ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 20, 2007

Mr. Christopher B. Gilbert
Bracewell & Guiliani LLP
711 Louisiana Street, Suite 2300
Houston, Texas 77002-2770

OR2007-10730

Dear Mr. Gilbert:

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# 287112.

The Houston Independent School District (the "district"), which you represent, received a request for e-mails between the superintendent and any district board member for a specified time period.[1] You claim that portions of the requested information are excepted from disclosure under sections 552.102 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You contend that the submitted information that you have highlighted pursuant to section 552.111 of the Government Code is excepted from disclosure under that exception. 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." Gov't Code § 552.111. In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice,

[1]You state that the requestor agreed to exclude third party e-mail addresses, student information that would be protected under FERPA, and a specified e-mail from her request. *See* Gov't Code § 552.222 (governmental body may communicate with requestor for purpose of clarifying or narrowing request). Accordingly, any such information is not responsive to the request and need not be released to the requestor.

recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body. Open Records Decision No. 615 at 5-6.

An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *Id.* Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *See Arlington Indep. Sch. Dist. v. Tex. Atty. Gen.*, 37 S.W.3d 152, 160 (Tex. App.—Austin 2001, no writ); Open Records Decision No. 615 at 4-5.

You state that the information you seek to withhold under section 552.111 relates to policy topics that were being debated and discussed by the superintendent and the board members. You further state that all of the communications were pre-deliberative and relate to broad policy issues, and not to internal administrative or personnel matters. Upon review, we find that the district has established the applicability of section 552.111 to the information you have marked in Exhibits A, B, C, D, E, and F, except as we have noted otherwise. We find the district has failed to establish that the information we have marked is excepted from disclosure under section 552.111. Therefore, the district may not withhold any of the information we have marked in Exhibits A, B, C, D, E, or F under section 552.111.

However, we note that some of the information we have marked as not falling under section 552.111 may be excepted from disclosure under section 552.101 of the Government Code.[2] Section 552.101excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, including section 21.048 of the Education Code, which provides in part:

> (c-1) The results of an examination administered under this section are confidential and are not subject to disclosure under [the Act] unless:
>
> > (1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or
> >
> > (2) the educator has failed the examination more than five times.

Educ. Code § 21.048(c-1). We note that subsection 21.048(c-1), as added to section 21.048 by the Eightieth Legislature, is a new statute that took effect June 15, 2007. *See* Act of

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

May 28, 2007, 80th Leg., R.S., S.B. 9, § 4 (to be codified at Educ. Code Ann. § 21.048(c-1)). The information not falling under section 552.111 contains references to an individual who appears to have failed an examination administered under section 21.048 of the Education Code five times or less. If, in fact, the individual failed the examination five times or less, the district must withhold the information we have marked under section 552.101 in conjunction with section 21.048(c-1) of the Education Code. However, if the individual failed the examination more than five times, the information we have marked under section 21.048(c-1) must be released.

You claim that Exhibit G is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) of the Government Code excepts from required public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This exception applies when the release of information would result in a violation of the common-law right to privacy. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.). The common-law right to privacy is violated if the information (1) contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and (2) is of no legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types 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.

Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, information related to an individual's mortgage payments, assets, bills, and credit history is generally protected by the common-law right to privacy. *See* Open Records Decision Nos. 545, 523 (1989); *see also* Open Records Decision No. 600 (finding personal financial information to include choice of particular insurance carrier). You assert Exhibit G contains personal financial information and that release of the information at issue could form the basis for future contract negotiations. We note that a public employee's salary does not pertain to the employee's private affairs. *See Indus. Found.*, 540 S.W.2d at 685; *see also* Open Records Decision Nos. 423 at 2 (1984) (scope of public employee privacy is narrow), 342 at 3 (1982) (certain information about public employees, including position, experience, tenure, salary, and educational level, has long been held disclosable). Furthermore, as a financial transaction between an individual and a governmental body, the public has a legitimate interest in this type of information. *See generally* Gov't Code § 552.022(a)(2) (stating, among other things, that public employee's salary is expressly public). Upon review, we find that the information contained in Exhibit

G is not highly intimate or embarrassing. Therefore, the Exhibit G is not confidential under common-law privacy, and the district may not withhold it on that ground.

In summary, the district may withhold the information you have marked in Exhibits A, B, C, D, E, and F, except where we have noted otherwise. The district must withhold the information we have marked under section 552.101 in conjunction with section 21.048(c-1) of the Education Code if in fact the individual at issue failed the examination five times or less. However, if the individual failed the examination more than five times, the information we have marked under section 21.048(c-1) must be released. 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,

Jordan Johnson
Assistant Attorney General
Open Records Division

JJ/jb

Ref: ID# 287112

Enc. Submitted documents

c: Ms. Ericka Mellon
Houston Chronicle
c/o Mr. Christopher B. Gilbert
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(w/o enclosures)