



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 15, 2004

Mr. Thomas E. Myers
Brackett & Ellis
100 Main Street
Fort Worth, Texas 76102-3090

OR2004-1953

Dear Mr. Myers:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 197620.

The Keller Independent School District (the "district"), which you represent, received a request for information pertaining to a specified investigation and retirement agreement. You state that some of the requested information has been or is being provided to the requestor. You claim, however, that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.107, 552.111, and 552.135 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the submitted information. We have also considered comments submitted by a representative of the requestor. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Initially, we note that the information that you submitted to us as Exhibit C is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part:

¹ Although you claim that the remaining requested information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the attorney-client privilege, we note that the appropriate exception to disclosure to assert when claiming that information requested of a governmental body is protected under the attorney-client privilege is section 552.107(1) of the Government Code. *See generally* Open Records Decision No. 676 at 2-3 (2002). Accordingly, we will address this aspect of your section 552.101 claim in conjunction with your section 552.107(1) claim.

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Exhibit C constitutes information from a completed investigation that was made of, for, or by the district that is subject to section 552.022(a)(1). Thus, Exhibit C must be released to the requestor, unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under other law.² You claim that Exhibit C is excepted from disclosure pursuant to sections 552.107 and 552.111 of the Government Code. However, we note that these particular exceptions to disclosure are discretionary exceptions to disclosure under the Public Information Act (the "Act") that do not constitute other law for purposes of section 552.022 of the Government Code.³ Accordingly, we conclude that the district may not withhold any portion of Exhibit C under section 552.107 or section 552.111 of the Government Code. However, we note that the Texas Supreme Court has held that the Texas Rules of Evidence constitutes "other law" for purposes of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider whether any portion of Exhibit C may be withheld under rule 503 of the Texas Rules of Evidence.

We note that rule 503 of the Texas Rules of Evidence enacts the attorney-client privilege. Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

² We note that the district does not claim that any portion of Exhibit C is excepted from disclosure under section 552.108 of the Government Code.

³ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or which implicates the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if 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. *See id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). Based on your representations and our review of Exhibit C, we find that you have adequately demonstrated that this exhibit constitutes a confidential communication exchanged between privileged parties for the purposes of rule 503. Accordingly, we conclude that the district may withhold Exhibit C pursuant to rule 503 of the Texas Rules of Evidence.⁴

You claim that rule 408 of the Texas Rules of Evidence prohibits the disclosure of the information that you submitted to us as Exhibit D. Rule 408 governs the admissibility of information developed through compromise negotiations. *See* TEX. R. EVID. 408. We note that section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

⁴ Because we base our ruling with respect to Exhibit C on rule 503 of the Texas Rules of Evidence, we need not address your claim regarding section 552.135 of the Government Code.

Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other law. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). However, for information to be encompassed by section 552.101, the provision argued must explicitly require confidentiality. A confidentiality requirement will not be inferred from statutory or constitutional structure. *See* Open Records Decision Nos. 658 at 4 (1998) (stating that statutory confidentiality provision must be express and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (stating that, as general rule, statutory confidentiality requires express language making information confidential), 465 at 4-5 (1987).

Further, we note that chapter 552 of the Government Code differs in purpose from statutes and procedural rules providing for discovery in judicial proceedings. *See* Gov't Code §§ 552.005 (chapter 552 does not affect scope of civil discovery), .006 (chapter 552 does not authorize withholding public information or limit availability of public information to public except as expressly provided by chapter 552); *see also* Attorney General Opinion JM-1048 (1989); Open Records Decision No. 575 (1990) *overruled in part by* Open Records Decision No. 647 at 2 (1996) (section 552.101 does not encompass discovery privileges), 575 at 2 (1990) (stating explicitly that discovery privileges are not covered under predecessor to section 552.101), 416 (1984) (finding that even if evidentiary rule specified that certain information may not be publicly released during trial, it would have no effect on disclosability under Act). Accordingly, because rule 408 of the Texas Rules of Evidence does not explicitly provide that information is confidential, we find that no portion of Exhibit D may be withheld from the requestor on that basis under section 552.101 of the Government Code. In addition, although we acknowledge that the Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022" of the Government Code, we note that Exhibit D is not encompassed by section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Accordingly, we also conclude that the district may not withhold any portion of Exhibit D under rule 408 of the Texas Rules of Evidence because the information at issue is not encompassed by section 552.022 of the Government Code.

You also claim that Exhibit D is excepted from disclosure pursuant to section 552.107(1) of the Government Code. Section 552.107(1) protects information that is encompassed by the attorney-client privilege. *See* Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body maintains the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *See id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client

governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *see id.* 503(b)(1), meaning it was "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." *See id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You indicate that Exhibit D is protected from disclosure under the attorney-client privilege because the correspondence in this exhibit was initiated at the request of or in the performance of legal representation of the district. However, after carefully reviewing your arguments and Exhibit D, we find that the communications in this exhibit were not exchanged between privileged parties. Accordingly, we conclude that the district may not withhold any portion of Exhibit D under section 552.107(1) of the Government Code.

You also claim that Exhibit D is excepted from disclosure pursuant to section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.- Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, or opinions reflecting the policymaking processes of the governmental body. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *see also Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.- Austin 2001, no pet.). The purpose of section 552.111 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.).

However, an agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *See* Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *See Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; *see also* Open Records Decision No. 615 at 4-5. However, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982). Further, a preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. *See* Open Records Decision No. 559 at 2 (1990).

You indicate that Exhibit D reveals your thoughts, advice, and recommendations regarding the subject matter of this request for information. However, after carefully reviewing your arguments and Exhibit D, we note that the exhibit does not constitute interagency or intraagency memoranda or otherwise reflect internal district communications concerning the policymaking processes of the district. Instead, Exhibit D pertains solely to a personnel matter and reflects external district communications. Accordingly, we conclude that the district may not withhold any portion of Exhibit D under section 552.111 of the Government Code.

However, we note that Exhibit D contains some information that may be excepted from disclosure pursuant to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(a)(1) if the current or former official or employee did not request confidentiality for this information in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, we conclude that to the extent that the current or former district official or employee with whom the marked section 552.117(a)(1) information in Exhibit D is associated elected confidentiality for this

information prior to the date that the district received this request, the district must withhold this particular information pursuant to section 552.117(a)(1) of the Government Code.

In summary, the district may withhold Exhibit C pursuant to rule 503 of the Texas Rules of Evidence. To the extent that the current or former district official or employee with whom the marked section 552.117(a)(1) information in Exhibit D is associated elected confidentiality for this information prior to the date that the district received this request, the district must withhold this particular information pursuant to section 552.117(a)(1) of the Government Code. The district must release the remaining submitted information to the requestor.

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).

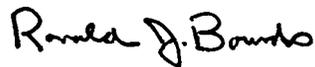
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 197620

Enc. Marked documents

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