



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 12, 2007

Ms. Amanda M. Bigbee
Henslee, Fowler, Hepworth & Schwartz, L.L.P.
306 West 7th Street, Suite 1045
Fort Worth, Texas 76102

OR2007-11931

Dear Ms. Bigbee:

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# 288890.

The Carroll Independent School District (the "district"), which you represent, received a request for information related to a named individual. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, 552.117, 552.130, 552.136, 552.137, and 552.139 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.²

Initially, we note that the submitted documents contain information that is excluded by the precise language of the request. The requestor has excluded the social security numbers, mailing addresses, and e-mail addresses from her request. Accordingly, any of this information within the submitted documents is not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive

¹Although you also raise section 552.103 of the Government Code, you have provided no argument explaining how this exception is applicable to the submitted information. Therefore, we presume you no longer assert this exception to disclosure. Gov't Code §§ 552.301, .302.

²We note that you have redacted some of the submitted information. In this instance, we are able to discern the nature of the redacted information. In the future, however, you should refrain from redacting any information that you submit to this office in seeking an open records ruling. See Gov't Code §§ 552.301(e)(1)(D), .302.

to the request and the district is not required to release that information in response to the request.

Next, we note that some of the requested information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2007-09035 (2007). To the extent the submitted information is identical to the information previously requested and ruled upon and the law, facts, and circumstances on which the prior ruling was based have not changed, the district must continue to rely on this ruling as a previous determination and withhold or release this information in accordance with Open Records Letter No. 2007-09035. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the information in the current request is not identical to the information previously requested and ruled upon by this office, we will address your arguments for this and the remaining information.

The submitted information contains a W-4 form. 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. Section 552.101 encompasses information made confidential by other statutes. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Tax return information is defined as data furnished to or collected by the Internal Revenue Service with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax. *See* 26 U.S.C. § 6103(b). Thus, the submitted W-4 form constitutes tax return information that must be withheld under section 552.101 of the Government Code in conjunction with federal law.³

Section 552.101 also encompasses section 21.355 of the Education Code, which provides, “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. In addition, the court has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 because “it reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). This office has determined that a teacher is someone who is

³As our ruling is dispositive, we need not address your remaining argument against the disclosure of this information.

required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of the evaluation. Open Records Decision No. 643. 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 contend that Exhibit C and a portion of Exhibit A are confidential under section 21.355. Having considered your arguments and reviewed the information at issue, we find that none of the information at issue constitutes an evaluation of a teacher or an administrator for the purposes of section 21.355. We therefore conclude that the district may not withhold any of the information in Exhibits C or A under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

You claim that Exhibit A is excepted from public disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) protects information within the attorney-client privilege. When asserting the attorney-client privilege under section 552.107, 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 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. 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).

You state that Exhibit A consists of communications made between attorneys representing the district and district employees. You state that the communications pertain to an internal investigation. We agree that some of this information was made for the purpose of rendering legal services to the district. You state that these communications were intended to be confidential, and have been maintained as strictly confidential. Based on your representations and our review, we agree that a portion of Exhibit A is protected by the attorney-client privilege and may be withheld under section 552.107 of the Government Code. We have marked this information accordingly.⁴

You also claim that Exhibit A is attorney work product.⁵ Section 552.111 encompasses the attorney work product privilege found at rule 192.5 of the Texas Rules of Civil Procedure. *See TEX. R. CIV. P. 192.5; City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines attorney work product as consisting of

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX.R.CIV.P. 192.5. A governmental body that seeks to withhold information on the basis of the attorney work product privilege under section 552.111 bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *See id.*; Open Records Decision

⁴As our ruling is dispositive, we need not address your remaining argument against the disclosure of this information.

⁵You argue that the information at issue is attorney work product that is excepted under Texas Rule of Evidence 192.5 in conjunction with section 552.101 of the Government Code. The proper exception that encompasses attorney work product is section 552.111 of the Government Code. Therefore, we address your argument under this section.

