ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 15, 2011

Mr. Christopher B. Gilbert
For Houston Independent School District
Thompson & Horton, L.L.P.
711 Louisiana Street, Suite 2100
Houston, Texas 77002-2746

OR2011-16811

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# 436129.

The Houston Independent School District (the "district"), which you represent, received a request for all e-mail communications sent to or received by a named individual from June 22, 2011 until the date of the request, except those e-mails dealing with doctor's appointments or other medical appointments. We understand the district will release some of the information. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted representative sample of information.[2]

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[1]Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1–2 (2002). We note that, in this instance, the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107(1) of the Government Code. *See id.*, Open Records Decision No. 677 (2002).

[2]We 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 those submitted to this office.

Initially, we note some of the submitted e-mails were not sent to or received by the named individual. This information, which we have marked, is not responsive to the request. Our ruling does not address the public availability of information that is not responsive to the request, and the district is not required to release non-responsive information.

Next, we note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, 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.[3] 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 includes unredacted education records. Because our office is prohibited from reviewing these records to determine the applicability of FERPA, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of such records.[4] We will, however, address the applicability of the claimed exceptions to the submitted information.

Section 552.107(1) of the Government Code 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, lawyer

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[3]A copy of this letter may be found on the Office of the Attorney General's website: http://www.oag.state.tx.us/open/20060725usdoe.pdf.

[4]In the future, if the district does obtain parental 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.

representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* 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, orig. proceeding). 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 have identified the parties to the e-mails submitted as Exhibit B. You explain these e-mails were communicated in order to facilitate the rendition of legal services to the district. You state the e-mails were intended to be and remain confidential. Accordingly, we conclude section 552.107(1) of the Government Code is generally applicable to the information submitted as Exhibit B. However, we note one of these e-mail strings includes a communication with a non-privileged party. If this communication, which we have marked, exists separate and apart from the e-mail string in which it appears, then the district may not withhold the communication with the non-privileged party under section 552.107(1) of the Government Code. The district may withhold the remaining information under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code 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 this exception 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, orig. proceeding); 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, orig. proceeding). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, opinions, recommendations, 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, including a consultant or other party with a privity of interest. *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 explain the e-mails submitted as Exhibit A pertain to various policymaking issues and involve members of the district's staff and board of trustees. Upon review, we conclude the information we have marked consists of advice, opinion, and recommendations on policymaking matters. The district may withhold this information under section 552.111 of the Government Code. However, one of the communications involves a third party whom the district has not identified. As the district has not established it shares a privity of interest with this party, it may not withhold the e-mails with that party under section 552.111 of the Government Code. We conclude the remaining information does not consist of advice, opinion, or recommendations on a policymaking matter, and the district may not withhold the remaining information under section 552.111 of the Government Code.

We note some of the remaining information is or may be encompassed by sections 552.101, 552.117, and 552.137 of the Government Code.[5] 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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if

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[5]The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

it (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. This office has found some kinds of medical information or information indicating disabilities or specific illnesses is protected by common-law privacy. *See* Open Records Decision Nos. 470 (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we conclude the information we have marked is highly intimate or embarrassing and of no legitimate concern to the public. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. 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)). 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 be withheld under section 552.117(a)(1) only 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. We note section 552.117 also encompasses a personal cellular telephone or pager number, unless the cellular or pager service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5–7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Therefore, if the employee whose information we have marked made a timely election under section 552.024 and the cellular telephone service is paid for with personal funds, the district must withhold this information under section 552.117(a)(1) of the Government Code. Conversely, if the employee did not make a timely election under section 552.024 or the cellular telephone service is not paid for with personal funds, the district may not withhold the information at issue under section 552.117(a)(1) of the Government Code.

Section 552.137 of the Government Code provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov't Code § 552.137(a)–(c). We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address a governmental entity maintains for one of its officials or employees. Upon review, we

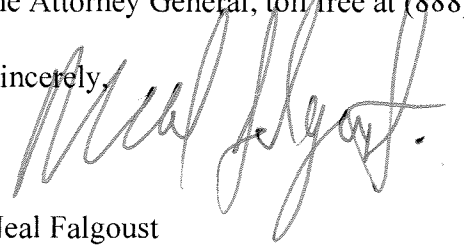
conclude the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release.[6]

In summary, the district may withhold the e-mails submitted as Exhibit B under section 552.107(1) of the Government Code. However, the district may not withhold the communication we have marked on that basis if it exists separate and apart from the otherwise privileged communication. The district may withhold the information we have marked under section 552.111 of the Government Code. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the employee whose information we have marked made a timely election under section 552.024 of the Government Code and the cellular telephone number is paid for with personal funds, the district must withhold this information under section 552.117(a)(1) of the Government Code. The district must withhold the e-mail addresses we have marked under 552.137 of the Government Code, unless the owners have affirmatively consented to their release. The remaining responsive 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,



Neal Falgoust
Assistant Attorney General
Open Records Division

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[6]As you acknowledge, Open Records Decision No. 684 (2009) serves as a previous determination permitting a governmental body to withhold e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting a ruling from this office.

Ref: ID# 436129

Enc. Submitted documents

c: Requestor
(w/o enclosures)