



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 28, 2009

Mr. Christopher B. Gilbert  
Thompson & Horton, L.L.P.  
711 Louisiana Street, Suite 2100  
Houston, Texas 77002-2746

OR2009-18249

Dear Mr. Gilbert:

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# 365332.

The Houston Independent School District (the "district"), which you represent, received a request for all documents related to the district's search for a superintendent during a specified time period.<sup>1</sup> You state that the district is releasing a large portion of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.126 of the Government Code and privileged under Texas Rule of Professional Conduct 1.05. We have considered your arguments and reviewed the submitted information.

We note the requestor has specifically excluded e-mail addresses of members of the public, except the personal e-mail addresses of board members and the e-mail addresses of the search firm hired by the district. Thus, any such information is not responsive to the request. In addition, we note that some of the submitted documents, which we have marked, are not responsive to the instant request for information because they do not fall within the time

---

<sup>1</sup>We note that the district received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

frame specified by the requestor. This decision does not address the public availability of the non-responsive information, and that information need not be released.

You claim portions of Exhibit C are excepted from disclosure under section 552.126 of the Government Code, which 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, resumes, 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 that at the time of the request the district had named a finalist, and, as the 21-day waiting period had expired, had hired a superintendent. You assert information you have highlighted in yellow and the pages you have marked in their entirety are excepted from disclosure under section 552.126. Based on your representations and our review, we agree that some of the information you have marked, and the additional information we have marked, identifies or tends to identify particular candidates. Thus, with the exception of the information we have marked for release, the district may withhold the information you have marked and the additional information we have marked in Exhibit C pursuant to section 552.126 of the Government Code.<sup>2</sup> You have failed to demonstrate, however, how the remaining information in Exhibit C identifies or tends to identify particular candidates. Consequently, the remaining information in Exhibit C may not be withheld under section 552.126 of the Government Code.

Next, you assert that portions of the remaining information in Exhibit C are confidential under section 552.101 of the Government Code. 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 encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found the public has a legitimate interest in information relating to applicants and employees

---

<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

of governmental bodies and their employment qualifications. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find you have failed to demonstrate how any part of the remaining consultant contact information and general candidate information in Exhibit C constitutes highly intimate or embarrassing information. Furthermore, we find there is a legitimate public interest in the general candidate information as it pertains to the candidates' employment qualifications and backgrounds. Therefore, the remaining information in Exhibit C may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). In this instance, you have not explained how the remaining general candidate information in Exhibit C pertains to the zones of privacy. Furthermore, we find the public's need to know information relating to the employment qualifications and backgrounds of potential government employees generally outweighs an individual's privacy interests for purposes of constitutional privacy. Thus, we find you have not demonstrated how any portion of the remaining information in Exhibit C falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Accordingly, no part of the remaining information in Exhibit C may be withheld under section 552.101 of the Government Code in conjunction with constitutional privacy.

You also assert that portions of the remaining information in Exhibit C are confidential pursuant to section 552.102 of the Government Code. 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). As you acknowledge, the information you seek to withhold in Exhibit C pertains to candidates being considered for the district's superintendent position, and not to actual district employees. Thus, you have failed to demonstrate the applicability of section 552.102 to the remaining information at issue in Exhibit C. Consequently, this information may not be withheld under section 552.102 of the Government Code.

You claim that information in Exhibits D and E is excepted from disclosure under section 552.107 of the Government Code, which protects information coming 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 a 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)–(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 pet.). 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 explain that the information at issue consists of communications between the district’s legal counsel and district representatives, made for the purpose of facilitating the rendition of professional legal services to the district. You also inform us that the confidentiality of these communications has been maintained. Based on your arguments and our review of this

information, we conclude that the information in Exhibits D and E consists of privileged attorney-client communications that the district may withhold under section 552.107.<sup>3</sup>

Next, we note that section 552.117 of the Government Code may be applicable to portions of the remaining information.<sup>4</sup> Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and 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 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). We have marked certain employee information under section 552.117(a)(1). You do not inform us, however, whether the employee whose information is at issue timely elected confidentiality under section 552.024. Therefore, we must rule conditionally. To the extent the employee concerned timely elected to keep the marked information confidential, then the district must withhold that information under section 552.117(a)(1) of the Government Code. To the extent the employee concerned did not make a timely election to keep the marked information confidential, the information may not be withheld under section 552.117(a)(1).

We note the remaining information contains the personal e-mail addresses of board members. 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). Gov't Code § 552.137(a)-(c). The e-mail addresses in the remaining information are not specifically excluded by section 552.137(c). As such, these e-mail addresses, which we have marked, must be withheld under section 552.137, unless the owners of the addresses have affirmatively consented to their release.<sup>5</sup> *See id.* § 552.137(b).

In, summary, except where marked for release, the district must withhold the information you have marked in Exhibit C, as well as the additional information we have marked, under section 552.126 of the Government Code. The district may withhold the information in Exhibit D and Exhibit E under section 552.107 of the Government Code. To the extent the

---

<sup>3</sup>As our ruling is dispositive, we need not address your remaining claim for this information.

<sup>4</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>5</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

employee concerned timely elected to keep his personal information confidential, the district must withhold the marked information under section 552.117 of the Government Code. The district must also withhold the e-mail addresses we have marked under section 552.137, unless the owners of the addresses have affirmatively consented to their release. 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](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, toll free, at (888) 672-6787.

Sincerely,



Tamara Wilcox  
Assistant Attorney General  
Open Records Division

TW/dls

Ref: ID# 365332

Enc. Submitted documents

c: Requestor  
(w/o enclosures)