



September 21, 2000

Ms. Michelle Simpkins  
Winstead, Sechrest & Minick  
100 Congress Avenue, Suite 800  
Austin, Texas 78701

OR2000-3658

Dear Ms. Simpkins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 139235.

The Brushy Creek Municipal Utility District (the "district"), which you represent, received two requests for documents relating to the refund of capital recovery fees to the residents of the district. One of the requestors also asked separately for all documents relating to capital recovery fees due to the district from the city of Austin. You state that the district will disclose or has disclosed most of the requested information; however, you claim that two memoranda, one related to refunds to residents, and one related to fees due from Austin, are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first note that the district received the first request for documents relating to the refund of capital recovery fees to the residents of the district on July 5, 2000. Section 552.301(b) of the Government Code provides:

The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

In this case, this office received, by courier, the request for a decision on July 20, 2000, after the ten-business-day period mandated by section 552.301(b). While deposit in United States

mail or interagency mail within the ten business days makes a request for decision timely, deposit with a private courier does not. Gov't Code § 552.308. Because the request for a decision was not timely received, the requested information is presumed to be public information. Gov't Code § 552.302.

In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); *see* Open Records Decision No. 630 (1994). The exceptions you have raised, sections 552.103, 552.107, and 552.111, are discretionary exceptions, and a governmental body waives discretionary exceptions by failing timely to invoke them. *See* Open Records Decision Nos. 630 (1994), 551 (1990), 470 (1987). Therefore, the exceptions raised do not constitute compelling reasons to overcome the presumption that the information is public. The memorandum you seek to withhold in connection with that request, the memorandum dated February 24, 2000, may not be withheld from disclosure pursuant to any of your claimed exceptions.

In addition, we note that one requestor, Mr. McLemore, has been provided access to that memorandum. The requestor submitted comments to this office, including a copy of that memorandum. *See* Gov't Code § 552.304 (a person may submit written comments to this office stating why the information at issue should or should not be released). As to any information you seek to withhold that has already been made available to the requestor or to another member of the public, we determine such information is not excepted from required disclosure. *See* Gov't Code § 552.007, Open Records Decision No. 192 (construing the statutory predecessor to section 552.007 of the Government Code to prohibit a governmental body from engaging in selective disclosure). Therefore, the district must release that memorandum to the requestors.

As to the request for all documents relating to capital recovery fees due to the district from the city of Austin, you object to the release of a memorandum dated June 15, 2000, and you timely raise sections 552.103, 552.107, and 552.111 of the Government Code. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *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 at 4 (1990). The district must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that a potential opposing party hires an attorney who makes a request for information establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). You inform us that the district is currently negotiating with the city of Austin regarding the capital recovery fees and that the district has received threats of litigation "from some parties regarding the refund" of the fees. We conclude that you have not established that litigation is reasonably anticipated in this case; therefore, the district may not withhold the memorandum dated June 15, 2000 under section 552.103.

You also assert section 552.107. Section 552.107(1) excepts information from 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 Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct. This exception does not apply to all client information held by a governmental body's attorney; rather, it excepts from public disclosure only "privileged information," *i.e.* communications made to the attorney in confidence and in furtherance of rendering professional services or that reveal the attorney's legal opinion or advice. Open Records Decision Nos. 589 at 1(1991), 574 at 3 (1990), 462 at 9-11(1987). Section 552.107(1) does not except purely factual information from disclosure, Open Records Decision Nos. 574 (1990), 559 (1990).

You relate that the submitted information was prepared by legal counsel for the district and that it constitutes the legal advice and opinion provided to the district by these attorneys regarding the capital recovery fees. From your representations and our review of the submitted materials we conclude that portions of the memorandum may be withheld from public disclosure under the attorney-client privilege aspect of section 552.107 of the Government Code. However, the portion of the memorandum labeled "Background" constitutes purely factual information which may not be withheld from disclosure under section 552.107(1). Open Records Decision Nos. 574 (1990), 559 (1990).

You also raise section 552.111 to withhold the June 15, 2000, memorandum from disclosure. As section 552.111 generally protects only advice, opinion, and recommendations, any protection under section 552.111 will usually be no greater or less than the protection offered under section 552.107. *See* Open Records Decision No. 574 at 2 (1990). As with section 552.107, the attorney work product privilege protected under section 552.111 generally does not extend to a neutral recital of facts obtained by the attorney. Open Records Decision No. 647 at 4 (1996) (citing *Owens-Corning*, 818 S.W.2d at 750 n. 2); *see Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686 (Tex. App. -- Houston [1<sup>st</sup> Dist.] 1990, no writ). Therefore, the district may not withhold the “Background” portion of the memorandum under section 552.111. In summary, the district must release the memorandum of February 24, 2000, and the “Background” portion of the memorandum of June 15, 2000. The district may withhold the remainder of that memorandum under section 552.107(1).

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 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,



Patricia Michels Anderson  
Assistant Attorney General  
Open Records Division

PMA/pr

Ref: ID# 139235

Encl. Submitted documents

cc: Mr. C.R. Nichols  
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