ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 4, 2011

Mr. Christopher B. Gilbert
Thompson & Horton LLP
711 Louisiana Street, Suite 2100
Houston, Texas 77002

OR2011-00162

Dear Ms. 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# 404812.

The Houston Independent School District (the "district"), which you represent, received a request for electronic communications to and from district trustees or five named district employees during a specified period that relate to or mention several specified terms. You claim the submitted information is excepted from disclosure under sections 522.107 and 552.111 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted representative sample of information.[2] We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

You raise section 552.107 of the Government Code for the e-mails in Exhibit B. Section 552.107(1) protects information coming within the attorney-client privilege. *Id.*

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[1]Although you also raise section 552.101 of the Government Code in conjunction with section 552.107, this office has concluded that section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Additionally, although you assert the attorney-client privilege under rule 503 of the Texas Rules of Evidence, we note that none of the submitted information is subject to section 552.022. Thus, section 552.107 is the proper exceptions to raise for your attorney-client privilege claim in this instance. *See generally* ORD 676.

[2]We assume 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.

§ 552.107(1). 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 Texas 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). 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.*, 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).

Exhibit B contains one e-mail chain consisting of two e-mails and related attachment, and a stand-alone e-mail. You identify the individuals listed as parties to the first half of the e-mail chain and the stand-alone e-mail as district officials, employees, and counsel. You explain these e-mails were communicated for the purpose of facilitating the rendition of legal services to the district, and that these e-mails were intended to be and have remained confidential. Therefore, based on your representations and our review, we agree most of the e-mails in Exhibit B are privileged, and the district may withhold this information under section 552.107 of the Government Code. However, the second half of the e-mail chain and related attachment reflect they were communicated with a party outside the district. You neither identify this outside party, nor explain how this individual is privileged with respect to this communication. Thus, we find this remaining information is not privileged. Consequently, to the extent the marked non-privileged information exists separate and apart from the otherwise privileged e-mail string in which it is submitted, it may not be withheld

under section 552.107. However, to the extent the non-privileged e-mail or related attachment do not exist separate and apart from the string in which they were submitted, they may be withheld along with the privileged portion of the string as privileged attorney-client communications.

You claim the e-mails submitted in Exhibit A are excepted from disclosure under 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). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990).

You state the e-mails and attachments in Exhibit A contain discussions about district policy with respect to the district's magnet program. You also identify the individuals who are party to these communications as district officials, employees, and representatives. Upon review, we have marked the portions of the information in Exhibit A that consist of advice, opinions, and recommendations of individuals you identified regarding district policy. The remaining portions of Exhibit A are either purely factual in nature or reflect they were

communicated with parties you have not identified as sharing a common deliberative process with the district. We conclude you failed to demonstrate the applicability of the deliberative process privilege to this information, and it may not be withheld under section 552.111 of the Government Code.

We note the remaining information in Exhibit A includes district employees' cellular telephone number and home address and telephone number that may be subject to section 552.117(a)(1) of the Government Code.[3] Section 552.117(a)(1) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). Additionally, section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117 exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The district may only withhold information under section 552.117(a)(1) on behalf of employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The district may only withhold the cellular telephone number, home address, and home telephone number we marked under section 552.117(a)(1) of the Government Code if the employees to whom this information pertains timely elected under section 552.024 to withhold this information. However, the cellular telephone number we marked may only be withheld if it is the employee's personal cellular telephone number. To the extent these employees did not timely elect to withhold this information, or if the marked cellular telephone number is not the employee's personal cellular telephone number, the information we marked be released.

Next, the non-privileged e-mail in Exhibit B and the remaining information in Exhibit A contain private e-mail addresses that may be subject to section 552.137 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). The e-mail addresses we marked do not appear to be excepted under subsection (c). Accordingly, unless

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[3]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

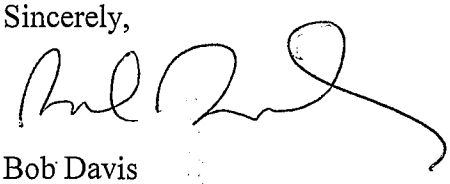
the owners of the e-mail addresses we marked consent to their release, the district must withhold these e-mail addresses under section 552.137.[4]

In summary, the district may generally withhold the information submitted in Exhibit B under section 552.107 of the Government Code. However, to the extent the e-mail and attachment we marked as non-privileged exist separate and apart from the e-mail string in which they were submitted, they may not be withheld under section 552.107. The district may withhold the information we marked under section 552.111 of the Government Code in Exhibit A. The district may withhold the home address and home telephone number we marked under section 552.117(a)(1) of the Government Code to the extent the employee to whom this information pertains timely elected under section 552.024 to withhold this information. The district may withhold the cellular telephone number we marked under section 552.117(a)(1) if the employee to whom this number pertains elected to withhold this information and it is that employee's personal number. The district must withhold the e-mail addresses we marked in Exhibits A and B under section 552.137 of the Government Code, unless their owners consent to their disclosure. The remaining submitted 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, toll free, at (888) 672-6787.

Sincerely,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/tf

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[4]Open Records Decision No. 684 (2009) is 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.

Ref: ID# 404812

Enc. Submitted documents

c: Requestor
(w/o enclosures)