



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 28, 2006

Ms. Christine Badillo
Counsel for Lake Travis ISD
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P.O. Box 2156
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OR2006-11301

Dear Ms. Badillo:

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# 260671.

The Lake Travis Independent School District (the "district"), which you represent, received two hundred and forty-eight (248) separate requests for information from the same requestor. The requestor seeks, in part, information pertaining to complaints and grievances submitted to the district and the Texas Education Agency, certain district expenditures, other requests for information, resignation letters, and specified school board agenda items. You state that the district does not maintain information responsive to one hundred and thirty-four (134) of the requests.¹ You also state that the district has released information responsive to sixty-six (66) of the requests. You further state that the district will withhold social security numbers pursuant to section 552.147(b) of the Government Code,² and some information it has determined to be subject to the federal Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a). You state that the district will also withhold any

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

responsive information that is commercially available.³ See Gov't Code § 552.027 (section 552.027 designed to alleviate burden of providing copies of commercially available books, publications, and resource materials maintained by governmental body). You claim that some of the requested information is not subject to release under the Act. You contend that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.114, 552.117, 552.136, and 552.137 of the Government Code and rule 503 of the Texas Rules of Evidence. We have considered your arguments and reviewed the submitted information.

Initially, you claim that some of the submitted information consists of protected education records. The United States Department of Education Family Policy Compliance Office recently informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.⁴ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. See 34 C.F.R. § 99.3 (defining "personally identifiable information"). You have submitted, among other things, unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine the applicability of FERPA, we will not address FERPA with respect to these records.⁵ Such determinations under FERPA must be made by the educational authority in possession of the education records.⁶ We will, however, address your arguments as to the remainder of the submitted information.

You argue that the submitted photographs, labeled as tab 7, are not subject to the Act. Section 552.021 of the Government Code provides for public access to "public information." See Gov't Code § 552.021. Section 552.002(a) 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

³This ruling does not address the applicability of the Act to this information as none of it was submitted for our review.

⁴A copy of this letter may be found on the attorney general's website at: http://www.oag.state.tx.us/opinopen/oq_resources.shtml.

⁵Therefore, we do not address the information you have submitted in tab 9.

⁶In the future, if the district does obtain parental consent to submit unredacted education records, and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Under this provision, information is generally “public information” within the scope of the Act when it relates to the official business of a governmental body or is maintained by a public official or employee in the performance of official duties, even though it may be in the possession of one person. *See* Open Records Decision No. 635 at 4 (1995). In addition, section 552.001 states it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See* Gov’t Code § 552.001(a). In this instance, although you claim that the photographs at issue are not public information subject to the Act, you state that these photographs were attached as exhibits to a grievance which was submitted to the district. Therefore, we find that the photographs were maintained by the district in connection with the transaction of its official business. Accordingly, we conclude that the photographs at issue are subject to the Act and may only be withheld if they are excepted from disclosure under the Act.

You assert that the photographs are confidential under the doctrine of common law privacy and must be withheld under section 552.101 of the Government Code. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses the doctrine of common law privacy. In *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), the Texas Supreme Court held that information is protected by common law privacy 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 a legitimate concern to the public. *See* 540 S.W.2d at 685. To demonstrate the applicability of common law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. We have reviewed the photographs at issue and find that they do not contain highly intimate or embarrassing information. Accordingly, these photographs are not confidential under the doctrine of common law privacy and may not be withheld under section 552.101.

Next, we note that the submitted information includes an attorney fee bill that is subject to section 552.022 of the Government Code. This section provides that

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:

(16) information that is in a bill for attorney’s fees and that is not privileged under the attorney-client privilege[.]

Gov’t Code § 552.022(a)(16). The submitted fee bill must be released under section 552.022(a)(16) unless it is confidential under other law. You assert that the fee bill is excepted from disclosure under sections 552.107 and 552.136 of the Government Code and rule 503 of the Texas Rules of Evidence. We note, however, that section 552.107 is a

discretionary exception to public disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (section 552.107 is not other law for purposes of section 552.022), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.107 is not "other law" for purposes of section 552.022. However, the Texas Supreme Court has held that the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your arguments under rule 503 of the Texas Rules of Evidence for the submitted fee bill. We also note that section 552.136 of the Government Code qualifies as "other law" for purposes of section 552.022. Therefore, we will address your arguments under section 552.136 for the submitted fee bill, as well as the remaining information.