No. 677 at 6-8. In order for this office to conclude that information was created or developed in anticipation of litigation, we must be satisfied that

(a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and (b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; Open Records Decision No. 677 at 7.

You state that the remaining information in Exhibit A consists of materials prepared or mental impressions developed in anticipation of litigation. You state that Exhibit A was created during an internal investigation that could have resulted in legal action. Upon review, we find that you have demonstrated that most of the remaining information in Exhibit A was prepared by a party’s representatives for trial or in anticipation of litigation. Therefore, the city may withhold the information we have marked in Exhibit A under section 552.111 as attorney work product.

You claim that Exhibit B is also excepted by section 552.111 of the Government Code. Section 552.111 of the Government Code 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. 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, 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). 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).

You assert that Exhibit B includes information relating to exchanges of opinions, advice, and recommendations regarding certain system wide decisions on specified policy issues. Based on this representation and our review, we find that a portion of the information in Exhibit B may be withheld under section 552.111. We have marked this information accordingly. We find that the remaining information in Exhibit B is not excepted under section 552.111, and it may not be withheld on that basis.

You claim that Exhibit G is excepted by section 552.101 in conjunction with common-law privacy. Section 552.101 encompasses the common-law right of privacy, which protects information 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. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (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. In addition, 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). We agree that a portion of the information in Exhibit G is protected by common-law privacy. Accordingly, the district must withhold the information that we have marked under section 552.101 in conjunction with common-law privacy.

You claim that a portion of Exhibit E is excepted under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. 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. Upon review of the submitted documents, it appears that the employee whose information is at issue timely requested confidentiality for his information. Therefore, we agree that the district must withhold the information you have marked under section 552.117(a)(1) of the Government Code.⁶ We have marked additional information in Exhibit G that must be withheld under section 552.117(a)(1) if the employee to whom the information pertains timely requested confidentiality for his information under section 552.024 of the Government Code.

You also claim that a portion of Exhibit E is confidential under section 552.130 of the Government Code. Section 552.130 excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130. We agree that the district must withhold the Texas driver's license number you have marked pursuant to section 552.130 of the Government Code.

You claim that the remaining information in Exhibit H is excepted under section 552.139 of the Government Code, which provides as follows:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer, or a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

Gov't Code § 552.139. We determine that a portion of the information in Exhibit H, the login and password information, is excepted under section 552.139. You have not

⁶As previously noted, the requestor excluded social security numbers and mailing addresses from her request. Accordingly, our ruling under section 552.117 does not encompass social security numbers or mailing addresses in this instance.

demonstrated that any of the remaining information in Exhibit H relates to computer network security or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). Furthermore, you have not demonstrated that this information consists of a computer network vulnerability assessment or report as contemplated in section 552.139(b). Consequently, none of the remaining information in Exhibit H may be withheld under section 552.139 of the Government Code.

In summary, the W-4 form must be withheld pursuant to section 552.101 in conjunction with federal law. The district may withhold the information in Exhibit A we have marked under section 552.107 of the Government Code. The district may withhold the information we have marked in Exhibits A and B under section 552.111 of the Government Code. The district must withhold the information we have marked in Exhibit G under section 552.101 in conjunction with common-law privacy. You must withhold the information you have marked pursuant to section 552.117(a)(1), and the additional information we have marked under section 552.117(a)(1) if the employee to whom the information belongs timely elected to keep his information confidential. The district must withhold the information you have marked in Exhibit E under section 552.130. The district must withhold the information we have marked in Exhibit H under section 552.139. 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,



Jordan Johnson
Assistant Attorney General
Open Records Division

JJ/jb

Ref: ID# 288890

Enc. Submitted documents

c: Ms. Jessamy Brown
Fort Worth Star-Telegram
c/o Amanda M. Bigbee
Henslee, Fowler, Hepworth & Schwartz, L.L.P.
306 West 7th Street, Suite 1045
Fort Worth, Texas 76102
(w/o enclosures)