



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 17, 2005

Ms. Marquette Maresh
Walsh, Anderson, Brown, Schulze & Aldridge, PC
P.O. Box 2156
Austin, Texas 78768

OR2005-05389

Dear Ms. Maresh:

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# 226357.

The Wichita Falls Independent School District (the "district"), which you represent, received a request for all records and documents submitted by the requestor and/or created on behalf of the requestor and her grievance against the former district in-house counsel. You state that you have provided the requestor with a portion of the requested information. You claim, however, that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.135, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the former district in-house counsel. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

We begin by addressing the former district in-house counsel's contention that a portion of the submitted information is not public information as defined by section 552.002 of the Government Code, and thus is not subject to the Act. The Act applies only 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. Information is generally subject to the Act when it is held by a governmental body and it relates to the official business of a governmental body or is used by a public official or employee in the performance of official duties. Open Records Decision No. 635 (1995).

The former district in-house counsel contends that the documents submitted as Exhibit 8 relate to clients from his private law practice, and therefore do not constitute records of the district. He states that the documents refer to clients and matters that had been commenced prior to his employment by the district, to requests for direction from former clients when new work needed to be performed, or to pro bono work unrelated to the district. Based upon these representations and our review of the documents at issue, we find that Exhibit 8 was not collected, assembled, or maintained by or for the district under a law or ordinance or in connection with the transaction of official business. See Gov't Code § 552.002. Therefore, the documents in Exhibit 8 are not subject to the Act and need not be released.¹

We now turn to the district's arguments for the remaining submitted information. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common law privacy, which 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), *cert. denied*, 430 U.S. 931 (1977).

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.

In this instance, while Exhibits 5 through 7 contain information protected by common law privacy, the requestor, as the individual to whom this private information pertains, has a special right of access to this information pursuant to section 552.023 of the Government Code. See Gov't Code § 552.023 (person or person's authorized representative has special right of access to information that is protected by laws intended to protect person's privacy), *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, *writ denied*) (identity of victims of sexual harassment was highly intimate or embarrassing information and public did not have legitimate interest in such information). Additionally, portions of the remaining

¹ As our ruling is dispositive, we need not address any remaining arguments regarding this information.

information pertain to the requestor's grievance against her former supervisor. This information is of legitimate public interest and is, therefore, not protected by common law privacy. *See generally* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former Gov't Code § 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy). Accordingly, none of the submitted information may be withheld under section 552.101 in conjunction with common law privacy.

The district raises section 552.111 of the Government Code for Exhibit 5. Section 552.111 exempts from required public 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. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 exempts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5. But 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).

The district contends that the handwritten notes in Exhibit 5 “reveal the mental impressions and thought processes of the [district’s] Superintendent in analyzing allegations of improper conduct.” The district further argues that these notes “reflect the opinion and recommendations of the Superintendent about resolution of the matter.” However, upon review of the information in Exhibit 5, we find that it does not consist of advice, recommendations, or opinions reflecting the district’s policymaking. Instead, the information at issue relates to administrative or personnel issues that do not rise to the level of policymaking issues. Therefore, none of the information in Exhibit 5 may be withheld pursuant to section 552.111 of the Government Code.

The district also argues that a portion of Exhibit 5 is excepted pursuant to section 552.135 of the Government Code. Section 552.135 provides:

(a) “Informer” means a student or former student or an employee or former employee of a school district who has furnished a report of another person’s or persons’ possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer’s name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student’s or former student’s name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee’s or former employee’s name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.135. Because the legislature specifically limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under section 552.135 must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See also* Gov't Code § 552.301(e)(1)(A). Upon review of Exhibit 5, we note that the requestor was the individual who reported the possible violation of law. Therefore, her identity need not be withheld in this instance. *See* Gov't Code § 552.023. Furthermore, the district has failed to explain how section 552.135 applies to any remaining portion of Exhibit 5. Consequently, the district may not withhold any portion of Exhibit 5 under section 552.135 of the Government Code.

The district raises section 552.107 of the Government Code for Exhibit 6. Section 552.107(1) excepts from disclosure information protected by the attorney-client privilege. Gov't Code § 552.107. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *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.² TEX. R. EVID. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives.³ TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body seeking to establish that a communication is protected by the attorney-client privilege must inform this office of the identity and capacity of each individual involved in the communication. Finally, the attorney-client privilege applies only to a communication that is confidential. *Id.* 503(b)(1). A confidential communication is a communication that was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of

² The privilege does not apply when an attorney or representative is acting in a capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. 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 a capacity other than that of attorney). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

³ Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client's lawyer or a representative of the lawyer; between the lawyer and the lawyer's representative; by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining "representative of the client," "representative of the lawyer").

professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets the definition of a confidential communication depends on the intent of the parties involved at the time the information was communicated. *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) of the Government Code 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 state that Exhibit 6 reveals communications between attorney representatives for the district and district employees. You also assert that these communications were not intended to be disclosed to persons other than those to whom the communications were made in furtherance of the rendition of professional legal services. Based on your representations and our review of Exhibit 6, we conclude that section 552.107 is applicable to this information. Thus, the district may withhold Exhibit 6 under section 552.107 of the Government Code.

Finally, the district raises the work product exception for Exhibit 7. Section 552.111 also encompasses the attorney work product privilege found in Rule 192.5 of the Texas Rules of Civil Procedure. *See Dallas Morning News*, 22 S.W.3d at 360; Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and
- b) the party resisting discovery

believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

The district asserts that it retained outside counsel to “provide legal advice regarding the [requestor’s] allegations, as well as potential claims and liabilities.” The district argues that the “requested documents in Exhibit 7 reflect the school attorney’s mental impressions, opinions, conclusions, or legal theories and thus constitutes core work product.” The district further asserts that this information “was made and developed in good faith anticipation of litigation.” Based on these representations and our review of the information at issue, we conclude that the district may withhold Exhibit 7 under section 552.111 of the Government Code as attorney work product.

In summary, the district may withhold the information in Exhibit 6 pursuant to section 552.107 of the Government Code, and the information in Exhibit 7 pursuant to section 552.111 of the Government Code. The information in Exhibit 5 must be released to the requestor.⁴

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

⁴ We note, however, that if the district receives another request for this particular information from a different requestor, the district should again seek a decision from this office before releasing this information to such a requestor. See Gov’t Code §§ 552.301, .302; Open Records Decision No. 673 (2001).

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,



Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/jev

Ref: ID# 226357

Enc. Submitted documents

c: Ms. Rita Bridges
P. O. Box 97533
Wichita Falls, Texas 76307-7533
(w/o enclosures)

Mr. David F. Gossom
Law Offices of David Gossom
3711 Maplewood Avenue, Suite 204
Wichita Falls, Texas 76308
(w/o enclosures)