ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 10, 2011

Mr. William M. Buechler
Buechler & Associates, P.C.
3660 Stoneridge Road, Suite D-101
Austin, Texas 78746

OR2011-08290

Dear Mr. Buechler:

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# 420472.

The Flour Bluff Independent School District (the "district"), which you represent, received a request for e-mails to or from the district superintendent or a named principal during a specified time period that mention proposed student organizations supporting gay, lesbian, bisexual, or transgender students, unity, or tolerance and e-mails between school board members discussing the proposed Gay-Straight Alliance organization. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception 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 prongs of this test must be satisfied. *Id.* at 681-82. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information

[1]Although you initially raised section 552.114 of the Government Code , you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume you have withdrawn this exception. *See* Gov't Code §§ 552.301, .302.

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. You seek to withhold Exhibit C in its entirety on the basis of common-law privacy. Upon review, we find a portion of the information in Exhibit C is highly intimate or embarrassing and not of legitimate public interest. Thus, the district must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. However, none of the remaining information is highly intimate or embarrassing, and the district may not withhold it under section 552.101 on that basis.

We note Exhibit C contains e-mail addresses subject to section 552.137 of the Government Code.[2] 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). We note section 552.137 is not applicable to an institutional e-mail address or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail addresses we have marked do not appear to be specifically excluded by section 552.137(c). *See id.* § 552.137(c). Therefore, the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners consent to their release.[3] As you raise no other exception to disclosure, the district must release the remaining information in Exhibit C.

You seek to withhold Exhibit F under section 552.103 of the Government Code, which provides in part:

> (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.
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> . . .
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> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure

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[2]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).

[3]We note this office 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.

> 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.

Id. § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture."[4] *Id.* 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 attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined 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 argue litigation is reasonably anticipated in this instance because, prior to the date the district received the request, the district received a letter from the American Civil Liberties Union (the "ACLU") demanding on behalf of a student that the district allow the formation of a gay-straight student organization. We note, however, that a threat to sue, or a perceived threat to sue, without any further action is not sufficient to establish reasonably anticipated litigation. *See* ORD 331. The ACLU's demand letter, which you provided to this office, states the ACLU "will take whatever steps necessary to protect the rights of [its] client" unless the district meets its demand. However, you do not inform our office that, at the time the district received the request, the ACLU or its client had actually taken any concrete steps toward filing suit against the district. *Cf.* Open Records Decision Nos. 638 at 3 (mere fact that individual alleged damages does not serve to establish litigation is reasonably anticipated), 551 at 1 (litigation reasonably anticipated when attorney's letter demanded

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[4]Among other examples, this office has concluded litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

damages and stated that attorney was authorized to file suit if damages were not paid), 452 at 5 (litigation reasonably anticipated when attorney made written demand for disputed payments and stated further legal action would be necessary unless payments were forthcoming). Furthermore, you provide a local newspaper article stating the district has agreed to allow the formation of a gay-straight student organization. Thus, on the date the district received the present request for information, the district had complied with the ACLU's demand. Consequently, we find you have failed to demonstrate the district reasonably anticipated litigation when it received the request. Therefore, we conclude the district may not withhold Exhibit F under section 552.103 of the Government Code.

You also seek to withhold Exhibit F 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. Section 552.111 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. The 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).

You state Exhibit F constitutes a recommendation related to district policy. Based on this representation and our review, we find a portion of Exhibit F consists of material that reflects the district's policymaking process. The district therefore may withhold this information, which we have marked, under section 552.111 of the Government Code. However, we find a portion of Exhibit F consists of purely factual information. Further, we note a portion of Exhibit F consists of a communication from the ACLU. You do not explain how this third party shares a privity of interest or common deliberative process with the district. Thus, you

have failed to demonstrate, and the remaining information in Exhibit F does not reflect on its face, that this information reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, we find the remaining information in Exhibit F is not excepted from disclosure under section 552.111 of the Government Code, and the district may not withhold it on that basis. As you raise no further exception to disclosure, the district must release the remaining information in Exhibit F.

In summary, the district must withhold the information we have marked in Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy. The district must withhold the e-mail addresses we have marked in Exhibit C under section 552.137 of the Government Code, unless their owners consent to their release. The district may withhold the information we have marked in Exhibit F under section 552.111 of the Government Code. The district must release the remaining information.

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,

Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 420472

Enc. Submitted documents

c: Requestor
(w/o enclosures)