



June 5, 2001

Ms. Jennifer Lehmann
Escamilla & Poneck, Inc.
P.O. Box 200
San Antonio, Texas 78291-0200

OR2001-2337

Dear Ms. Lehmann:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148020.

The San Antonio Independent School District (the "district"), which you represent, received a request for a copy of e-mail correspondence over the last twelve months to and from three specified individuals. According to your April 4, 2001 letter to the requestor, you are releasing documents that are not being sent to this office. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.104, 552.107, 552.108, 552.111, 552.114, 552.116, and 552.128 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you claim e-mails in Exhibit B related to incomplete investigations are excepted under section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is made expressly public except as provided by section 552.108 of the Government Code or if confidential under other law. Thus, you ask to withhold some of the submitted e-mails until the investigations are completed. However, section 552.022 does not serve as an exhaustive list of public information or as an exception to the release of information. Rather, it lists eighteen categories of public information that generally may be withheld only if confidential by law or, in the case of completed reports, investigations, evaluations, and audits, if excepted under section 552.108 of the Government Code. *See Gov't Code § 552.022* (Section 552.022(a) expressly states that it does not limit "the amount or kind of information that is public information under this chapter."). Therefore, you may not withhold any of the submitted information in Exhibit B under section 552.022.

You contend that Exhibits B1 and B2 are excepted under section 552.108 of the Government Code. Section 552.108(a)(1) excepts from disclosure information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime if release of the information would interfere with the detection, investigation, or prosecution

of crime. Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. See Gov't Code §§ 552.108(a), (b), .301(b)(1); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

Section 552.108 applies to information held by a law enforcement agency or prosecutor. The district does not qualify as a law enforcement agency. However, you explain that the submitted e-mails in Exhibits B1 and B2 pertain to employee investigations for embezzlement and making threats of physical harm. You represent that the information has been provided to the San Antonio Police Department which is conducting a criminal investigation into these matter. Based on your representations and our review of the submitted information, we agree that you have demonstrated that release of the submitted e-mails in Exhibits B1 and B2 would interfere with the detection, investigation, or prosecution of crime. See Open Records Decision Nos. 474 (1987), 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information which relates to incident). Thus, you may withhold the submitted information in Exhibits B1 and B2 under section 552.108(a)(1) of the Government Code.¹

You claim that e-mails in Exhibits B3, B4, and B7 are excepted under sections 552.101 and 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common law right of privacy. *Id.* The doctrine of common law privacy protects information that contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. *Id.* However, the scope of public employee privacy is narrow. Open Records Decision No. 423 at 2 (1984). Because the work behavior of a public employee and the conditions for his or her continued employment are matters of legitimate public interest, the common law right of privacy does not protect facts about a public employee's misconduct on the job or complaints made about

¹Having found the e-mails excepted under section 552.108(a)(1), we need not address the applicability of your other asserted exceptions to this information.

the employee's performance. *See* Open Records Decision No. 438 (1986). Similarly, information about a public employee's qualifications, disciplinary action and background is not protected by common law privacy. *See* Open Records Decision No. 444 (1986). After reviewing the submitted e-mails in Exhibits B3, B4, and B7, we conclude that you may not withhold these e-mails under sections 552.101 or 552.102 in conjunction with common law privacy.

You also claim that Exhibits B3, B4, B5, B6, and B7 are excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from required public disclosure 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. *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ); Open Records Decision No. 615 at 5 (1993). 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). However, an agency's policymaking functions do not encompass internal administrative or personnel matters, as disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000); *Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (records relating to problems with specific employee do not relate to making of new policy but merely implement existing policy); Open Records Decision No. 615 at 5-6 (1993). *But see* Open Records Decision No. 631 (1995) (finding personnel matters of a broader scope were excepted from disclosure under section 552.111).

Although you claim that the e-mails contain opinions, advice, and recommendations of district administrators about how to proceed in investigations, you have not explained how the submitted e-mails relate to the policymaking functions of the district. Based on our review of the e-mails, we conclude that the submitted e-mails pertain to internal administrative and personnel matters which are not protected under section 552.111. *See City of Garland*, 22 S.W.3d at 351. Accordingly, we find that you may not withhold the submitted e-mails in Exhibits B3, B4, B5, B6, and B7 under section 552.111 of the Government Code.

Further, you claim that the e-mails in Exhibits B3, B4, and B5 are excepted under section 552.116 of the Government Code. Section 552.116 of the Government Code, as amended by the Seventy-sixth Legislature, provides in relevant part:

- (a) An audit working paper of an audit of the *state auditor or the auditor of a state agency or institution of higher education* as defined by Section 61.003, Education Code, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [required public disclosure] by this section.

Gov't Code § 552.116(a) (emphasis added). Because the district is neither the state auditor nor a state agency or institution of higher education, section 552.116 is inapplicable to the district. Accordingly, you may not withhold Exhibits B3, B4, and B5 under section 552.116 of the Government Code. Therefore, you must release the e-mails in Exhibits B3, B4, B5, B6, and B7.

Next, you contend that the information submitted in Exhibit C is excepted under section 552.104 of the Government Code. Section 552.104 states that information is excepted from required public disclosure if release of the information would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body usually in competitive bidding situations. *See* Open Records Decision No. 592 (1991). This exception protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from public disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision No. 541 (1990). Based on your representation that the information in Exhibit C relates to bids that have not yet been awarded, we conclude that the submitted information is excepted from disclosure based on section 552.104 until such time as the contract is awarded.²

You also claim that e-mails in Exhibit D are excepted under section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney of a political subdivision 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). A "confidential communication" is a communication "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Tex. R. Evid. 503(a)(5). When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, purely factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* You state that the e-mails in Exhibit D reflect an exchange between the client and the district's attorney for the purpose of seeking legal advice. After reviewing the submitted information, we conclude that you may withhold the e-mails in Exhibit D under section 552.107(1) of the Government Code.

²Having found the information in Exhibit C to be excepted under section 552.104, we need not address the applicability of section 552.128 of the Government Code.

Next, you contend that an e-mail in Exhibit E is excepted under section 552.103 of the Government Code. Section 552.103(a) provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing 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 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You have provided a copy of an original petition in which a former district employee filed a lawsuit against a private company for an on-the-job injury. You state that the district is working with the former employee and his lawyer in exchange for protection on the collection of a lien that the district has against the private company. You have also submitted a copy of the district's notice of a worker's compensation subrogation claim against the private company.

Based on the totality of the circumstances, we conclude that you have demonstrated the applicability of section 552.103 of the Government Code. Accordingly, you may withhold the submitted e-mail in Exhibit E under section 552.103 of the Government Code. We note that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). We note that the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

You also claim that a student's last name in Exhibit F is excepted under sections 552.026 and 552.114 of the Government Code and the Family Educational Rights and Privacy Act of 1974 ("FERPA"). See 20 U.S.C. § 1232g(b)(1). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." See Open Records Decision Nos. 332 (1982), 206 (1978). We have marked the identifying information of the student in Exhibit F which must be withheld pursuant to FERPA and sections 552.026 and 552.114 of the Government Code.

In conclusion, you may withhold the e-mails in Exhibits B1 and B2 under section 552.108(a)(1) of the Government Code. You may also withhold Exhibit C under section 552.104 of the Government Code and Exhibit D under section 552.107 of the Government Code. Further, you may withhold Exhibit E under section 552.103 of the Government Code. You must withhold the marked student-identifying information in Exhibit F under FERPA. You must release the remaining submitted information.

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,



Jennifer H. Bialek
Assistant Attorney General
Open Records Division

JHB/sdk

Ref: ID# 148020

Encl: Marked documents

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