



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 7, 2010

Ms. Chris G. Elizalde  
Walsh, Anderson, Brown, Gallegos and Green, P.C.  
For Mexia Independent School District  
P.O. Box 2156  
Austin, Texas 78768

OR2010-04887

Dear Ms. Elizalde:

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# 375125.

The Mexia Independent School District (the "district"), which you represent, received a request for specified correspondence from October 1, 2009 to the present. You state some information will be released to the requestor. We note the district has redacted student-identifying information from the information submitted to this office pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a).<sup>1</sup> You also state that you will redact home telephone numbers, home addresses, personal cellular telephone numbers, social security numbers, and family member information subject to section 552.117 of the Government Code under section 552.024 of the Government Code.<sup>2</sup> You claim that portions of the submitted information are excepted from disclosure under

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<sup>1</sup>The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

<sup>2</sup>See Gov't Code § 552.024(c)(2) (if employee or official or former employee or official chooses not to allow public access to his or her personal information, the governmental body may redact the information without the necessity of requesting a decision from this office).

sections 552.101, 552.102, 552.107, 552.111, 552.137 of the Government Code, and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. You also claim that a portion of the submitted information is not subject to the Act. We have considered your arguments and reviewed the submitted representative sample of information.<sup>3</sup>

We note the district did not fully comply with section 552.301 of the Government Code. Subsection (b) of section 552.301 requires a governmental body requesting an open records ruling from this office to “ask for the attorney general’s decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request.” Gov’t Code § 552.301(b). While the district raised sections 552.101, 552.107, 552.111, 552.137 within the ten-business-day time period as required by subsection 552.301(b), the district did not raise section 552.102 until after the ten-business-day deadline had passed. Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). However, mandatory exceptions to disclosure cannot be waived by a governmental body. *See* Gov’t Code § 552.352; Open Records Decision No. 574 at 3 n.4 (2001) (mandatory exceptions). Because section 552.102 is a mandatory exception, we will consider the district’s argument under section 552.102 notwithstanding its violation of section 552.301(b) in raising that exception.

We note that a portion of the submitted information within Exhibit 3, which we have marked, consists of completed reports subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). Although you seek to withhold the information at issue under section 552.111 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally); 663 at 5 (1999) (section 552.111 may be waived). As such, section 552.111 does not qualify as “other law” that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any portion of the information subject to 552.022(a)(1), which we have marked, under section 552.111 of the Government Code. However, the Texas Supreme Court has held that the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *In re City of Georgetown*, 53

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<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.

S.W.3d 328, 336 (Tex. 2001). We will, therefore, consider your argument under Rule 192.5 of the Texas Rules of Civil Procedure for the information that is subject to section 552.022.

For the purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See* Open Records Decision No. 677 at 9-10 (2002). Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). A governmental body seeking to withhold information under this privilege bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *See id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and created or obtained the information for the purpose of preparing for such litigation. *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

In this instance, we find that neither of the reports at issue consist of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of litigation. We therefore conclude the district may not withhold either of the marked reports under Texas Rule of Civil Procedure 192.5.

We now turn to the arguments regarding the information not subject to section 552.022. Section 552.021 of the Government Code provides for public access to "public information," which is defined by section 552.002 of the Government Code 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." Gov't Code § 552.002(a). Thus, information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns or has a right of access to the information. *See* Open Records Decision No. 462 (1987); *cf.* Open Records Decision No. 499 (1988).

The information within Exhibit 7 consists of e-mails from district employees regarding personal business. You assert that the information within Exhibit 7 does not constitute public information and therefore is not subject to public disclosure under the Act. After reviewing your arguments and the information at issue, we agree that this information does 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 §§ 552.002, 552.021; *see also* ORD 635 (1993) (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). Therefore, we conclude that the information within Exhibit 7 is not subject to the Act and need not be released in response to this request.

You assert that the information within Exhibit 5 is excepted from disclosure under 552.102 of the Government Code. Section 552.102(a) of the Government Code 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). 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 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.

The types of information considered intimate or 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. *See id.* at 683. Additionally, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990). Upon review, we find that no portion of the information within Exhibit 5 constitutes highly intimate or embarrassing information of no legitimate concern to the public. Therefore, no portion of the information within Exhibit 5 may be withheld under either section 552.102 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 a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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 state the submitted e-mails within Exhibit 4 are communications between the district’s attorneys and the district’s representatives that were made in furtherance of the rendition of legal services to the district. You state these communications were intended to be confidential and the confidentiality of these e-mails has been maintained. Based on your representations and our review, we conclude that the district may generally withhold the e-mails within Exhibit 4 under section 552.107 of the Government Code. We note, however, that three of the individual e-mails contained in the submitted e-mail strings you seek to withhold under section 552.107 consist of communications with non-privileged parties. We have marked these non-privileged e-mails. To the extent these non-privileged e-mails exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107. Accordingly, with the exception of the marked non-privileged e-mails that exist separate and apart from the otherwise privileged e-mail strings, the district may withhold the e-mails within Exhibit 4 under section 552.107 of the Government Code.

You assert the remaining information in Exhibit 3 is excepted from public disclosure based on the attorney work product privilege. Section 552.111 of the Government Code encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. The test to determine whether information was created or developed in anticipation of litigation is the same as that discussed above concerning rule 192.5.

You state the information at issue reflects the work of attorneys representing the district with regard to litigation or anticipated litigation regarding various matters involving the district. Based on your representations and our review, we conclude the district may withhold the information we have marked as attorney work product under section 552.111 of the Government Code. However, we find you have failed to demonstrate the remaining information within Exhibit 3 consists of material prepared or mental impressions developed in anticipation of litigation or for trial by a party or a representative of a party. Accordingly, the district may not withhold any of the remaining information under the work product privilege of section 552.111.

You also argue portions of the remaining information are excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code, which 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." Gov't Code § 552.111. 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 ORD 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). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. See ORD 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982).

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 that the information at issue consists of the advice, opinions, and recommendations of district employees and consultants involving district policymaking matters. Based on your representations and our review, we agree that some of the information at issue, which we have marked, consists of the advice, opinions, or recommendations of district employees or consultants regarding policymaking matters. However, you have failed to establish that the remaining information, which consists of general factual and administrative information, consists of advice, opinions, or recommendations for purposes of section 552.111. Therefore, the deliberative process privilege section of 552.111 is not applicable to the remaining information at issue, and none of the remaining information may be withheld on that basis. Accordingly, the district may only withhold the information we have marked under the deliberative process privilege of section 552.111 of the Government Code.

Next, you raise section 552.137 of the Government Code for portions of the information within Exhibit 6. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purposes 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). We have marked e-mail addresses within Exhibit 6, and e-mail addresses within the remaining information of Exhibit 4, that are not of a type specifically excluded by subsection (c). Accordingly, the district must withhold the e-mail addresses we have marked

under section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure.<sup>4</sup>

In summary, the information in Exhibit 7 is not subject to the Act and need not be released to the requestor. The district may withhold the information we have marked under sections 552.107 and 552.111 of the Government Code. The district must withhold the information we have marked under section 552.137 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](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,



Jennifer Burnett  
Assistant Attorney General  
Open Records Division

JB/dls

Ref: ID# 375125

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>4</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 an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.