



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 15, 2004

Ms. Alyssa M. Burkhart
Rapier & Wilson, P.C.
103 West McDermott
Allen, Texas 75013-2782

OR2004-7905

Dear Ms. Burkhart:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 208972.

The Mustang Special Utility District (the "district"), which you represent, received a request for information concerning the district's former general manager. You state that the district does not possess information responsive to the part of the request pertaining to expense reports submitted by the former general manager. We note that the Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You also indicate that some responsive information has been released. You claim, however, that the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by addressing your contention that the information submitted as Exhibit A is not public information subject to disclosure under the Act. The Act only applies to public information. See Gov't Code § 552.021. Section 552.002 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." Gov't Code § 552.002. You indicate that Exhibit A consists of e-mails sent by district board members from personal e-mail addresses on home computers,

rather than from the district's office. You therefore contend the e-mails in Exhibit A are not public information within the scope of section 552.002.

We have reviewed the information at issue and conclude that the e-mails are "public information" subject to the Act. The determination of whether records solely related to the official business of a governmental body are "public information" under the Act does not depend on whether such records are held by an individual officer of the governmental body rather than the governmental body as a whole. *See* Open Records Decision No. 635 at 3-4 (1995). We note, and you do not dispute, that the information Exhibit A relates solely to the official business of the district. Specifically, the e-mails in Exhibit A contain detailed references to the policies and procedures of the district and indicate concern by district board members for the appropriate use of district-owned property. Thus, because Exhibit A consists of information related to the official business of the district and is maintained by officers of the district, we determine that the information in Exhibit A is public information subject to the Act and may not be withheld from required public disclosure unless it falls within one of the Act's exceptions.

Next, we also note that the submitted documents include a public notice of a special meeting of the district board of directors. The minutes, tape recordings, and agendas of a governmental body's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying upon request), 551.043 (notice of meeting of governmental body must be posted in a place readily accessible to general public at least 72 hours before scheduled time of meeting), 551.053-.054 (district governing bodies required to post notice of meeting at a place convenient to the public in administrative office of district); *see also* Gov't Code § 552.022(a)(15) (information regarded as open to the public is not excepted from disclosure under Act unless expressly confidential by law). Information made public by statute may not be withheld from the public under any of the Act's exceptions to public disclosure. *See, e.g.*, Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Accordingly, the district must release the public notice we have marked in accordance with the Open Meetings Act. *See* Gov't Code § 551.022.

We now turn to your claimed exceptions to disclosure. You contend that the information submitted as Exhibit C is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. Section 552.102(a) 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 in *Industrial Foundation v. Texas Industrial Accident Board* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. *See Indus. Found. v.*

Tex. Indus. Accident Bd., 540 S.W.2d 668, 683-85 (Tex. 1976). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: an individual’s criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *U. S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Upon review, we find that Exhibit C contains a small amount of information that is protected by common-law privacy. The district must withhold this information, which we have marked, pursuant to section 552.101. The remainder of Exhibit C, however, relates to the job qualifications, performance, and circumstances of resignation of a public employee and is therefore subject to a legitimate public interest. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee’s qualifications and performance and the circumstances of resignation or termination), 423 at 2 (1984) (scope of public employee privacy is narrow). Thus, the remainder of Exhibit C is not protected by common-law privacy and may not be withheld on that basis.

We note, however, that Exhibit C contains information that is confidential by law. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Tax return information is defined as data furnished to or collected by the IRS with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax. *See* 26 U.S.C. § 6103(b). The district must withhold the W-4 form in Exhibit C pursuant to section 552.101 of the Government Code as information made confidential by federal law.

Exhibit C also contains the former general manager's I-9 form and attached documents. I-9 forms are governed by section 1324a of title 8 of the United States Code, which provides that an I-9 form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the I-9 form in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we find that the submitted I-9 form and attached documents are confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

You contend that the information submitted as Exhibits B and D is excepted from disclosure under 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." 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, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body. Open Records Decision No. 615 at 5-6 (1993). The 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. Open Records Decision No. 559 at 2 (1990). An agency's policymaking functions, however, 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. Open Records Decision No. 615 at 5-6 (1993).

You state, and the document reflects, that Exhibit B consists of a draft agreement memorializing settlement negotiations between the district and the former general manager regarding the former general manager's resignation. You also indicate that Exhibit D pertains to the job performance of the former general manager and contains advice and opinion regarding "whether violations of the employee handbook had occurred." Upon review, we find that Exhibit B and Exhibit D relate solely to a personnel matter of the district and do not reflect the policymaking processes of the district. We therefore determine that Exhibit B and Exhibit D are not excepted under section 552.111 of the Government Code and may not be withheld from disclosure on that basis. As you raise no other exceptions to disclosure for this information, we determine that Exhibit B and Exhibit D must be released to the requestor.

Next, we note that Exhibit C and Exhibit A contain information that may be excepted from disclosure under 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 elect to keep this information confidential pursuant to section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) 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). Therefore, the district may only withhold information under section 552.117 if the relevant individuals elected to keep the information confidential pursuant to section 552.024 prior to the date the district received the present request for information. Exhibit C contains information pertaining to the former general manager, and Exhibit A contains the home telephone number of a district board member, which we have marked. If the district determines that these individuals timely elected to keep the marked information confidential, the district must withhold the information we have marked pursuant to section 552.117(a)(1). Otherwise, this information may not be withheld under section 552.117(a)(1).

In the event, however, the former general manager did not timely elect to keep his social security number confidential pursuant to section 552.024, we note that the social security number may be excepted under section 552.101. A social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security number at issue is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

We also note that Exhibit C contains the former general manager's personal e-mail address, and that Exhibit A contains the personal e-mail addresses of a district board member and an outside contractor. Section 552.137 of the Government Code provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 excepts certain e-mail addresses of members of the public, or personal e-mail addresses of officers or employees of a governmental body, who have not affirmatively consented to their release. Provided the individuals at issue have not consented to the release of the e-mail addresses, the district must withhold the e-mail addresses we have marked in Exhibit A and Exhibit C pursuant to section 552.137.

Finally, Exhibit C also contains information that is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 excepts information relating to a Texas motor vehicle driver's license and information relating to a Texas motor vehicle title or registration. Gov't Code § 552.130. We have marked the information the district must withhold under section 552.130 of the Government Code.

In summary, the district must release the public notice we have marked in accordance with the Open Meetings Act. The information submitted as Exhibit A is public information subject to the Act. We have marked e-mail addresses in Exhibit A and Exhibit C that must be withheld under section 552.137 of the Government Code unless the individuals at issue consented to release them. We have also marked information in Exhibit A and Exhibit C that must be withheld under section 552.117(a)(1) of the Government Code, provided the individuals at issue elected to keep the information confidential prior to the date the district received the present request. In the event the former general manager of the district did not timely elect to keep his social security number confidential, the social security number may

be excepted under section 552.101 of the Government Code in conjunction with federal law. We have marked a W-4 form, an I-9 form, and attachments to the I-9 form that must be withheld under section 552.101 in conjunction with federal law. We have marked a small amount of information that is protected by common-law privacy and must be withheld under section 552.101. We have also marked information that must be withheld under section 552.130 of the Government Code. The remainder of the submitted information must be released 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 thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten 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 ten 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 ten 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); *Tex. 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 ten calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Saldivar', with a long horizontal flourish extending to the right.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 208972

Enc: Submitted documents

c: Mr. David Lewis
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(w/o enclosures)