



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 26, 2012

Ms. Sarah W. Langlois  
Attorney for Harris County Department of Education  
Rogers, Morris & Grover, L.L.P.  
5718 Westheimer Road, Suite 1200  
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OR2012-17169

Dear Ms. Langlois:

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# 468959.

The Harris County Department of Education ("HCDE"), which you represent, received a request for information related to a performance review of HCDE conducted by MGT of America, Inc. ("MGT"). You claim the requested information is excepted from disclosure under sections 552.107(1) and 552.111 of the Government Code.<sup>1</sup> You also believe the submitted information may implicate the interests of MGT. You inform us MGT was notified of the present request for the submitted information and of its right to submit

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<sup>1</sup>Although you claim the attorney-client privilege under section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, we note section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-3 (2002). Although rule 503 is other law for purposes of section 552.022 of the Government Code, the submitted information is not subject to section 552.022. *See id.* at 1-6. Thus, in this instance, the attorney-client privilege is properly claimed under section 552.107(1) of the Government Code. We note you also claim section 552.022, which is not an exception to disclosure under subchapter C of the Act. Instead, section 552.022(a) provides for required public disclosure of 18 categories of information, unless the information is made confidential under the Act or other law or subject to section 552.022(a)(1) but excepted from disclosure under section 552.108 of the Government Code. *See* Gov't Code § 552.022(a).

arguments to this office as to why the information should not be released.<sup>2</sup> We received correspondence from MGT. We have considered all the submitted arguments and reviewed the representative sample of information you submitted.<sup>3</sup> We also have considered the comments we received from the requestor and another interested party.<sup>4</sup>

You first inform us HCDE and MGT entered into confidentiality agreements regarding information exchanged between the parties. Although section 552.101 of the Government Code encompasses "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," Gov't Code § 552.101, this exception may not be invoked based on an agreement to keep information confidential unless a governmental body is specifically authorized by statute to enter into such an agreement. See Open Records Decision Nos. 653 at 2 n.2 (1997); 444 at 6 (1986). We also note information is not confidential under the Act simply because the party that submits the information anticipates or requests it be kept confidential. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. See Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information did not satisfy requirements of statutory predecessor to Gov't Code § 552.110). You have not identified any law that authorizes HCDE to enter into an agreement to keep information confidential. Therefore, HCDE must release the submitted information unless it falls within the scope of an exception to disclosure, notwithstanding any expectation or agreement to the contrary.

You also inform us HCDE searched its physical files and intranet system, along with the individual computers and hard drives of employees who were involved in MGT's performance review of HCDE, for information responsive to the present request. You state that in addition to the information that was located, HCDE may have information responsive to the request that exists only as backup data on magnetic tapes. You explain that once it has been deleted from HCDE's intranet system/portal or an HCDE computer's hard drive, such information exists only as backup data on magnetic tapes, unless the user personally archives

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<sup>2</sup>See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

<sup>3</sup>This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes HCDE to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

<sup>4</sup>See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

the information. You state that in order to restore archived information that exists on backup tapes, HCDE would be required to load backup tapes and program and/or manipulate data through use of software to be able to search the content of the archived information. You contend such information is not considered to be "maintained" by HCDE for purposes of the Act. We note computer software programs generally keep track of the location of files by storing the location of data in the "file allocation table" (FAT) of a computer's hard disk. The software then displays the file as being in a specific storage location. Usually, but not always, when a file is "deleted," it is not actually deleted, but the display of its location is merely shown to be moved to a "trash bin" or "recycle bin." Later, when files are "deleted" or "emptied" from these "trash bins," the data is usually not deleted, but the location of the data is deleted from the FAT. Some software programs immediately delete the location information from the FAT when a file is deleted. Once the location reference is deleted from the FAT, the data may be overwritten and permanently removed. Thus, based on your representations, we conclude the locations of any information stored on backup tapes have been deleted from the FAT system. We therefore agree any such information was no longer being "maintained" by HCDE at the time of the present request and does not constitute public information subject to disclosure under the Act. See Gov't Code §§ 552.002 (public information consists of information collected, assembled, or maintained by or for governmental body in connection with transaction of official business), .021; *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed). Thus, the Act does not require HCDE to release any information that was stored on backup tapes when HCDE received the present request for information.

Next, we address your claims for the submitted information under sections 552.107(1) and 552.111 of the Government Code. Section 552.107(1) 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 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. 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). 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, 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, orig. proceeding). 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 explain the information you have marked in Exhibit D-4 and all the information in Exhibit D-9 consist of communications between an attorney for and client representatives of HCDE that were made in connection with the rendition of legal services to HCDE. You state the communications were intended to be and remain confidential. Based on your representations and our review, we conclude HCDE may withhold the information you have marked in Exhibit D-4 and the information in Exhibit D-9 under section 552.107(1) of the Government Code.<sup>5</sup>

Section 552.111 of the Government Code excepts from disclosure “[a]n 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. This exception encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2 (1993)*. The purpose of this privilege is to protect advice, opinion, and recommendation in the decisional process and 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 (1993)*, 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, and opinions 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) (Gov’t Code § 552.111 not applicable to personnel-related

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<sup>5</sup>As we are able to make this determination, we need not address your other claim for this information.

