



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 11, 2005

Ms. Lisa B. Silvia
Paralegal
Fort Worth Independent School District
100 North University Drive, Suite NW 130
Fort Worth, Texas 76107

OR2005-03084

Dear Ms. Silvia:

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# 221040.

The Fort Worth Independent School District (the "district") received a request for four categories of information.¹ You state that you will release most of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.² We have also reviewed comments submitted by the requestor. *See Gov't Code § 552.304* (providing that interested party may submit comments stating why information should or should not be released).

¹We note that the requestor subsequently narrowed his request to exclude family member and health information. Therefore, any such submitted information is not responsive to this request for information, and need not be released pursuant to this ruling. We have marked other submitted information which is not responsive to the request, and need not be released.

²We 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.

We begin by addressing your contention that the submitted e-mails are 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 state that the e-mails were sent by the district's Superintendent, district board members, and in house counsel for the district from personal e-mail addresses on home computers on private time, rather than from the district's office. You therefore contend the submitted e-mails are not public information within the scope of section 552.002.

We have reviewed the e-mails at issue and conclude that some of the information, which we have marked, was not collected, assembled, or maintained by the district under a law or ordinance or in connection with the transaction of official district business. Accordingly, we conclude that this information is not "public information" subject to the Act and need not be released to the requestor. *See* Gov't Code § 552.002(a), *see also* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business). With respect to the remaining information in these e-mails, we note that 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 also note, and you do not dispute, that the submitted e-mails relate to the official business of the district. Thus, because the submitted e-mails are related to the official business of the district and are maintained by officers of the district, we determine that the remaining information in these e-mails 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, the requestor asserts that the department failed to comply with section 552.301(d) of the Government Code. Under section 552.301(d), a governmental body must provide the requestor with a written statement that the governmental body has asked for a decision from the attorney general, and a copy of the governmental body's written communication to the attorney general, within ten business days of receiving a request. Gov't Code § 552.301(d)(1), (2). The faxed request the district received is dated January 5, 2005. The tenth business day following the district's receipt of this request is January 20, 2005.³ The requestor asserts that the district did not provide him with the required written notice until February 1, 2005. Thus, he alleges the district failed to comply with section 552.301(d). In support of his assertion, the requestor has submitted a copy of letter sent to him by the district, in which the district acknowledges that the "requestor failed to receive any of the

³You inform this office that January 17, 2005 was a district holiday.

correspondence via fax due to a wrong digit in the fax number.” Upon review, we find that the district failed to comply with the requirements of section 552.301(d).

Pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with the procedural 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) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally speaking, 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). Sections 552.103, 552.107 and 552.111 are discretionary exceptions intended to protect only the interests of the governmental body as opposed to exceptions that are intended to protect interests of third parties or information that is confidential by law. *See* Open Records Decision Nos. 542 at 4 (1990) (statutory predecessor to Gov’t Code section 552.103 subject to waiver), 676 at 11-12 (2002) (claim of attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 does not provide compelling reason for purposes of section 552.302 if it does not implicate third party rights), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Consequently, a discretionary exception does not generally constitute a “compelling reason” to withhold information. Thus, none of the submitted information may be withheld pursuant to sections 552.103, 552.107 and 552.111. However, section 552.101 can provide a compelling reason to overcome the presumption of openness; therefore, we will consider the applicability of this exception to the submitted information.

Section 552.101 excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 also encompasses the doctrine of common law privacy. 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. 540 S.W.2d at 683. However, upon review, none of the submitted information may be withheld under common law privacy.

We note that the submitted information contains personal e-mail addresses of district employees. 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 § 552.137.⁴ 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 their e-mail addresses, the district must withhold the e-mail addresses we have marked pursuant to section 552.137.

In summary, we have marked the information that is not public information under chapter 552 of the Government Code and need not be released. The district must withhold

⁴The Office of the Attorney General will raise a mandatory exception like section 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

the e-mail addresses we have marked under section 552.137 unless the individuals at issue consented to release them. The remaining 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 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, 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, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

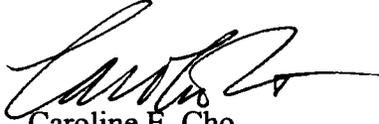
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'Caroline E. Cho', written in a cursive style.

Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/TLH/sdk

Ref: ID# 221040

Enc. Submitted documents

c: Mr. Daniel A. Ortiz
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(w/o enclosures)