Rule 503 of the Texas Rules of Evidence enacts the attorney-client privilege and provides in part:

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:

- (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. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure 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).

You state that the submitted attorney fee bill documents communications between district employees and the attorneys for the district. Based on your representations and our review, we agree that some of the information you seek to withhold, which we have marked, is protected under the attorney-client privilege and may be withheld pursuant to Texas Rule of Evidence 503. However, we find that you have failed to demonstrate that the remainder of the attorney fee bill documents privileged communications under Texas Rule of Evidence 503.

Next, we address your arguments under section 552.136 of the Government Code, which provides as follows:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov’t Code § 552.136. We have reviewed the remaining information, including the submitted fee bill, and marked the account numbers and routing numbers which must be withheld under section 552.136. We find, however, that you have not demonstrated that the remaining numbers you have marked may be used to obtain money, goods, services, or another thing of value, or initiate a transfer of funds. Therefore, these numbers may not be withheld under section 552.136.

Next, we address your arguments under section 552.103 of the Government Code. Section 552.103 provides in relevant part 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.

Id. § 552.103(a), (c). A governmental body 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 was pending or reasonably anticipated on the date the governmental body received the request for information, 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You contend that the information pertaining to various complaints and grievances submitted to the Texas Education Agency ("TEA"), tabs 3 - 6, pertains to pending litigation involving the district. You inform us that in May of 2005, the requestor filed for a special education due process hearing with the TEA. You further inform us that in November of 2005, the TEA's hearing officer issued an order in the hearing that was subsequently appealed to federal district court. You state that this federal litigation is currently pending before the United States District Court for the Western District of Texas. Upon review, we find that the district was involved in pending litigation prior to the date the district received the present requests. Additionally, we agree that the information at issue relates to the pending litigation. Accordingly, the district may withhold the information at issue, which we have marked, pursuant to section 552.103 of the Government Code.

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we address your arguments under section 552.111 of the Government Code, which excepts from 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. Section 552.111 encompasses the deliberative process privilege. *See* Open

Records Decision No. 615 at 2 (1993). The purpose of this exception 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, 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, and opinions that reflect 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. The 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). Furthermore, 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).

You state that the information you seek to withhold under section 552.111 consists of memoranda drafted by the district's superintendent for consideration by the district's board members. You also state that these memoranda contain the superintendent's advice, recommendations, and opinions on district policy matters such as facility construction, taxing policies, compensation, and benefits planning. After reviewing your arguments and the information at issue, we find that the district may withhold some of this information under section 552.111 of the Government Code. However, we find that the remainder of the information at issue is purely factual and not subject to section 552.111. Accordingly, the district may only withhold the information we have marked under section 552.111 of the Government Code.

Next, we address your arguments under section 552.117 of the Government Code, which excepts from disclosure the home address, personal telephone number, social security number, and family member information of current or former employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). The district may only withhold information under section 552.117(a)(1) on behalf of current or former employees who made a request

for confidentiality under section 552.024 prior to the date on which the request for this information was made. You state that the employees in question timely elected under section 552.024 to keep their personal information confidential. Based on your representations and our review, we find that the personal information we have marked must be withheld under section 552.117 of the Government Code.

Finally, we address your arguments under section 552.137 of the Government Code, which requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See* Gov't Code § 552.137 (b). 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 remaining information. Therefore, the district must withhold the e-mail addresses we have marked under section 552.137.

In summary, this ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consists of "education records" subject to FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act. The district may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. The account numbers and routing numbers we have marked must be withheld under section 552.136 of the Government Code. The information in tabs 3 - 6 may be withheld under section 552.103 of the Government Code. The district may withhold the information we have marked under section 552.111 of the Government Code. The personal information we have marked must be withheld under section 552.117 of the Government Code. The district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. 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); *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 Office of the Attorney General 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. 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 A. Person III
Assistant Attorney General
Open Records Division

JAP/dh

Ref: ID# 260671

Enc. Submitted documents

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