



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 18, 2012

Mr. S. Anthony Safi
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P.O. Box 1977
El Paso, Texas 79999-1977

OR2012-14826

Dear Mr. Safi:

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# 465206.

The El Paso Independent School District (the "district"), which you represent, received a request for specified board meeting minutes and reports. You inform us that the district will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.111, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we must address the district's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. Gov't Code § 552.301(b). While you raised sections 552.111 and 552.116 of the Government Code within the ten-business-day time period as required by section 552.301(b), you did not raise section 552.101 of the Government Code until after the ten-business-day deadline had passed. Consequently, we find the district failed to comply with the procedural

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.

requirements of section 552.301(b) of the Government Code with respect to its claim under section 552.101.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its untimely claim, unless that claim is a compelling reason for withholding information from disclosure. *See generally id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also generally* Open Records Decision No. 630 (1994). A compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will consider the applicability of this section to the submitted information. We will also consider the applicability of sections 552.111 and 552.116 of the Government Code, which you timely raised.

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, such as section 21.355 of the Education Code, which provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355(a). This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). We have determined “administrator” in section 21.355 means a person who is required to and does in fact hold an administrator's certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *See id.* at 4.

You claim a portion of the submitted memorandum dated August 15, 2007, is confidential under section 21.355. We note, however, that the information at issue consists of a summary of an internal audit concerning the improper use of district funds. This information does not constitute an evaluation of the individual at issue's performance as an administrator for purposes of section 21.355. Accordingly, we find you have failed to demonstrate how the information at issue constitutes an evaluation for purposes of section 21.355 of the Education Code, and it may not be withheld under section 552.101 of the Government Code on that basis. As you raise no further exceptions to disclosure of the memorandum dated August 15, 2007, the district must release it.

You raise section 552.111 of the Government Code for the submitted memorandum dated September 8, 2008. 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).

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 inform us that the information at issue consists of an internal deliberative memorandum pertaining to district policy matters. You explain that the district has released a draft policymaking document pertaining to a portion of this memorandum to the public in its final form. Based on your representations and our review, we find the district may withhold the information you have marked under section 552.111 of the Government Code.² However,

²As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

you do not explain that the remaining information in the memorandum dated September 8, 2008, will be released to the public in its final form. Thus, to the extent this information will be released to the public in its final form, the district may withhold it as a draft document under section 552.111. Otherwise, the district may not withhold the remaining information in the memorandum dated September 8, 2008, as a draft document under that section. In that instance, we have marked portions of the information at issue consisting of advice, opinions, or recommendations regarding policy matters the district may withhold under section 552.111. However, we conclude the remaining information in the memorandum dated September 8, 2008, does not consist of advice, opinions, or recommendations, or is purely factual in nature. Accordingly, the district may not withhold any of this information under section 552.111. As no further exceptions to disclosure are raised for the remaining information, the district must release it.

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/bhf

Ref: ID# 465206

Enc. Submitted documents

c: Requestor
(w/o enclosures)