



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 28, 2011

Ms. LeAnne Lundy
Rogers, Morris & Grover, L.L.P.
For New Caney Independent School District
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2011-01523

Dear Ms. Lundy:

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# 408032.

The New Caney Independent School District (the "district"), which you represent, received a request for the requestor's client's personnel file, including any letters from other district employees, parents, or others regarding the requestor's client. You state that student-identifying information has been redacted from some of the responsive records pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You also state you have released some of the requested information to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.103, 552.111, and 552.137 of the Government Code. We have

¹We note that 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. A copy of the DOE's letter to this office is posted on the Attorney General's website at: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

considered the exceptions you claim and reviewed the submitted representative sample of information.²

Section 552.103 of the Government Code provides, in relevant part, as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an

²We 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.

attorney for a potential opposing party.³ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You state the district reasonably anticipates litigation will ensue between the district and the requestor’s client based on correspondence between the district and the requestor. You state the requestor “has made allegations against [the district] and its employees of ‘undue and unlawful influence’ and making ‘false statements’ concerning and ‘threats’ to [the requestor’s client].” You contend the requestor was retained in relation to these allegations and intends to file suit against the district. However, you do not provide, and the submitted information does not reveal, any concrete evidence showing that the requestor or the requestor’s client actually threatened to file a lawsuit against the district or otherwise took any objective steps toward filing suit prior to the district’s receipt of the request. Accordingly, you failed to demonstrate the district reasonably anticipated litigation on the date the district received the request, and the district may not withhold any portion of the requested information under section 552.103 of the Government Code.

You claim section 552.111 of the Government Code for portions of the submitted information. Section 552.111 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, recommendations, and opinions 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, and opinions that reflect 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

³Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (2) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

personnel. *Id.*; see also *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 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).

Moreover, 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).

You state the information at issue pertains to the district's decision not to renew the requestor's client's probationary employment contract. We find this information pertains to a routine personnel matter that does not rise to the level of policymaking. Accordingly, the district may not withhold the information at issue under section 552.111 of the Government Code.

You note the requested information contains personal e-mail addresses. 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 listed in the information at issue are not specifically excluded by section 552.137(c). As such, these e-mail addresses, which you have marked, must be withheld under section 552.137, unless the owners of the addresses have affirmatively consented to their release.⁴ See *id.* § 552.137(b).

In summary, the district must withhold the personal e-mail addresses you have marked under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release. The remaining information must be released.⁵

⁴Open Records Decision No. 684 (2009) serves as 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, without the necessity of requesting an attorney general decision.

⁵We note the information being released contains confidential information to which the requestor, as his client's authorized representative, has a right of access. See Gov't Code § 552.023 (person has special right of access to information that relates to the person and that is protected from disclosure by laws intended to protect person's privacy interests). Thus, if the district receives another request for this particular information from a different requestor, then the district should again seek a decision from this office.

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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 408032

Enc. Submitted documents

c: Requestor
(w/o enclosures)