



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 3, 2011

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

OR2011-07870

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# 419505.

The Georgetown Independent School District (the "district"), which you represent, received a request for all e-mail communications sent by, to, or between eight specified e-mail addresses for a specified time period and all written communications sent by, to, or between seven named board members for a specified time period. You state you will release some information to the requestor. You state the district has redacted e-mail addresses subject to section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You also state the district has redacted home telephone numbers, home addresses, 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 assert that portions of the submitted information are not subject to the Act. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.126 of the Government

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<sup>1</sup>Open Records Decision No. 684 is 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.

<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).

Code.<sup>3</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>4</sup>

Initially, we note some of the submitted information is not responsive to the instant request because it does not consist of e-mails or written communications sent by, to, or between the eight e-mail addresses or seven board members specified in the request. This ruling does not address the public availability of any non-responsive information, and the district need not release any non-responsive information in response to this request.

Next, we address your assertion Exhibits 5 and 7 are 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. Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). You contend Exhibit 5 consists of e-mails that were not "assembled[] or maintained under the requirement of law or ordinance nor [were they] assembled or maintained in connection with the transaction of official school district business." You further state that the communications contained within Exhibit 5 "relate specifically to the private interests, activities, and opinions of a [d]istrict employee" and that the e-mails are private exchanges that do not address district business.

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<sup>3</sup>Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, although you also raise rule 503 of the Texas Rules of Evidence, we note section 552.107 of the Government Code is the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code. *See* ORD 676 at 1-2.

<sup>4</sup>We assume that the representative samples of records submitted to this office are 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.

Based on your representation and our review of the information at issue, we conclude Exhibit 5 does not constitute public information for the purposes of section 552.002. *See* Open Records Decision No. 635 at 4 (1995) (section 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Therefore, Exhibit 5 is not subject to the Act and need not be released in response to this request.<sup>5</sup> We also note that this office has 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 made public under section 552.021 of the Government Code. *See* Open Records Decision No. 581 (1990). Based on the reasoning in that decision and our review of the information at issue, we determine that the password information in Exhibit 7 does not constitute public information under section 552.002. Accordingly, Exhibit 7 is also not subject to the Act and need not be disclosed.

We understand that the district has redacted some student identifying information, which the district is authorized to redact pursuant to the federal Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. The United States Department of Education Family Policy Compliance Office has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.<sup>6</sup> Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). The submitted information also includes unredacted education records. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA should be made, we will not address the applicability of FERPA to any of the submitted information. Such determinations under FERPA must be made by the educational authority in possession of the education records.<sup>7</sup> We will, however, address the applicability of the claimed exceptions to the submitted information.

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<sup>5</sup>As our ruling is dispositive for Exhibit 5, we need not address your remaining argument for this exhibit.

<sup>6</sup>A copy of this letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

<sup>7</sup>In the future, if the district does obtain parental or an adult student's consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

You raise section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code for the information in Exhibit 8b. 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. This section encompasses information protected by other statutes, such as section 21.355 of the Education Code, which provides, "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This section applies to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. See Open Records Decision No. 643 (1996). The Third Court of Appeals has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 because "it reflects the principal's judgment regarding [a teacher's] actions, gives corrective direction, and provides for further review." *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). In Open Records Decision No. 643, 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 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. See *id.* at 4.

You state, and provide documentation showing, the named teacher held the appropriate teaching certificate at the time of the evaluation. Based on your representation and our review of the information at issue, we conclude the written reprimand we have marked consists of a teacher evaluation for purposes of section 21.355. Therefore, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, we find you have not demonstrated the remaining information in Exhibit 8b consists of a teacher evaluation for purposes of section 21.355. Accordingly, the remaining information may not be withheld under section 552.101 on that basis.

You raise section 552.101 of the Government Code in conjunction with common-law privacy for Exhibit 6. Section 552.101 also encompasses the doctrine of common-law privacy, which 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). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. 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. *Id.* at 683. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. 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, information relating to public employees and public

employment is generally not protected by common-law privacy because the public has a legitimate interest in such information. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 470 at 4 (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 423 at 2 (1984) (scope of public employee privacy is narrow). 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 information must be withheld in its entirety to protect the individual's privacy. In this instance, although you seek to withhold Exhibit 6 in its entirety, you have not demonstrated, nor does it otherwise appear, this is a situation in which the information at issue must be withheld in its entirety on the basis of common-law privacy. Thus, the district may not withhold Exhibit 6 in its entirety under section 552.101 of the Government Code in conjunction with common-law privacy. Upon review, however, we find the information we have marked is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the district must withhold the information we have marked in Exhibit 6 under section 552.101 in conjunction with common-law privacy. However, you have failed to demonstrate any portion of the remaining information in Exhibit 6 is highly intimate or embarrassing and of no legitimate public concern. Thus, no portion of the remaining information in Exhibit 6 may be withheld under section 552.101 on the basis of common-law privacy.

