



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 18, 2008

Ms. Amanda Bigbee  
Henslee Schwartz, L.L.P.  
306 West 7<sup>th</sup> Street, Suite 1045  
Fort Worth, Texas 76102

OR2008-11266

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# 317784.

The Weatherford Independent School District (the "district"), which you represent, received a request for all e-mails sent and received by four named district employees from February 15, 2008 through May 15, 2008. You state that some information will be made available to the requestor. You indicate that the district is redacting some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a).<sup>1</sup> You claim some of information is not public information subject to the Act, and the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, 552.116, 552.117, 552.135, 552.136, 552.137, and 552.139 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted sample of information.<sup>3</sup>

---

<sup>1</sup>We note that our office is prohibited from reviewing 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 information.

<sup>2</sup>Although you raise section 552.101 in conjunction with the attorney-client privilege, 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).

<sup>3</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.

Initially, we note that some of the submitted e-mails are not responsive to the request for information because they were created before the time period requested or they were created after the date of the request. This ruling does not address the public availability of any information that is not responsive to the request and the district is not required to release that information in response to the request. We have marked the non-responsive e-mail messages.

Next, we address your contention that Exhibits H through M are 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 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.

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 claim the e-mails in Exhibits H-M do not constitute public information because they do not relate to the transaction of district business. *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 at issue do not relate to the district's transaction of official business. Therefore, except as we have marked otherwise, the district is not required to disclose those e-mails in Exhibits H through M that are not work related because they are not public information subject to the Act. We will now address the applicability of the claimed exceptions to the remaining e-mails that are subject to the Act.

Section 552.102(a) excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under

section 552.101.<sup>4</sup> See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). In *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), the Texas Supreme Court held that information is protected by common-law privacy 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 a legitimate concern to the public. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82.

You assert that Exhibit B is related to the health and medical issues of two separate individuals and should be withheld as private medical information under section 552.102(a). In some instances, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are confidential under common-law privacy. However, not all medical information is protected under common-law privacy. In this instance, some of the information you seek to withhold pertains to a request for time off, which is of legitimate public interest. See Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, this information may not be withheld under common-law privacy. We note, however, a portion of the remaining information in Exhibit B is medical information. This information, which we have marked, is intimate and of no legitimate public interest. Accordingly, this information must be withheld under section 552.102 as private information.

You claim that Exhibit D 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

---

<sup>4</sup>Section 552.101 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 also encompasses the doctrine of common-law privacy.

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 Exhibit D constitutes a communication made between an attorney representing the district and district administrators. You inform us the communication pertains to deposition preparation in relation to a third party lawsuit and document production in response to a subpoena. You state this communication was intended to be confidential and has been maintained as confidential. Based on your representations and our review, we agree Exhibit D is protected by the attorney-client privilege and may be withheld 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).

You state Exhibit F consists of advice, recommendations, and opinions regarding certain special education practices and personnel issues. Based on your representation and our review, we find the district may withhold some of the information, which we have marked, under section 552.111 of the Government Code. We find the remaining information in Exhibit F pertains to personnel matters or is not advice, opinion, or recommendation. Therefore, the district may not withhold this information under section 552.111 of the Government Code.

Section 552.117(a)(1) excepts from disclosure the current and former home addresses 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 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). Therefore, the district may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. Accordingly, if the employees timely elected to keep their personal information confidential, the district must withhold the information we have marked in Exhibits B and I under section 552.117(a)(1). The district may not withhold this information under section 552.117(a)(1) if the employees did not make timely elections to keep their information confidential.

Next, we address your contention that Exhibit E is excepted from disclosure under section 552.135 of the Government Code, which provides the following:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under that exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* § 552.301(e)(1)(A). You state that portions of Exhibit E reveal the identities of individuals who reported possible violations of civil and regulatory laws and policies to the district. Based on your representations and our review of the information, we conclude the district must withhold the information we have marked under section 552.135 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 e-mail 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 private e-mail address does not appear to be of a type specifically excluded by section 552.137(c). Therefore, unless the individual whose private e-mail address is at issue consented to release of her e-mail address, the district must withhold the e-mail address we have marked under section 552.137 of the Government Code.

You also claim that a portion of the remaining submitted information is excepted from disclosure under section 552.139 of the Government Code. Section 552.139 provides that information is excepted from required public disclosure "if it is information that relates to computer network security or to the design, operation, or defense of a computer network." *Id.* § 552.139(a). You state Exhibit C contains "a password to a secure government webpage and a secure and confidential link to a webpage that includes personnel information for an

applicant to a position.” You claim the information relates to “defense of a computer network” and that “access to this information could mean access to significant portions of the computer network[.]” The information you have marked allows access to an expired external website link, not to the district’s own computer network. Accordingly, the district may not withhold the information under section 552.139 of the Government Code.

Lastly, the district also asserts section 552.136 for the password and website link. 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.* We find that you have failed to demonstrate how the information 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 information under section 552.136 of the Government Code.

In summary, except as we have marked otherwise, the district is not required to disclose those e-mails in Exhibits H through M that are not work related. The district must withhold the private information we have marked under section 552.102. The district may withhold the information in Exhibit D under section 552.107 and the information we have marked in Exhibit F under section 552.111. If the employees timely elected to keep their personal information confidential, the district must withhold the information we have marked in Exhibits B and I under section 552.117(a)(1). The district must withhold the information we have marked in Exhibit E under section 552.135 of the Government Code. The district must withhold the marked e-mail address under section 552.137 of the Government Code. The district must release the remaining responsive information.

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,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/mcf

Ref: ID# 317784

Enc. Marked documents

c: Ms. Catherine Whited  
5212 East Bankhead  
Weatherford, Texas 76087  
(w/o enclosures)