



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 13, 2011

Mr. Christopher B. Gilbert
Thompson & Horton, L.L.P.
Phoenix Tower, Suite 2000
3200 Southwest Freeway
Houston, Texas 77027

OR2011-13167

Dear Mr. Gilbert:

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# 429725.

The Houston Independent School District (the "district"), which you represent, received two requests from different requestors. The first requestor seeks all e-mails to and from a named individual from April 14, 2011, to June 21, 2011, excluding any communications dealing with medical appointments. The second requestor seeks all e-mails to and from the named individual from January 1, 2011, to June 23, 2011, and all text messages between the named individual and a second named individual during the same time period. We note the second requestor states the district may redact confidential student and medical information, as well as the e-mail addresses of private citizens, from the requested e-mails. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107,

and 552.111 of the Government Code.¹ We have considered your arguments and reviewed the submitted information, most of which consists of representative samples.²

Initially, we note portions of the submitted information, including Exhibits C-1, C-2, and C-3, are not responsive to the requests because they were created after the dates the requests were received or they were not sent to or from the named individual. This decision does not address the public availability of the non-responsive information, which we have marked, and that information need not be released in response to the present requests.

Next, you have not submitted information responsive to the request for all text messages between the named individual and a second named individual from a specified time period. To the extent the district maintains information responsive to this request that existed on the date this request was received, we assume you have released it. If you have not released any such information, you must do so at this time. Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note some of the submitted information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-09481 (2011). In that decision, we ruled portions of the information at issue were excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy, and sections 552.107, 552.111, 552.117, and 552.137 of the Government Code. We have no indication the law, facts, or circumstances on which the previous ruling was based have changed. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude the district must continue to rely on Open Records Letter No. 2011-09481 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first

¹You inform us the district withdraws its initial claims under sections 552.102 and 552.103 of the Government Code. We note that although you raised sections 552.104 and 552.137 of the Government Code as exceptions to disclosure in your initial briefs to this office, you did not submit to this office written comments stating the reasons why these sections would except the submitted information; we therefore assume you no longer assert these exceptions. *See* Gov't Code §§ 552.301, .302. Further, although you raise section 552.101 of the Government Code in conjunction with 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). In addition, although you assert the attorney-client privilege under Texas Rule of Evidence 503, we note none of the information for which you claim this privilege is subject to section 552.022 of the Government Code. Thus, section 552.107 is the proper exception to raise for your attorney-client privilege claim in this instance. *See generally* ORD 676.

²We 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.

type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information was not responsive to the previous request for information and is not encompassed by the prior ruling, we will consider your arguments against disclosure.

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 established. *Id.* at 681-82. The type of information considered highly 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.

You claim Exhibit D should be withheld in its entirety on the basis of 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 information must be withheld in its entirety to protect the individual’s privacy. In this instance, you have not demonstrated, and the information at issue does not reflect, a situation in which Exhibit D must be withheld in its entirety on the basis of common-law privacy. We note, however, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or 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). Upon review, we have marked information in Exhibit D that is highly intimate and embarrassing and of no legitimate public interest. Accordingly, the district must withhold this information under section 552.101 in conjunction with common-law privacy. However, we find the remaining information at issue is not intimate or embarrassing or is of legitimate public interest. Therefore, none of the remaining information in Exhibit D may be withheld under section 552.101 in conjunction with common-law privacy.

You assert Exhibits C-4 through C-24 are excepted from disclosure under section 552.107(1) of the Government Code. This section 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. 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 inform us Exhibits C-4 through C-24 consist of communications between or among the district’s school board members, administrators, employees, and attorneys that were made in furtherance of the rendition of professional legal services to the district. You state these communications have not been and were not intended to be disclosed to third parties. Based on your representations and our review, we conclude the district has established Exhibits C-4 through C-24 are protected by the attorney-client privilege. Therefore, the district may withhold Exhibits C-4 through C-24 under section 552.107(1) of the Government Code.

You seek to withhold Exhibit B under section 552.111 of the Government Code. 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 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).

You inform us Exhibit B contains discussions about district policy with respect to the district's Apollo, magnet, Vanguard, and gifted and talented programs, state funding issues, cost considerations concerning the renovation of facilities, and concerns regarding the teacher evaluation process and staff retention. You have identified most of the individuals who are parties to these discussions and state they are the district's school board members, administrators, employees, and attorneys. Based on your representations and our review, we have marked the information in Exhibit B that consists of advice, opinions, and recommendations of the individuals you identified regarding district policy; therefore, the district may withhold the marked information under section 552.111 of the Government Code. However, the remaining portions of Exhibit B either are purely factual in nature, do not relate to policymaking, or reflect they were communicated to parties you have not identified as sharing a common deliberative process with the district. Thus, we conclude you failed to demonstrate the applicability of the deliberative process privilege to the remaining information, and the district may not withhold the remaining information in Exhibit B under section 552.111.

We note that portions of the remaining information in Exhibits B and D may be subject to section 552.117(a)(1) of the Government Code.³ This section excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security

³The 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).

numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)(1)). We note section 552.117 encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *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 we have marked in Exhibits B and D timely elected confidentiality under section 552.024, the district must withhold this information under section 552.117(a)(1); however, the district may only withhold the marked cellular telephone number if this individual pays for the cellular telephone service with personal funds. If, however, these individuals did not timely elect to keep their personal information confidential, the personal information we marked in Exhibits B and D may not be withheld under section 552.117(a)(1).

Finally, the remaining information in Exhibits B and D includes 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 email address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not specifically excluded by section 552.137(c). As such, the e-mail addresses we have marked in Exhibits B and D 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 information we marked in Exhibit D under section 552.101 of the Government Code in conjunction with common-law privacy. The district may withhold Exhibits C-4 through C-24 under section 552.107(1) of the Government Code. The district may withhold the information we have marked in Exhibit B under section 552.111 of the Government Code. To the extent the individuals whose information we marked in Exhibits B and D timely elected confidentiality under section 552.024 of the Government Code, the district must withhold this information under section 552.117(a)(1) of the Government Code; however, the district may only withhold the

⁴We 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.

marked cellular telephone number if this individual pays for the cellular telephone service with personal funds. If, however, these individuals did not timely elect to keep their personal information confidential, the personal information we marked in Exhibits B and D may not be withheld under section 552.117(a)(1). Lastly, the district must withhold the e-mail addresses we marked in Exhibits B and D 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.

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# 429725

Enc. Submitted documents

c: Requestor
(w/o enclosures)