



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 8, 2008

Ms. Laura C. Rodriguez
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P.O. Box 460606
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OR2008-12294

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# 321044.

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 June 17, 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 552.101, 552.102, 552.107, 552.116, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, you claim that the e-mails in AG-0063 through AG-0072 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

¹Although you raise 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).

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 find that the e-mails in AG-0063 through AG-0072, as well as the e-mails in AG-0010 and AG-0011, are purely personal in nature, 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.

Next, 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, 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.

Government Code § 552.116. You state that the documents in AG-0051 through AG-0056 are “a result of the audit conducted by the [district] on the criminal background checks.” 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 also state that the documents in AG-0058 through AG-0062 are audit working papers pertaining to proposed honorees for the district’s foundation awards. However, upon review of your arguments and the information at issue, we find you have not demonstrated that any of the information at issue constitutes audit working papers for the purposes of section 552.116. Accordingly, we conclude that the district may not withhold any of the submitted information under section 552.116 of the Government Code.

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 information protected by other statutes. Chapter 560 of the Government Code provides that a governmental body may not release the biometric identifiers of an individual except in certain limited circumstances. *See* Gov’t Code §§ 560.001 (defining “biometric identifier”), 560.002 (prescribing the manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). You state that documents in AG-0051 through AG-0056 were “generated as a result of fingerprint information.” Upon review, however, we find that the submitted information does not contain any biometric identifiers. Therefore, the district may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses chapter 411 of the Government Code. Chapter 411 authorizes DPS to compile and maintain criminal history record information (“CHRI”) from law enforcement agencies throughout the state and to maintain access for authorized persons to federal criminal history records. *See* Gov’t Code §§ 411.042, .087. CHRI is defined as “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” *Id.* § 411.082(2).

In 2007, the Legislature enacted section 411.0845 of the Government Code, which provides in pertinent part as follows:

(a) [DPS] shall establish an electronic clearinghouse and subscription service to provide criminal history record information to a particular person entitled to receive criminal history record information and updates to a particular record to which the person has subscribed under this subchapter.

(b) On receiving a request for criminal history record information from a person entitled to such information under this subchapter, [DPS] shall provide through the electronic clearinghouse:

(1) the criminal history record information reported to [DPS] or the Federal Bureau of Investigation relating to the individual who is the subject of the request; or

(2) a statement that the individual who is the subject of the request does not have any criminal history record information reported to [DPS] or the Federal Bureau of Investigation.

(d) [DPS] shall ensure that the information described by Subsection (b) is provided only to a person otherwise entitled to obtain criminal history record information under this subchapter. Information collected under this section is confidential and is not subject to disclosure under [the Act].

(e) A person entitled to receive criminal history record information under this section must provide [DPS] with the following information regarding the person who is the subject of the criminal history record information requested:

(1) the person's full name, date of birth, sex, Texas driver's license number or personal identification certificate number, and social security number;

(2) a recent electronic digital image photograph of the person and a complete set of the person's fingerprints as required by [DPS]; and

(3) any other information required by [DPS].

Id. § 411.0845(a), (b), (d), (e). Pursuant to section 22.083(a-1) of the Education Code, a school district is authorized to obtain this CHRI from DPS. Educ. Code § 22.083(a-1)(1); *see also* Gov't Code § 411.097.

You state that the district obtained the information in AG-0051 through AG-0056 from the DPS clearinghouse pursuant to section 411.0845 of the Government Code. Based on your representations and our review, we find that the information we have marked in AG-0052, AG-0054, and AG-0056 is confidential under section 411.0845(d) of the Government Code. Therefore, the district must withhold this information under section 552.101 of the Government Code in conjunction with section 411.0845(d). *Id.* § 411.0845(d) (providing that information collected under section 411.0845 is confidential and not subject to disclosure under the Act). The remaining information at issue is not confidential under section 411.0845(d) and may not be withheld from disclosure on that basis.

Section 552.101 also encompasses the doctrine of common-law privacy. Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

Id. § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ *ref'd n.r.e.*), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. Thus, we will consider your privacy claim under both sections 552.101 and 552.102.

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. 540 S.W.2d at 685. 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. Upon review, we find that no portion of the information at issue constitutes highly intimate or embarrassing information for the purposes of common-law privacy. Furthermore, we note that some of the information at issue consists of employment information that is of a legitimate public interest. Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Thus, the district may not withhold any of the submitted information under either section 552.101 or section 552.102 on the basis of common-law privacy.

Next, section 552.107(1) of the Government Code 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. ORD 676 at 6-7.

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 AG-0001 through AG-0050 and AG-0073 through AG-0086 are communications between the district and the district’s outside counsel. You also state that these communications were made in confidence and in the furtherance of the rendition of legal services. We understand that these communications have remained confidential. You have identified most of the parties to these communications. Based on our review of your representations and the information, we find that the district may withhold the e-mails in AG-0001 through AG-0009 and AG-0012 through AG-0050 under section 552.107 of the Government Code. However, we determine that the district has failed to demonstrate that the e-mails in AG-0073 through AG-0086 constitute confidential communications between privileged parties made for the purpose of facilitating the rendition of professional legal services. Accordingly, none of this information may be withheld under section 552.107 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). The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that members of the public have affirmatively consented to the release of these e-mail addresses. Therefore, the district must withhold the e-mail address you have marked in AG-0057 under section 552.137 of the Government Code.

In summary: (1) the e-mails in AG-0063 through AG-0072, as well as the e-mails in AG-0010 and AG-0011, are not subject to the Act and need not be released; (2) the district

must withhold the information we have marked in AG-0052, AG-0054, and AG-0056 under section 552.101 of the Government Code in conjunction with section 411.0845(d) of the Government Code; (3) the district may withhold the e-mails in AG-0001 through AG-0009 and AG-0012 through AG-0050 under section 552.107 of the Government Code; and (4) the district must withhold the e-mail address you have marked in AG-0057 under section 552.137 of the Government Code. 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 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,



Katherine M. Kroll
Assistant Attorney General
Open Records Division

WJD/jh

Ref: ID# 321044

Enc. Submitted documents

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(w/o enclosures)