



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 2, 2011

Ms. Kelley L. Kalchthaler
Counsel for the Georgetown Independent School District
Walsh, Anderson, Brown, Gallegos and Green, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2011-07804

Dear Ms. Kalchthaler:

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# 419373.

The Georgetown Independent School District (the "district"), which you represent, received a request for a document containing certain information about district employees whose jobs were cut on a specified date and e-mails sent or received during a specified period by the district's superintendent or the district's board of trustees. You state the district will release some of the requested information to the requestor. You inform us the district has redacted information subject to section 552.117 of the Government Code as permitted by section 552.024(c) of the Government Code,¹ as well as information subject to

¹Section 552.117 of the Government Code exempts 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. Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the current or former employee or official chooses not to allow public access to the information. *See* Gov't Code §§ 552.117, .024(c).

sections 552.137 and 552.136 of the Government Code pursuant to Open Records Decision No. 684 (2009).² You also state the district has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.³ You claim portions of the submitted information are not subject to the Act. You also claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.126 of the Government Code.⁴ We have considered your arguments and reviewed the submitted representative sample of information.⁵

First, we address your assertion that the information submitted in Exhibits 5 and 7 is not subject to the Act. The Act is applicable only to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act defines public information 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.

Id. § 552.002(a). Virtually all information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see*

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision, including a credit card number, debit card number, charge card number, insurance policy number, bank account number, and bank routing number under section 552.136 of the Government Code; and an e-mail address of a member of the public under section 552.137 of the Government Code.

³The 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>.

⁴Although you also raise section 552.101 of the Government Code in conjunction with the attorney-client privilege, under Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Thus, we will not address your claim that the submitted information is confidential under section 552.101 in conjunction with rule 503.

⁵We 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.

also Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You claim the e-mails in Exhibit 5 are personal in nature and were not collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official district business. Upon review, we agree two of the e-mails in Exhibit 5 are unrelated to any district business. Based on your representations and our review, we agree that these two e-mails, which we have marked, were not "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 § 552.021; see also Open Records Decision No. 635 (1995) (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). Because this marked information is not subject to the Act, it need not be released in response to this request for information. However, we find the remaining two e-mails in Exhibit 5 relate to the actions of the district's superintendent in his capacity as the superintendent and thus constitute "public information" as defined by section 552.002(a). Accordingly, we consider whether these e-mails are excepted under the Act.

You also contend the information in Exhibit 7 has no other significance than its use as a tool for the maintenance, manipulation, or protection of public property. In Open Records Decision No. 581 (1990), this office determined that certain computer information, such as source codes, documentation information and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information that is made public under section 552.021. See ORD 581 at 6 (construing predecessor statute). Exhibit 7 consists of an automated authentication e-mail sent to a district employee, which provides a temporary password for access to a Texas Education Agency website. Based on your representations and our review, we agree the information in Exhibit 7 is not subject to the Act and need not be released in response to this request for information.

You claim Exhibit 3 is excepted under section 552.111 of the Government Code, which excepts from disclosure "an interagency or intra-agency 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 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. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); 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 consultant. See Open Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). 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 assert the e-mails in Exhibit 3 consist of advice, opinion, and recommendation between and among district officials and district consultants regarding district policy matters. Upon review, we have marked the portions of this information that contain advice, opinion, or recommendation of district representatives about district policy. The district may withhold this information under section 552.111 of the Government Code. However, we find most of the remaining information in Exhibit 3 consists of either administrative information that does not relate to policymaking or information that is purely factual in nature. You have failed to demonstrate, and the information does not reflect on its face, how such information is excepted under section 552.111. Additionally, some of the remaining information in Exhibit 3 consists of advice, opinion, or recommendation communicated between district employees and employees of other school districts. You have not demonstrated how the district shares a privity of interest or common deliberative process with representatives of other school districts. See ORD 561. Accordingly, we find none of the remaining information may be withheld under section 552.111 of the Government Code.

You next claim the e-mails submitted in Exhibit 4 are excepted under section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. Gov't Code § 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 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). 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).

You identify most of the individuals listed as parties to the e-mails in Exhibit 4 as district counsel, district employees, and district officials. You state this information was communicated for the purpose of rendering legal assistance and advice to the district. You also state these communications were intended to be and have remained confidential. Thus, based on your representations and our review, we agree most of the e-mails in Exhibit 4 constitute privileged attorney-client communications which the district may withhold under section 552.107(1) of the Government Code. However, two e-mail chains in Exhibit 4 reflect they were communicated with parties outside the district. You neither identify these outside parties nor explain how they are privileged with respect to the communications at

issue. Thus, we find this remaining information in Exhibit 4, which we marked, is not protected by the attorney-client privilege and may not be withheld under section 552.107(1).

