



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 12, 2008

Ms. Laura C. Rodriguez
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P.O. Box 460606
San Antonio, Texas 78246

OR2008-10998

Dear Ms. Rodriguez:

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# 319047.

The Northside Independent School District (the "district"), which you represent, received a request for all of the superintendent's incoming and outgoing e-mails on April 2, 2008. You assert that a portion of the submitted information is not subject to the Act. You claim the submitted information is excepted from disclosure under sections 552.104, 552.107, 552.116, 552.136, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, you claim AG-0013 through AG-0018 are not subject to the Act. The Act is only applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists of "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (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." *Id.* § 552.002(a). Thus, virtually all information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The district contends this information concerns

¹Although the district raises section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

personal matters and does not relate to official government business. Based on your representations and our review, we agree AG-0013 through AG-0018 are not public information for the purpose of section 552.002 of the Government Code. Thus, we conclude this information is not subject to the Act, and need not be released in response to this request.²

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations, including where the governmental body may wish to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 at 8 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a bidder will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). However, section 552.104 does not except from disclosure information relating to competitive bidding situations once a contract has been executed. Open Records Decision Nos. 306 (1982), 184 (1978).

In this instance, you inform us the e-mail correspondence and attachments in the documents numbered AG-0077 through AG-0163 were created in connection with an attempt to negotiate different terms on which health care is provided to district employees. You state that "[s]hould favorable terms for contract renewal not be achieved, the [d]istrict will be required to seek bids from other providers pursuant to state law." You argue that release of the specific terms being discussed would undermine the district's ability to negotiate the best terms with other providers. Based on your representations and our review, we find the district has demonstrated that release of AG-0077 through AG-0163 would harm the interests of the district in a particular competitive situation. We therefore conclude the district may withhold these pages pursuant to section 552.104 of the Government Code. We note the district may no longer withhold this information under section 552.104 once a new contract involving the health care coverage of district employees has been executed.

Next, you claim some of the submitted information is excepted from disclosure under section 552.107(1) 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

²As our ruling on this information is dispositive, we need not address your claim under section 552.137 for this same information.

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 the e-mails marked as AG-0001 through AG-0012 are communications between the district and the district’s outside counsel, and that these communications were made in furtherance of the rendition of legal services and advice to the district. You further state all of these communications were made in confidence, intended for the sole use of the district and its attorneys, and they have not been shared or distributed to others. Based on your representations and our review, we conclude section 552.107 is applicable to AG-0001 through AG-0012. Accordingly, the district may withhold these e-mails under section 552.107 of the Government Code.

You assert the e-mails marked as AG-0021 through AG-0076 are excepted from disclosure under section 552.116 of the Government Code. Section 552.116 provides as follows:

- (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, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of

Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 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, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) 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 AG-0021 through AG-0076 are "emails between [d]istrict employees and the vendor providing fingerprint services that address particular issues and concerns regarding the [d]istrict's audit on criminal background checks" of its employees. We note that section 22.083 of the Education Code authorizes a school district to obtain criminal history record information relating to its employees. *See* Educ. Code § 22.083(a-1). You contend that AG-0021 through AG-0076 pertain to "an audit by the district relating to the criminal history background check of a public school employee." Gov't Code § 552.116(b)(1). Based on your representations, we understand you to claim the marked e-mails are audit working papers. *See id.* § 552.116(b)(2). Having considered your arguments and reviewed this information, we conclude the district may withhold AG-0021 through AG-0076 as audit working papers under section 552.116.

Next, you claim the username in AG-0020 is protected from disclosure under section 552.136 of the Government Code. Section 552.136 states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument. *Id.* Although you assert the username you have marked is an access device number, we find that you have failed to demonstrate how the username at issue constitutes an access device number used to obtain

money, goods, services, or another thing of value or initiate a transfer of funds other than a transfer originated solely by paper instrument. We therefore conclude the district may not withhold the marked username under section 552.136 of the Government Code.

Section 552.137 states that “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure. Gov’t Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). The e-mail addresses at issue are excluded by section 552.137(c) because they were provided by persons who have a contractual relationship with a governmental body. *Id.* § 552.137(c)(1). Therefore, the district may not withhold the e-mail addresses you have marked in AG-0164 through AG-0170 under section 552.137 of the Government Code.

In summary, the e-mails marked as AG-0013 through AG-0018 are not subject to the Act and need not be released to the requestor. The district may withhold AG-0077 through AG-0163 under section 552.104 of the Government Code, AG-0001 through AG-0012 under section 552.107 of the Government Code, and AG-0021 through AG-0076 as audit working papers under section 552.116 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). If the governmental body does not file suit over 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/mcf

Ref: ID# 319047

Enc. Submitted documents

c: Mr. Raymond Tamayo
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(w/o enclosures)