



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 2, 2006

Mr. Benjamin J. de Leon
Assistant Counsel
Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2006-12996

Dear Mr. Leon:

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# 263654.

The Texas Education Agency (the "agency") received a request for all records pertaining to a specified investigation of a driving school. You state that some of the responsive information has been or will be released. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.116, 552.130, and 552.137 of the Government Code. You state that you will redact some of the submitted information in accordance with the Family Education Rights and Privacy Act. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the United States Department of Education Family Policy Compliance Office recently informed this office that the Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, 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 purposes of our review in the open records ruling process under the Act.¹ Consequently, state and local educational authorities that

¹ A copy of this letter may be found on the Office of the Attorney General's website at http://www.oag.state.tx.us/opinopen/og_resources.shtml.

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, which you assert you will redact in accordance with FERPA. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to the information at issue. Such determinations under FERPA must be made by the educational authority in possession of the education records.² We will, however, address the applicability of the remaining claimed exceptions to the submitted information.

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part 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:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov’t Code § 552.022(a)(1). In this instance, the information we have marked consists of a completed report made of, for, or by the agency. A completed report must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. We note that sections 552.103, 552.111, and 552.116 of the Government Code are discretionary exceptions to disclosure that a governmental body may waive. See *id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov’t Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 473 (1987) (governmental body may waive section 552.111). As such, sections 552.103, 552.111, and 552.116 are not other law that makes information confidential for the purposes of section 552.022. Therefore, the agency may not withhold any portion of the marked report under these sections. You also raise the common-law informer’s privilege, as incorporated by section 552.101 of the Government Code. The common-law informer’s privilege is “other law” for purposes of section 552.022. See *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *Tex. Comm’n on Envtl. Quality v. Abbott*, No. GN-204227 (126th Dist. Ct., Travis County, Tex.). Section 552.130 also constitutes “other law” for purposes of section 552.022. Therefore, we will consider the applicability

² In the future, if the agency does obtain parental consent to submit unredacted education records and the agency seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

of the common-law informer's privilege and section 552.130 to the information that is subject to section 552.022, as well as the remaining submitted information. We will also address your claims under sections 552.103, 552.111, and 552.116 with respect to the information that is not subject to section 552.022.

Section 552.101 of the Governmental Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. The informer's privilege, incorporated into the Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). This privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). It protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (*citing* Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988).

You state that the information at issue pertains to complaints reported to the agency alleging various violations of chapter 1001 of the Texas Education Code. You explain that the agency is charged with enforcing this civil statute. We note that violations of this statute are punishable by administrative and criminal penalties. *See* Educ. Code §§ 1001.553, .554. Based on your representations and our review of the information at issue, we find that this information involves reports of violations of law made to officials with the duty of enforcing that law. Therefore, we conclude that the agency may withhold the identifying information of the informer, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

Section 552.130 provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). The submitted information contains "TEA license numbers" issued to driving safety instructors and driver education teachers by the agency. These numbers do not fall within the scope of section 552.130, and they may not be withheld under that exception.

We now turn to your remaining arguments for the information that is not subject to section 552.022 of the Government Code. You claim that some of this information is excepted from disclosure 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).³

This office considers a contested case under the Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation" for purposes of section 552.103. Open Records Decision No. 588 (1991) (discussing previous version of section 552.103). You inform us that the agency "has brought an action in the State Office of Administrative Hearings pursuant to the [APA] to assess an administrative penalty against [a named individual]." Based on these representations and our review of the information at issue, we agree that litigation was pending when the agency received the request for information. Furthermore, having reviewed your arguments and representations, we find that the some of the information that you seek to withhold is related to the pending proceedings. Accordingly, the agency may withhold the information we have marked pursuant to section 552.103.³ However, you have not explained how the remaining information at issue is related to the pending proceedings. Accordingly, we conclude the agency may not withhold this information under section 552.103 of the Government Code.

We note, however, 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

³ As our ruling is dispositive, we need not address your claim under section 552.107 of the Government Code this information.

information. Open Records Decision Nos. 349 (1982), 320 (1982). 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 e-mails exchanged between agency employees. You indicate that these e-mails contain advice, recommendations, and opinions regarding the assessment of administrative penalties against a driving safety instructor. After reviewing your arguments and the information at issue, we find that the agency may withhold some of this information, which we have marked, under section 552.111 of the Government Code. However, we find that the remainder of the information at issue is purely factual and may not be withheld under section 552.111.

Section 552.116 of the Government Code provides:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, or a joint board operating under Section 22.074, Transportation Code, is excepted from [public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state that some of the remaining information consists of audit working papers prepared and maintained by the agency during the course of an investigation of a driving school as authorized under sections 1001.454 and 1001.455 of the Education Code. *See* Educ. Code §§ 1001.454, 455. We note that, for purposes of section 552.116 of the Government Code, an audit includes an investigation. Based on your representations and our review of the information at issue, we agree that this information, which you have marked, constitutes audit working papers that may be withheld under section 552.116.

Finally, we address your argument 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). 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. In addition, the general e-mail addresses of businesses are not excepted from disclosure under section 552.137. The agency must withhold the e-mail address we have marked under section 552.137, unless the owner of this particular e-mail address has affirmatively consented to its release.

In summary, the information we have marked under section 552.022(a)(1) must be released. The agency may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the informer's privilege. The agency may withhold

the information we have marked under sections 552.103 and 552.111 of the Government Code. The agency may withhold the remaining information it has marked under section 552.116 of the Government Code. The agency must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of this particular e-mail address has affirmatively consented to its release. This ruling does not address the applicability of FERPA to the submitted information. Should the agency determine that all or portions of the submitted information consists of "education records" that must be withheld under FERPA, the agency must dispose of that information in accordance with FERPA, rather than the Act. The remaining information subject to the Act must be released.

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,



Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 263654

Enc. Submitted documents

c: Ms. Sherry L. Hayes
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(w/o enclosures)