Next, you claim portions of Exhibit 5 are excepted 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. Exhibit 5 identifies two candidates for superintendent positions at three school districts other than the district. However, because section 552.126 provides that superintendent finalist names must be released by a school district seeking to withhold applicant identities, *see id.*, we find section 552.126 does not protect the identities of applicants to other school districts. Accordingly, because this information does not identify any applicant for the position of superintendent of the district, we conclude section 552.126 is not applicable in this instance. Thus, the district may not withhold any portion of Exhibit 5 on the basis of section 552.126.

You raise section 552.101 of the Government Code for Exhibits 6 and 8. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes, including section 21.355 of the Education Code, which provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. In Open Records Decision No. 643 (1996), we determined for purposes of section 21.355, the word "teacher" means a person who is required to, and does in fact, hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055, and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* ORD 643 at 4. The Third Court of Appeals has concluded that a written reprimand constitutes an evaluation for the purposes of section 21.355 where "it reflects the principal's judgment regarding [a teacher's] actions, gives corrective direction, and provides for further review." *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You claim the responsive information in Exhibit 8 is made confidential pursuant to section 21.355. You inform this office the employee whose conduct is at issue in these documents is a teacher who was required to hold, and did hold, a teaching certificate under subchapter B of chapter 21 at the time of this reprimand. Upon review, however, the reprimand and other information in Exhibit 8 pertain to the teacher's conduct as supervisor at an extracurricular choir competition, not as a classroom teacher. *See* Educ. Code § 21.353 (teachers shall be appraised only on basis of classroom teaching performance and not in connection with extracurricular activities). Consequently, we find the information at issue does not consist of evaluations as contemplated by section 21.355 of the Education Code. Accordingly, the district may not withhold any portion of Exhibit 8 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Accordingly, the district may not withhold any portion of Exhibit 8 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

You claim the information in Exhibit 6 is made confidential by common-law privacy, which is also encompassed by section 552.101 of the Government Code. 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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate and embarrassing. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). However, as this office has often stated, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and is, therefore, generally not protected from disclosure under common-law privacy. *See, e.g.*, Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest). Whether information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983).

You claim Exhibit 6 is confidential in its entirety pursuant to common-law privacy. Generally, only highly intimate information that implicates the privacy of an individual is withheld. However, in certain instances, where it is demonstrated that the requestor knows the identity of the individual involved, as well as the nature of certain incidents, the entire report must be withheld to protect the individual's privacy. In this case, you have not demonstrated, and the submitted information does not reflect, a situation in which Exhibit 6 must be withheld in its entirety on the basis of common-law privacy. However, upon review, we have marked medical information in Exhibit 6 that we find to be of no legitimate public interest. The district must withhold this marked information under section 552.101 of the Government Code in conjunction with common-law privacy.

We note portions of the submitted information may be subject to section 552.117 of the Government Code.⁶ Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or

⁶The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

former official or employee of a governmental body who timely requests this information be kept confidential under section 552.024. *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, to the extent the current and former employees whose information we marked timely requested confidentiality for the marked personal information under section 552.024, the district must withhold this information under section 552.117(a)(1). However, to the extent these employees did not so elect, the information we marked must be released.

Finally, 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 personal e-mail addresses we marked in the remaining information are not subject to subsection (c). Thus, the district must withhold the marked e-mail addresses under section 552.137 of the Government Code, unless their respective owners consent to their release.

In summary, Exhibit 7 and the e-mails we marked in Exhibit 5 are not subject to the Act and the district need not release them in response to this request. The district may withhold the information we marked in Exhibit 3 under section 552.111 of the Government Code. With the exception of the information we marked for release, the district may withhold Exhibit 4 under section 552.107 of the Government Code. The district must withhold the information we marked in Exhibit 6 under section 552.101 of the Government Code in conjunction with common-law privacy. The district must also withhold the information we marked under section 552.117(a)(1) of the Government Code to the extent the employees concerned elected to keep this information confidential prior to the district's receipt of the request for information. The district must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless their respective owners consent 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, 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,

A handwritten signature in black ink, appearing to read "Bob Davis", written in a cursive style.

Bob Davis
Assistant Attorney General
Open Records Division

RSD/eb

Ref: ID# 419373

Enc. Submitted documents

c: Requestor
(w/o enclosures)