



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 21, 2007

Ms. Ellen H. Spalding  
Attorney at Law  
Feldman & Rogers, L.L.P.  
5718 Westheimer Road, Suite 1200  
Houston, Texas 77057

OR2007-10779

Dear Ms. Spalding:

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# 287140.

The Eanes Independent School District (the "district"), which you represent, received a request for three categories of information relating to the district superintendent.<sup>1</sup> You state that the district is redacting some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a).<sup>2</sup> You claim that the remaining information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.117

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<sup>1</sup> You inform us that the requestor has agreed to allow the district to redact from the requested documents certain e-mail addresses, account information, social security numbers, and grades from teacher transcripts. See Gov't Code § 552.222 (governmental body may ask requestor to clarify or narrow scope of request). As this information is no longer encompassed by the request, it is not responsive and we do not address its availability in this ruling.

<sup>2</sup> We note that our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made; therefore, we will not address the applicability of FERPA to any of the submitted records.

of the Government Code.<sup>3</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>4</sup>

Initially, we note that you have not submitted any information responsive to category 1 of the request. Further, you have not indicated that you have released such information or that you wish to withhold any such information from disclosure. Therefore, to the extent information responsive to this part of the request existed on the date that the district received the instant request, we assume that the district has released it to the requestor. If the district has not released any such information, the district must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302; *Open Records Decision No. 664 (2000)* (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

You claim that portions of the requested information are excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides:

(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*

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<sup>3</sup> Although you also raise section 552.102 of the Government Code, you have not submitted arguments explaining how this exception applies to the requested information. Therefore, we presume that you have withdrawn this exception. *See* Gov't Code §§ 552.301, .302.

<sup>4</sup> We assume that the "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.

*Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684S.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 section 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. ORD 452 at 4. 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 assert that the information at issue is related to anticipated and pending litigation. 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 anticipated or pending litigation involving the district. Therefore, the district may not withhold any of the submitted information under section 552.103.

We next address your claims under section 552.107 of the Government Code, which protects information that comes 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. *See* ORD 676 at 6-7. 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. *See* 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. *See 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 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. *See*

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. *See 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 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 have marked information in Exhibits B and C that the district contends consists of confidential communications between attorneys for the district and the district that were made in connection with the rendition of professional legal services. You indicate that the communications remain confidential. Based on your representations and our review of the information in question, we conclude that the district may withhold the information that you have marked in Exhibit C under section 552.107 of the Government Code. However, we find that the district has failed to establish the applicability of section 552.107 to the information in Exhibit B. Therefore, none of the information in Exhibit B may be withheld on this basis.

Next, you assert that some of the remaining information is excepted under section 552.111 of the Government Code. 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. 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*, 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 ORD 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). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. See ORD 615 at 5. If factual information, however, 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 inform us that the information at issue "reflect[s] internal communications with the superintendent that consist of advice, recommendations, opinions, and other material reflecting the policymaking process of [the district]." Having considered your arguments and the information at issue, we find you have failed to demonstrate that the information you marked constitutes advice, recommendation, or opinion related to a policymaking process within the district. We therefore conclude that the district may not withhold any of the information under section 552.111 of the Government Code.

You claim some of the remaining information is excepted from public disclosure 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." Gov't Code § 552.101. This section encompasses information made confidential by other statutes. You assert that a portion of Exhibit C is confidential under section 418.177 of the Texas Homeland Security Act (the "HSA").

Section 418.177 provides:

Information is confidential if the information:

- (1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and
- (2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Govt Code § 418.177. The fact that information may relate to a governmental body's security concerns does not make the information per se confidential under the HSA. See Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions controls

scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A).

You inform us that the phone message you have marked in Exhibit C "relates to a homeland security/district security issue." After reviewing your arguments and the information at issue, we find that you have not established that the phone message you marked in Exhibit C relates to an assessment of the risk or vulnerability of persons or property to an act of terrorism or related criminal activity. *See id.* § 418.177. Therefore, we conclude that the district may not withhold any of the information under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code.

Section 552.101 also encompasses section 21.355 of the Education Code. Section 21.355 provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. 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 an administrator. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined that for purposes of section 21.355, the word "teacher" means a person who is required to, and does in fact, hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055, and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* ORD 643 at 4. We also determined that the word "administrator" in section 21.355 means a person who is required to, and does in fact, hold an administrator's certificate under subchapter B of chapter 21 of the Education Code, and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

You assert that entries in the superintendent's date book in Exhibit B are confidential under section 21.355. Having considered your arguments and reviewed that information, we conclude that none of the entries in the superintendent's date book constitute evaluations for the purposes of section 21.355. We therefore conclude that the district may not withhold any of the information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

The common-law right of privacy is also encompassed by section 552.101. Information must be withheld under section 552.101 in conjunction with common-law privacy if the information is highly intimate or embarrassing, and it is of no legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). 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. 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 information concerning the intimate relations between individuals and their family members, *see* ORD 470. However, this office has found that, absent special circumstances, the names, addresses, and marital status of members of the public are not excepted from required public disclosure under common-law privacy. *See* ORD 455. Furthermore, information relating to public employees and public employment is generally a matter of legitimate public interest. *See e.g.*, Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (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). Finally, we note that the right of privacy lapses at death; thus information may not be withheld on the basis of the privacy interests of a deceased individual. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981).

We have marked the information that the district must withhold under section 552.101 in conjunction with common-law privacy. The district, however, has failed to demonstrate that any of the remaining information at issue constitutes highly intimate or embarrassing information for the purposes of common-law privacy.

Finally, you argue that some of the remaining information is subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, personal cellular 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 of the Government Code. *See* Gov't Code § 552.117; Open Records Decision No. 676 at 6 (2002). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information

be kept confidential. We have marked information that is subject to section 552.117. If the employees whose information is at issue timely elected to keep their personal information confidential, you must withhold this information under section 552.117(a)(1) of the Government Code. The district may not withhold this information under section 552.117(a)(1) if the employees at issue did not make a timely election.

In summary, the district may withhold the information you have marked in Exhibit C under section 552.107 of the Government Code. The district must withhold the information we have marked in Exhibit C under section 552.101 in conjunction with common-law privacy. The district must withhold the information we have marked in Exhibit C under section 552.117(a)(1) of the Government Code, if the employees timely elected to keep their personal information confidential pursuant to section 552.024 of the Government Code. The remaining information 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).

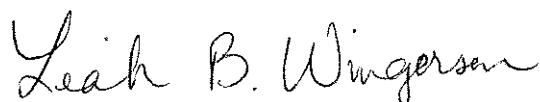
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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

A handwritten signature in cursive script that reads "Leah B. Wingerson".

Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/ma

Ref: ID# 287140

Enc. Submitted documents

c: Ms. Dianna Pharr  
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(w/o enclosures)