



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 15, 2008

Ms. Julianne B. Kugle
Coats Rose Yale Ryman Lee, PC
3 East Greenway Plaza, Suite 200
Houston, Texas 77046-0307

OR2008-11166

Dear Ms. Kugle:

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# 318005.

The Kendall County Water Control and Improvement District No. 2 (the "district"), which you represent, received a request for specified public notices and communications to or from the district's Board of Directors (the "board") and specified individuals, organizations, companies, and agencies over two specified periods of time. You state that the district has released or will release some of the requested information. You claim that portions of the submitted information are not subject to the Act. You also claim that the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹

Initially, we note that some of the submitted information, which we have marked, is not responsive to the instant request because it was created after the date the request was

¹We 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). 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.

received by the district. The district need not release non-responsive information in response to this request, and this ruling will not address that information.

Next, the district argues that some of the requested information is not subject to the Act because it was created prior to the creation of the district, and is therefore not public information for purposes of the Act. *See* Gov't Code § 552.021. You also argue that "the referenced individuals clearly were not 'Directors' of the [d]istrict until the [d]istrict's organizational meeting" which was held on March 3, 2008. Thus, you assert that these individuals were not governmental officials until that date and any communications involving these individuals before March 3, 2008 are not public information. Section 552.002(a) of the Government Code defines "public information" as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988).

The district was authorized by Senate Bill 1245, which amended Subtitle I, Title 6 of the Special District Local Laws to add Chapter 9022 to the Special District Local Laws Code, effective September 1, 2007. Tex. Spec. Dist. Code § 9022.001. Section 9022.002 states that "[t]he district is a water control and improvement district in Kendall County created under and essential to accomplish the purposes of section 59, Article XVI, Texas Constitution." *Id.* § 9022.002. You inform us that the district's creation was confirmed by the eligible voters of the district at an election held on May 10, 2008. *See* Tex. Spec. Dist. Code § 9022.023 (the initial directors of the district shall hold an election to confirm the creation of the district); *see also id.* § 9022.021 (providing for initial directors of the district). We note that the request for information in this instance was received by the district after the May 10, 2008 election, and therefore, as you acknowledge, the district had been created when the request was received. Upon review of the information at issue, we find that the information relates to matters concerning the district. Accordingly, we find that on the date the request for information was received by the district, the information at issue was being maintained by the district in connection with the transaction of the district's official business. We therefore conclude that all of the remaining submitted information is public information subject to the Act.²

Next, we must address the district's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant

²In reaching this conclusion, we do not take a position with respect to your contention that the district was not in fact "created" on September 1, 2007, the effective date of the legislation that established the district, but rather was "created" by the May 10, 2008 confirmation election.

to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). The district requested a decision from this office on May 29, 2008. In the letter dated May 29, 2008, the district states that it received the request for information on May 19, 2008; further, the request for information indicates, on its face, that it was received on May 19, 2008. However, in the letter dated June 11, 2008, the district states that it received the request on May 21, 2008. Because of this conflicting information, we are unable to determine whether the district submitted a representative sample of a copy of the requested information within fifteen business days of receiving the written request. *See id.* § 552.301(b). We therefore find that the district has failed to establish that it complied with the procedural requirements of section 552.301 in requesting a ruling from this office. *See id.* § 552.301(e)(1)(C).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Although you raise section 552.107 of the Government Code, this is a discretionary exception to public disclosure that protects the governmental body's interest and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, you may not withhold any portion of the submitted information under section 552.107 of the Government Code.

You also assert that a portion of the responsive information consists of purely personal communications that do not pertain to the official business of the district. You thus contend that this information is not public information as defined by section 552.002 and need not be released. However, you have not submitted any such information to this office for our review, and thus, we are unable to determine whether or not the information at issue is subject to the Act. Accordingly, we find that, to the extent that any of the responsive information that you did not submit to this office is unrelated to the transaction of official district business, such information is not subject to disclosure under the Act and need not be released to the requestor. *See* Gov't Code §§ 552.002(a)(1); 552.021. However, to the extent that any of the responsive information that you did not submit to this office is related to the transaction of official district business, then you have failed to comply with

section 552.301 with respect to such information, and any such information must be released to the requestor. *See id.* §§ 552.301, .302. For the information that you have submitted to this office for review, we note that portions of the submitted information may be subject to section 552.137 of the Government Code, which can provide a compelling reason to withhold information.³ Therefore, we will address section 552.137.

Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses we have marked are not a type specifically excluded by section 552.137(c). Accordingly, the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure. As you raise no other exceptions to disclosure, the remaining submitted information must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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,

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

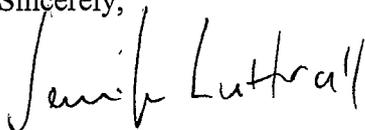
toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas 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 Office of the Attorney General 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 318005

Enc. Submitted documents

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(w/o enclosures)