You raise section 552.107(1) of the Government Code for Exhibit 4. 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. *See* 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 e-mails submitted as Exhibit 4 constitute communications between legal counsel for the district and district officials and employees. Furthermore, you state that these communications were made for the purpose of facilitating the rendition of professional legal services and that the confidentiality of these communications has been maintained. Based on your representations and our review, we find that most of the information within Exhibit 4 consists of attorney-client privileged communications. However, one of the submitted communications was sent to a non-privileged party. Therefore, we find that this communication, which we have marked for release, does not constitute a privileged attorney-client communication and may not be withheld under section 552.107(1) of the Government Code. Accordingly, with the exception of the communication marked for release, the district may withhold Exhibit 4 under section 552.107(1) of the Government Code.

You raise section 552.111 of the Government Code for Exhibit 3. 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, 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. *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 (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 Exhibit 3 consists of interagency and intraagency communications involving the discussion of policy issues of the district. Upon review, we agree some of the information at issue reveals advice, opinions, or recommendations that pertain to policymaking. The district may withhold these portions of the information at issue, which we have marked, under section 552.111 of the Government Code. However, we find the remaining information at issue consists either of general administrative or personnel information that does not relate to policymaking or information that is purely factual in nature. Further, we find portions of the remaining information were communicated with individuals with whom you have failed to demonstrate how the district shares a privity of interest or common deliberative process. Accordingly, you have failed to demonstrate the applicability of section 552.111 to the remaining information in Exhibit 3, and none of it may not be withheld on that basis.

We note some of the remaining information is subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home addresses and telephone numbers, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. 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 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 individuals whose information is at issue timely elected confidentiality under section 552.024, the district must withhold the information you have redacted and the information we have marked under section 552.117(a)(1) of the Government Code. The district may not withhold the marked or redacted information under section 552.117(a)(1) to the extent the individuals did not timely elect to keep their personal information confidential.

As previously noted, the district has redacted certain e-mail addresses under section 552.137 of the Government Code pursuant Open Records Decision No. 684. 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). Section 552.137(c)(1) states an e-mail address "provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent" is not excepted from public disclosure. *Id.* § 552.137(c)(1). In this instance, the e-mail addresses of employees of Walsh, Anderson, Brown, Gallegos & Green, P.C. you seek to withhold belong to representatives of a firm that has contracted with the district. Because those e-mail addresses were provided to the district by individuals who have a contractual relationship with the district, the e-mail addresses are specifically excluded by section 552.137(c)(1). As such, those e-mail addresses may not be withheld under section 552.137 of the Government Code and must be released. To the extent the remaining e-mail addresses you have redacted and the additional e-mail addresses we have marked are not specifically excluded by section 552.137(c), these e-mail addresses must be withheld under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release. *See id.* § 552.137(b).

In summary, Exhibits 5 and 7 are not subject to the Act and need not be released in response to this request. The district must withhold the information we have marked in Exhibit 8b under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. With the exception of the communication marked for release, the district may withhold Exhibit 4 under section 552.107(1) of the Government Code. The district may withhold the information we have marked in Exhibit 3 under section 552.111 of the Government Code. To the extent the individuals whose information is at issue timely elected confidentiality under section 552.024 of the Government Code, the district must withhold the information you have redacted and the information we have marked under section 552.117(a)(1) of the Government Code. The e-mail addresses of employees of Walsh, Anderson, Brown, Gallegos & Green, P.C. are specifically excluded by section 552.137(c) of the Government Code and may not be withheld under section 552.137 of the Government Code. To the extent the remaining e-mail addresses you have redacted and the additional e-mail addresses we have marked are not specifically excluded by

section 552.137(c) of the Government Code, the district must withhold these e-mail addresses under section 552.137 of the Government Code, unless the owners of the addresses affirmatively 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](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 'Nneka Kanu', written in a cursive style.

Nneka Kanu  
Assistant Attorney General  
Open Records Division

NK/em

Ref: ID# 419505

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)