



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 15, 2008

Ms. Laura C. Rodriguez
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2008-11187

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# 319046.

The Northside Independent School District (the "district"), which you represent, received a request for all of the district superintendent's incoming and outgoing e-mails for April 3, 2008. You assert that a portion of the submitted information is not subject to the Act. You claim that portions of the submitted information are excepted from disclosure under sections 552.103, 552.104, 552.107, 552.116, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you claim that the e-mails in documents AG-0006 through AG-0012 are not subject to the Act. The Act is only applicable to "public information." *See* Gov't Code § 552.021. Section 552.002(a) defines public information as "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). Information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if it is maintained for a governmental body, the governmental body owns or has a right of access to the information, and the information pertains to the transaction of official business. *See* Open Records Decision No. 462 (1987).

After reviewing the information at issue, we agree that the e-mails in documents AG-0006 through AG-0012 are purely personal, and thus do not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the district. *See* Gov't Code § 552.021; *see also* Open Records Decision No. 635 (1995) (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). Thus, we conclude that this information is not subject to the Act, and need not be released in response to this request.

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 that the e-mail correspondence and attachments in the documents numbered AG-0013 through AG-0015 are related to ongoing negotiations with the district's current health maintenance organization regarding the terms on which health care is provided to district employees. You state that "should favorable terms for contract renewal not be achieved, the District will be required to seek bids from other providers pursuant to state law." You argue that the release of the specific terms being discussed would undermine your ability to negotiate the best terms with other providers. Based on your representations and our review, we find that the district has demonstrated that release of documents AG-0013 through AG-0015 would harm the interests of the district in a particular competitive situation. We therefore conclude that the district may withhold documents AG-0013 through AG-0015 pursuant to section 552.104 of the Government Code. We note that the district may no longer withhold the information under section 552.104 once a new contract involving the health care coverage of district employees has been executed and is in effect.

Next, you claim that documents AG-0001 through AG-0005 are excepted from disclosure under section 552.107(1) of the Government Code. Section 552.107(1) protects information coming 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. 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, lawyer representatives, and lawyers representing another party in a pending action concerning a matter of common interest therein. 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 the e-mails in documents AG-0001 through AG-0005 are communications between representatives for the district and the attorneys for the district, and that these communications took place for the purpose of facilitating the rendition of legal services for the district. You further state that all of these communications were intended to be confidential and do not indicate that the privilege has been waived. Based on our review of your representations and the submitted information, we find that you have demonstrated the applicability of the attorney-client privilege to the e-mails at issue. Accordingly, the district may withhold the e-mails in documents AG-0001 through AG-0005 under section 552.107 of the Government Code.¹

¹As our ruling is dispositive, we need not address the district’s argument under section 552.103 of the Government Code.

Next, we address your arguments under section 552.116 of the Government Code. Section 552.116 of the Government Code 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 [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] 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. We understand you to claim that a portion of the submitted e-mails, and specifically AG-0022, consist of audit working papers. Gov't Code § 552.116(b)(1). You specifically assert that "the responsive documents include e-mails between [d]istrict employees and the vendor providing fingerprint services that address particular issues and concerns regarding the district's audit on criminal background checks." However, upon review of the submitted e-mails at issue, including AG-0022, we find that they pertain to the general administration of the fingerprinting program and do not pertain to an audit of the criminal history background check of any specific public school employees or an audit of the vendor conducting the fingerprinting program. Accordingly, we find that you have failed to demonstrate the applicability of section 552.116 to any of the submitted e-mails. Therefore, the district may not withhold AG-0022 or any of the other submitted e-mails under section 552.116 of the Government Code.

Section 552.117(a)(1) excepts from disclosure the current and former home addresses, 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 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected under 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). You state that the employee at issue elected to keep her personal information confidential prior to the time that the district received the instant request for information. Thus, the district must withhold the information we have marked under section 552.117 of the Government Code.

Section 552.137 of the Government Code 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). You have marked personal e-mail addresses that the district seeks to withhold under section 552.137. The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). We therefore conclude that the district must withhold the e-mail addresses you have marked under section 552.137 of the Government Code.

In summary, documents AG-0006 through AG-00012 are not subject to the Act. The district may withhold documents AG-0013 through AG-0015 under to section 552.104 of the Government Code and documents AG-0001 through AG-0005 under section 552.107 of the Government Code. The district must withhold the information we have marked under section 552.117 of the Government Code and the information you have marked under section 552.137 of the Government Code. The remaining submitted 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 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).

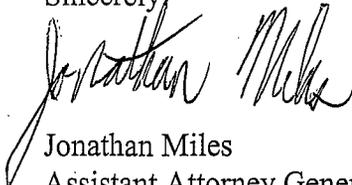
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/jh

Ref: ID# 319046

Enc. Submitted documents

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