



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 8, 2005

Ms. Ellen B. Huchital
McGinnis, Lochridge & Kilgore, L.L.P.
1221 McKinney Street, Suite 3200
Houston, Texas 77010

OR2005-07149

Dear Ms. Huchital:

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# 229857.

The Eanes Independent School District (the "district"), which you represent, received a request for all communications sent to or from the district's Board of Trustees (the "board") or Superintendent for a specified period of time. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.111, 552.114, 552.117, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.² We have also considered comments submitted by the requestor. See Gov't Code § 552.304

¹Although you initially asserted that the submitted information is excepted under sections 552.105 and 552.136, you do not provide arguments explaining the applicability of these sections to the information at issue; therefore, we assume that the district is no longer asserting these sections. See Gov't Code § 552.301(e)(1)(A) (requiring a governmental body to explain the applicability of raised exception).

²You inform us that you have submitted representative samples of the requested information; however, you also state that the district "cannot logistically compile all responsive documents to submit to the Attorney General." Generally, we assume that a "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.

(interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's assertion that the district failed to comply with section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure.³ Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents.

On May 3, 2005, the requestor sent a request to the district for "any and documents that show or reflect all e-mails and correspondence between and among the superintendent and board members. . . . Please include, but do not limit your search to emails that are sent between and among the board members and superintendent and also between the board members and/or superintendent and [various other individuals]." The district informs us it interpreted the request to be only for communications between or among the members of the board and the Superintendent. On May 18, 2005, the district informed the requestor that the district did not have any information responsive to the request for information. After receiving the district's reply to her request for information, the requestor responded on the same day by asserting that her request was for all communications sent to or from the board or Superintendent. The district asked for a decision from this office to withhold the information at issue on June 1, 2005, and submitted a representative sample of it on June 8, 2005.

The requestor asserts that her May 18 response to the district was a clarification of the May 3 request, but the district asserts that the May 18 response was a new request for information. We note that a governmental body must make a good faith effort to relate a request for information to any responsive information that is within its custody or control. *See* Open Records Decision No. 561 at 8-9 (1990). Upon review of the requestor's May 3 request, we

³We note that, 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).

are unable to conclude the district violated that duty in responding to the May 3 request. Thus, we agree with the district that the requestor's correspondence of May 18 was a new request for information. Accordingly, we find that the district complied with the procedural requirements of section 552.301 in requesting a ruling from this office.

We next address your assertion that the request for information "is harassing and unduly burdensome." The motives of a requestor may not be considered in responding to a request made under the Act. Gov't Code § 552.222(a). In addition, as noted above, a governmental body must make a good-faith effort to relate a request to information within its possession or control. ORD 561. If the information requested is not clear, or if a large amount of information is requested, a governmental body may communicate with the requestor for the purpose of clarifying or narrowing the request. *See* Gov't Code § 552.222(b); Open Records Decision No. 663 at 2-5 (1999). But a governmental body may not refuse to comply with a request on the ground of administrative inconvenience. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976).

You claim that some of the submitted documents are confidential teacher evaluations under section 21.355 of the Education Code. Section 21.355 provides that "[a] document evaluating the performance of a teacher or administrator is confidential." This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. *See* Open Records Decision No. 643 (1996). We note that this office is currently involved in litigation styled *North East Independent School District v. Abbott*, Cause No. GN304566 (345th Dist. Ct., Travis County, Tex.), appeal filed, No. 03-04-00744-CV (Tex. App.—Austin Nov. 15, 2004). Your arguments and the information that you have submitted are similar to the issues and information involved in the pending litigation. Accordingly, this ruling does not address the information that you argue is subject to section 21.355, and we will allow the court to determine whether the type of information at issue must be released to the public.

The district asserts that the information at issue is excepted under section 552.103 of the Government Code, which 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.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You state that, prior to the district’s receipt of the request for information, the requestor filed complaints against the district with at least four different state and federal agencies, as well as several internal grievances. Based on your assertion, we conclude that litigation was reasonably anticipated by the district on the date it received the request for information. However, after review of your arguments and the information at issue, we conclude you have not established that the information at issue is related to the anticipated litigation. Therefore, the district may not withhold any of the submitted information under section 552.103.

The district asserts that some of the submitted information is excepted under section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Section 552.101 also encompasses the Family Educational Rights and Privacy Act of 1974 (“FERPA”). 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. *See* 20 U.S.C. § 1232g(b)(1). "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.

Gov't Code § 552.206. 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. In this instance, however, you have submitted the requested information to this office for consideration. Therefore, we will consider whether the information is protected by FERPA.

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). Under FERPA, the parents or guardians of a student have an affirmative right of access to their child's education records. 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3 ("parent" includes legal guardian of student). Thus, the requestor, as a parent of the child at issue in the submitted records, has a right of access to her child's records under FERPA.⁴ We have marked the information that identifies other students, and that the district must withhold under section 552.101 in conjunction with FERPA. The remaining submitted information does not contain identifying information of a student; therefore, the district may not withhold any of the remaining information under section 552.101 on that ground.

⁴If the district receives another request for this information from a person who would not have a special right of access to it, the city should resubmit this same information and request another decision. *See* Gov't Code §§ 552.301(a), 552.302; Open Records Decision No. 673 (2001).

Section 552.101 also encompasses information protected by common law privacy. Section 552.102 of the Government Code 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*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. Accordingly, we address the board’s section 552.102 claim in conjunction with its common law privacy claim under section 552.101 of the Government Code.

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d 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. This office has found that the following types of information are excepted from required public disclosure under common law privacy: 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); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). The documents at issue do not contain highly intimate or embarrassing information; therefore, the remaining information is not confidential under common law privacy, and the district may not withhold it under section 552.101 or 552.102 on that ground.

The district assert that some of the submitted information is excepted under section 552.107 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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. 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. *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 a 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. 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, *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.” *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. *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). Based on your representations and our review of the information at issue, we agree that the information you have marked under section 552.107 consists of privileged attorney-client communications that the district may withhold.

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.” 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 excepts 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).

This office has also concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

After review of your arguments and the submitted information, we conclude that some of the submitted information consists of advice, recommendations, opinions, and other material reflecting the policymaking processes of the district; therefore, the district may withhold this information, which we have marked, under section 552.111. However, we find the district has not established that the remaining information consists of advice, recommendations, opinions, or other material reflecting the policymaking processes of the district, or that it contains a preliminary draft of a document that is intended for public release in its final form; therefore, the district may not withhold the remaining information at issue under section 552.111.

You contend that some of the remaining information must be withheld under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. The remaining information does not contain these types of information; therefore, the district may not withhold any of the remaining information under section 552.117.

Finally, you assert that some of the submitted information is excepted under section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a

member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. Some of the e-mail addresses at issue are not excepted from release pursuant to section 552.137(c). However, the remaining addresses are not of a type specifically excluded under section 552.137(c), and you do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the district must withhold these e-mail addresses, which we have marked, under section 552.137.

To conclude, we do not address the applicability of section 21.355 to the submitted documents. The district must withhold the information we have marked under section 552.101 in conjunction with FERPA and under section 552.137. The district may withhold the information it has marked under section 552.107 and the information we have marked under section 552.111. It must release the remaining information at issue.

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).

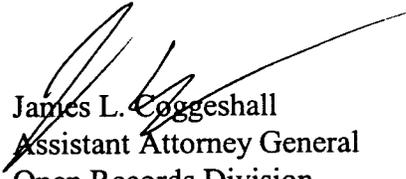
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 229857

Enc. Submitted documents

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