ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 12, 2007

Mr. Eric E. Munoz
Schwartz & Eichelbaum, P.C.
For Premont Independent School District
4201 West Parmer Lane, Suite A-100
Austin, Texas 78727

OR2007-16400

Dear Mr. Munoz:

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# 297038.

The Premont Independent School District (the "district"), which you represent, received a request for any e-mails between board members, including e-mails between board members and district administrators during a specified time period.[1] First, you claim some of the information is not subject to the Act. You also claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111 and 552.126 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially we note that the requests for information contain questions. A governmental body is not required to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request for information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). We therefore assume that the district has made a good faith effort to locate any information that would be responsive to the requestor's inquiries in the present request.

[1]We note that the requestor clarified his original request. *See* Gov't Code § 522.222(b) (governmental body may ask requestor to clarify request).

Next, we address your contention that some of the submitted information is not subject to the Act. Section 552.002(a) of the Act provides:

> (a) In this chapter, "public information" means information that is collected, assembled, or maintained under a law or ordinance or in connection with transaction of official business:
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> > (1) by a governmental body; or
> >
> > (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Information is generally subject to the Act when it is held by a governmental body and it relates to the official business of a governmental body or is used by a public official or employee in the performance of official duties. *See* Open Records Decision No. 635 (1995). You indicate that a portion of the submitted information is non-business related and was produced from a board member's personal e-mail account. *See id.* (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). After reviewing the submitted e-mails, we agree that all but one of the e-mails in Exhibit U do not relate to the district's transaction of official business. We find, however, that the remaining requested e-mails, that you claim are not public information, consist of records reflecting day-to-day business within the district, and are therefore subject to the Act. Therefore, except as we have marked otherwise, the district is not required to disclose those e-mails in Exhibit U that are not work related. We will now address the applicability of the claimed exceptions to the remaining e-mails that are subject to the Act.

You state that some of the submitted information is subject to 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.
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> . . .
>
> (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 this particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the request for information is received, 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).

You state that some of the information contained in the e-mails at issue discuss pending civil lawsuits to which the district is a party. Based on your representations, and our review of the submitted information, we conclude that litigation was pending when the district received the request. We also conclude that this information is related to the pending lawsuits for purposes of 552.103. Therefore, the district may withhold the information in Exhibits F-H, J, and L-N, that it asserts is excepted under section 552.103 of the Government Code.

Generally, 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 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).

Section 552.107(1) protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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. 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 a 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)-(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 Exhibits I and K constitute confidential e-mails between your office and the superintendent that were made for the furtherance of providing legal services to the district. You also indicate that the confidentiality of these communications has been maintained. Thus, we find that you may withhold Exhibits I and K under section 552.107 of the Government Code.

Section 552.111 of the Government Code 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." 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, opinions, and other material reflecting 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. 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 the marked information in Exhibits R, S, and T constitutes advice, opinions, or recommendations made between the Superintendent and the Board of Trustees relating to specified policy issues. Based on your representation and our review of the information at issue, we find that the district may withhold the marked information in Exhibits R, S, and T under section 552.111 of the Government Code. The rest of the information is factual and must be released.

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 common-law 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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (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. *Id.* at 683. Additionally, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). The district must withhold the information that we have marked in Exhibits F and Q under section 552.101 of the Government Code in conjunction with common-law privacy.

We note that some of the submitted information may be subject to section 552.117 of the Government Code.[2] Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security 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. Gov't Code § 552.117(a)(1). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, the district may only withhold information under section 552.117(a)(1) on

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[2]The Office of the Attorney General will raise mandatory exceptions like sections 552.117 and 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. Therefore, the district may only withhold the information we have marked under section 552.117(a)(1) if the individual at issue timely elected to keep his personal information confidential.

Section 552.126 of the Government Code excepts from required public disclosure "[t]he name of an applicant for the position of superintendent of a public school district[.]" Gov't Code § 552.126. Section 552.126 provides, however, that "the board of trustees must give public notice of the name or names of the finalists being considered for the position at least 21 days before the date of a meeting at which a final action or vote is to be taken on the employment of the person." *Id.* Upon review, we agree that the names of the applicants for the position of interim superintendent are excepted from disclosure under section 552.126. Furthermore, this protection from disclosure extends not only to the names of the individuals, but also to any information tending to identify the individuals. *See* Open Records Decision No. 540 (1990) (interpreting section 552.123 – which, in similar language to section 552.126, protects identities of applicants for chief executive officer of institution of higher education – as applying to identities, rather than just names of applicants). Accordingly, the district may withhold the names of the applicants as well as the identifying information of these applicants that the district highlighted in Exhibit O under section 552.126 of the Government Code.

Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work email 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. The e-mail addresses do not appear to be of a type specifically excluded by section 552.137(c). Therefore, unless the individuals whose e-mail addresses are at issue consented to release of their e-mail addresses, the district must withhold the information that we have marked under section 552.137 of the Government Code.

In summary, except for one marked e-mail, the district need not release the submitted e-mails in Exhibit U that are not subject to the Act. The district may withhold the information in Exhibits F-H, J, and L-N that it asserts is excepted under section 552.103 of the Government Code. The district may withhold Exhibits I and K under section 552.107 of the Government Code. We have marked the information in Exhibits R, S, and T the district may withhold under section 552.111 of the Government Code. The district must withhold the information that we have marked in Exhibits F and Q under section 552.101 of the Government Code in conjunction with common-law privacy. The district may only withhold the information we have marked in Exhibit Q under section 552.117(a)(1) if the individual at issue timely elected

to keep his personal information confidential. The district may withhold the names and the identifying information of the applicants for superintendent it highlighted in Exhibit O under section 552.126 of the Government Code. The district must withhold the e-mail addresses that 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,

Henisha D. Anderson
Assistant Attorney General
Open Records Division

HDA/jb

Ref: ID# 297038

Enc: Submitted documents

c: Mr. R. R. Garcia
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