



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 12, 2009

Mr. Sydney W. Falk, Jr.
Attorney for Austin Independent School District
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816 Congress Avenue, Suite 1700
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OR2009-06365

Dear Mr. Falk:

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# 341482.

The Austin Independent School District (the "district"), which you represent, received a request for correspondence dated December 31, 2008 to February 9, 2009 sent from citizens and a consulting firm to the district's school board (the "board") regarding the current superintendent search, and correspondence sent from two named individuals to the board president regarding the current superintendent search. The district received a second request for all e-mails regarding the superintendent search forwarded to the board and board president. You state the district has provided or will provide some of the requested information to the requestors. You claim the submitted e-mails and letters are excepted from disclosure under sections 552.111 and 552.126 of the Government Code. You also claim releasing one of the submitted e-mails may implicate the proprietary interests of PROACT Search, Inc. ("PROACT"). Accordingly, you state, and have provided documentation showing, you notified PROACT of the request and of the company's right to submit arguments to this office as to why the e-mail at issue should not be released. *See Gov't Code § 552.305(d); see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have received comments from PROACT. We have considered the submitted arguments and reviewed the submitted information.

You claim Documents B-1 through B-5 are excepted from disclosure under section 552.126 of the Government Code. This section excepts from disclosure the “name of an applicant for the position of superintendent of a public school district . . . except 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 a vote or final action is taken. Gov’t Code § 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 language similar to section 552.126, protects identities of applicants for chief executive officer of institutions of higher education – as applying to identities, rather than just names of applicants). This office has previously held the type of information that identifies individuals in such cases includes, but is not limited to, résumés, professional qualifications, membership in professional organizations, dates of birth, current positions, publications, letters of recommendation, or any other information that can be uniquely associated with a particular applicant. *Id.* In this instance, you state the board has “not formally named any finalists in its search for a new superintendent.” You assert the e-mails and letters in Documents B-1 through B-5 are excepted from disclosure in their entirety under section 552.126. Although you acknowledge only portions of these documents identify or tend to identify particular candidates, you argue the content in Documents B-1 through B-5, when combined with other information reported in the media and elsewhere, would tend to identify some of the candidates. We note, however, section 552.126 applies only to information that, on its face, identifies or tends to identify particular candidates. This office cannot extend the protection of section 552.126 to include information that could identify or tend to identify candidates based on what you characterize as the requestor’s detective work. *Cf. Star-Telegram v. Doe*, 915 S.W.2d 471, 474-475 (Tex. 1995) (disclosure of certain facts that would enable “knowledgeable friends and acquaintances” to identify victim of sexual assault did not implicate victim’s privacy interests where victim’s name not disclosed to public). Therefore, we find you have failed to demonstrate how Documents B-1 through B-5 in their entirety identify or tend to identify particular candidates. However, we find portions of the e-mails and letters identify or tend to identify particular candidates. Thus, the district may withhold the marked information in Documents B-2, B-4, and B-5 pursuant to section 552.126 of the Government Code. As you have claimed no other exceptions to disclosure for the remaining information in Documents B-1 through B-5, it must be released.

You assert the e-mail in Document C-1 is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *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 section 552.111 exempts from disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See ORD 615 at 5. Although a governmental body's policymaking functions do not generally encompass routine internal administrative or personnel matters, 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).

Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. See Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. See ORD 561 at 9.

You state the e-mail submitted as Document C-1 consists of a communication between the district's consultant and the district's board president. You argue the board's selection of a superintendent is a policy decision regarding the direction the board wishes for the future of the district. You further assert the superintendent choice implicates the board's policy goals for the district and the manner in which those goals will be achieved. Based on your arguments, we find you have sufficiently demonstrated how information contained in the e-mail pertains to administrative and personnel matters of broad scope that affect the district's policy mission. You contend Document C-1 contains the consultant's advice, recommendations, and opinions regarding certain topics and potential issues to be discussed with some of the chosen superintendent candidates, and should, therefore, be withheld in its entirety based on the deliberative process privilege. Section 552.111, however, does not protect factual information. Rather, it only protects those portions of a document that reveal advice, recommendations, opinions, or material reflecting policymaking processes. Based on your arguments and our review, we find you have established the deliberative process privilege is applicable to the marked information in Document C-1. Accordingly, the district may withhold the marked portions of Document C-1 under section 552.111 of the Government Code.¹ The remaining information in Document C-1 consists of factual information, which you have failed to demonstrate constitutes advice, recommendations, opinions, or material reflecting the policymaking processes of the district. As you have

¹As our ruling for this information is dispositive, we need not address PROACT's arguments against disclosure.

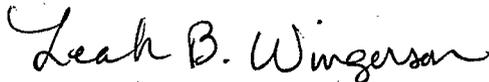
raised no other exceptions to disclosure, the remaining information in Document C-1 must be released.

In summary, the district may withhold the marked information in Documents B-2, B-4, and B-5 pursuant to section 552.126 of the Government Code, and Document C-1 under section 552.111 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 341482

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

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(w/o enclosures)