2)(C)9(viii)(I); see Open Records Decision No. 622 (1994).

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/ch

Ref.: ID# 34591

Enclosures: Marked documents

cc: Mr. Ken Milstead
Editor and Publisher
The Suburban Tribune
3008-F Balch Springs Road
Balch Springs, Texas 75180
(w/o enclosures)