



July 12, 2001

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

OR2001-3021

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# 149352.

The Brushy Creek Municipal Utility District (the “district”) received a written request for “all E-Mail received by or sent by the MUD General Manager, all Members of the Board of Directors, Legal Counsels, and all other consultants, during the period of 1 May 2000 through 5 April 2001.” You indicate that a portion of the responsive information is the subject of previous requests for decisions that the district has submitted to this office. To the extent this office has already issued decisions allowing the district to withhold the same information that is responsive to the instant request, the district may rely upon the decisions as previous determinations and withhold the information from the requestor. *See* Open Records Decision No. 673 (2001). You also indicate that the district has released a portion of the responsive information to the requestor. You contend that the remaining responsive information, a representative sample of which you have submitted to this office, is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.¹ The

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 No. 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.

requestor has also submitted comments to this office as to why some of the requested information should be released. *See* Gov't Code § 552.304.

The requestor has brought to our attention that he previously submitted to the district other records requests for all documents "prepared" by the district's attorneys, and this office has issued rulings regarding those district documents that you submitted to us as being responsive to those requests. *See* Open Records Letter Nos. 2001-2024 (2001), 2000-2660 (2000). Those rulings did not encompass any of the records at issue here. However, the requestor contends that the prior requests for all "documents prepared" by the district's attorneys would necessarily include all attorney correspondence, including the e-mail communications at issue here. Consequently, the requestor contends that the district has waived the protection of sections 552.107(1) and 552.111 for the documents at issue here.

We disagree. We do not believe that the district should have been expected to interpret those requests for "documents prepared" by the district's attorneys to include e-mail communications, which often consist of an informal, on-going, and dynamic exchange of information between correspondents. While it may have been prudent for the district to seek clarification from the requestor as to the scope of his prior requests, in this instance we do not believe it unreasonable for the district to not have considered the subject e-mails as coming within the ambit of the earlier requests. Accordingly, we do not view the district's current decision request to be untimely, and we will therefore consider the applicability of the exceptions you raised to all of the communications at issue.

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). Based on our review of the submitted documents, we conclude that many of the communications, or portions thereof, reveal 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 documents accordingly.

Section 552.111 of the Government Code excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993) at 5. The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). See also *City of Garland v. Dallas Morning News*, 43 Tex. Sup. Ct. J. 303 (Jan.13, 2000). In Open Records Decision No. 615 at 5, this office held that

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters . . . [Emphasis in original.]

In Open Records Decision No. 429 (1985), this office indicated that information protected by section 552.111 must be prepared by a person or entity with an official reason or duty to provide the information in question. See also Open Records Decision Nos. 283 (1981), 273 (1981). This helps assure that the information plays a role in the deliberative process; if it does not, it is not entitled to protection under section 552.111. Open Records Decision No. 464 (1987). See *Wu v. National Endowment of the Humanities*, 460 F.2d 1030 (5th Cir.), cert. denied, 410 U.S. 926 (1972). Accordingly, we will consider the application of section 552.111 to the e-mails between the district and its consultants.

Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 at 5. If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982). We have marked those portions of the e-mail communications that the district may withhold pursuant to section 552.111. All remaining information must be released to the requestor, except as discussed above.

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 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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/RWP/seg

Ref: ID# 149352

Enc. Submitted documents

c: Mr. John C. McLemore
8400 Cornerwood Drive
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(w/o enclosures)