



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 17, 2011

Ms. Karla Schultz
Counsel for Hays Consolidated Independent School District
Walsh, Anderson, Brown, Gallegos and Green, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2011-08682

Dear Ms. Schultz:

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# 420871.

The Hays Consolidated Independent School District (the "district"), which you represent, received a request for eight categories of information related to a reduction in the district's workforce. You state the district has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

You raise section 552.107(1) of the Government Code for Exhibit 3. This section protects information that comes 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 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

¹We 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 those records contain substantially different types of information than that submitted to this office.

professional legal services” to the client governmental body. *See* 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. *See 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 capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* Tex. R. Evid. 503(b)(1)(A)-(E). 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. *See 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 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 Exhibit 3 is a communication between the district’s assistant superintendent and the district’s attorneys. You inform us the communication was made in furtherance of the rendition of professional legal services to the district. You also state the communication was not intended to be disclosed to any third parties and has not been disclosed to any person outside the district. Based on your representations and our review, we find the district has demonstrated the applicability of the attorney-client privilege to Exhibit 3. Thus, the district may withhold this information under section 552.107(1) of the Government Code.

You claim portions of Exhibit 4 are confidential under section 21.355 of the Education Code. 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 section encompasses information protected by other statutes. Section 21.355 of the Education Code provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. In Open Records Decision No. 643, this office interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, we concluded a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* You argue the records you marked in Exhibit 4 under section 21.355 are teacher evaluations. You state, and provide documentation showing, the teachers held the

appropriate certifications and were teaching at the time of the evaluations. Based on your representations and our review, we conclude the records we marked in Exhibit 4 are teacher evaluations for purposes of section 21.355. Accordingly, these records are confidential under section 21.355 of the Education Code and must be withheld under section 552.101 of the Government Code. We note, however, that two of the records you marked under section 21.355 do not evaluate the performance of a teacher or administrator. Thus, we find you have failed to demonstrate these records are evaluations for purposes of section 21.355, and the district may not withhold this information under section 552.101 in conjunction with section 21.355.

Finally, you raise section 552.111 of the Government Code for the remaining information in Exhibit 4. This section 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* Open Records Decision No. 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* Open Records Decision No. 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).

This office has also concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You assert the district board meeting minutes submitted in Exhibit 4 are protected by section 552.111 because they are preliminary drafts of documents intended for public release in their final forms. In Open Records Decision No. 225, this office concluded that a governmental body's minutes could not be withheld in any form under the statutory predecessor to section 552.111 because they only reflect facts; they are not policymaking documents. *See* Open Records Decision No. 225 at 3-4 (1979); *see also* Open Records Decision No. 615 (1993) (discussing application of section 552.111 to policymaking matters); Gov't Code § 551.022 (providing that minutes of open meeting are public records and shall be available for public inspection and copying on request). Thus, the district may not withhold the minutes in their entirety under section 552.111. Furthermore, you do not explain how the handwritten notations contained in the minutes consist of advice, recommendations, opinions, and other material reflecting the district's policymaking process. Accordingly, we find you have failed to demonstrate section 552.111 of the Government Code is applicable to any portion of the minutes and they must be released.

You also assert the remaining documents in Exhibit 4 are excepted from disclosure under section 552.111. You represent the interpretation and implementation of the district's policy governing workforce reductions is an administrative matter of broad scope that affects the district's policy mission. In addition, our review of the remaining documents reveals that they contain advice, opinions, or recommendations regarding district workforce reductions. Based on your representations and our review, we agree portions of the remaining documents consist of advice, opinions, or recommendations, and other material reflecting the district's policymaking process. Therefore, the district may withhold this information, which we marked, under section 552.111 of the Government Code. However, we find the remaining information in Exhibit 4 consists of facts that are severable from the advice, opinions, and recommendations. As you raise no further exceptions to disclosure, the remaining information must be released.

In summary, Exhibit 3 may be withheld under section 552.107(1) of the Government Code. The district must withhold the evaluations we marked in Exhibit 4 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district may withhold the information we marked in Exhibit 4 under section 552.111 of the Government Code. 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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/eb

Ref: ID# 420871

Enc. Submitted documents

c: Requestor
(w/o enclosures)