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). Moreover, 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).

This office has concluded a preliminary draft of a document 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.

We also have concluded section 552.111 can encompass communications between a governmental body and a third party. *See* Open Records Decision Nos. 631 at 2 (1995) (Gov't Code § 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) (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (Gov't Code § 552.111 applies to memoranda prepared by governmental body's consultants). In order for section 552.111 to protect communications with a third party, the governmental body must identify the third party and explain the nature of the party's relationship with the governmental body. Section 552.111 is not applicable to a governmental body's communications with 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 contend the remaining information at issue is excepted from disclosure under section 552.111. You state the remaining information is related to a performance review of HCDE conducted by MGT pursuant to a consulting services agreement between HCDE and MGT. You inform us MGT's final report of the performance review is posted on HCDE's website. You explain the remaining information at issue consists of a draft of the report and information related to the creation of the report. You contend the remaining information is related to HCDE's policymaking processes because it encompasses administrative and personnel matters of broad scope that affect HCDE's policy mission. Based on your representations and our review, we conclude HCDE may withhold Exhibit D-1, except for

the information we have marked for release; Exhibit D-3; the information we have marked in Exhibit D-4; and the information we have marked in Exhibit D-5 under section 552.111 of the Government Code. We find the remaining information at issue is generally factual and does not consist of advice, opinions, or recommendations that implicate HCDE's policymaking processes. We therefore conclude HCDE may not withhold any of the remaining information under section 552.111.

We note HCDE may be required to withhold some of the remaining information under section 552.117 of the Government Code.<sup>6</sup> Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who timely requests confidentiality for the information under section 552.024 of the Government Code. *See* Gov't Code §§ 552.117(a)(1), .024. Section 552.117(a)(1) encompasses an employee's personal cellular telephone or pager number if the employee pays for the telephone or pager service with his or her personal funds. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to Gov't Code § 552.117 not applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request confidentiality under section 552.024. We have marked information in Exhibit D-4 HCDE must withhold under section 552.117(a)(1) of the Government Code if the employee concerned timely requested confidentiality for the information under section 552.024 of the Government Code.

Lastly, we address MGT's claims under section 552.110 of the Government Code and copyright law. Section 552.110 protects the proprietary interests of private parties with respect to two types of information: "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision" and "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(a)-(b).

The Supreme Court of Texas has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

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<sup>6</sup>This office will raise section 552.117 on behalf of a governmental body, as this section is a mandatory exception to disclosure. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . A trade secret is a process or device for continuous use in the operation of the business . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.<sup>7</sup> *See Open Records Decision No. 552 at 5 (1990)*. We cannot conclude section 552.110(a) is applicable, however, unless the information is shown to meet the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See Open Records Decision No. 402 (1983)*.

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See Open Records Decision No. 661 at 5-6 (1999)* (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

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<sup>7</sup>The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980)*.

We understand MGT to contend some or all of the remaining information constitutes trade secrets of the company protected by section 552.110(a). We note the information at issue generally appears to have been prepared for, to have been obtained from, or to otherwise pertain to HCDE. We find MGT has not demonstrated that any of the remaining information at issue constitutes a trade secret of the company under section 552.110(a). *See* RESTATEMENT OF TORTS § 757 cmt. b (A trade secret “is not simply information as to single or ephemeral events in the conduct of the business . . . . [It] is a process or device for continuous use in the operation of the business[.]”). We therefore conclude HCDE may not withhold any of the remaining information under section 552.110 of the Government Code.

MGT also states the company’s “processes and documents are under federal copyright protection[.]” We note copyright law does not make information confidential for purposes of section 552.101 of the Government Code. *See* Open Records Decision No. 660 at 5 (1999). We also note none of the submitted information appears to be protected by copyright law. In any event, a governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *See* Open Records Decision Nos. 180 at 3 (1977), 109 (1975). A custodian of public records must comply with copyright law, however, and is not required to furnish copies of records that are copyrighted. *See* ORD 180 at 3. If a member of the public wishes to make copies of copyrighted materials, he or she must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

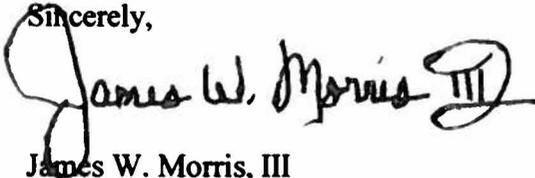
In summary, HCDE (1) may withhold the information you have marked in Exhibit D-4 and the information in Exhibit D-9 under section 552.107(1) of the Government Code; (2) may withhold Exhibit D-1, except for the information we have marked for release; Exhibit D-3; the information we have marked in Exhibit D-4; and the information we have marked in Exhibit D-5 under section 552.111 of the Government Code; and (3) must withhold the information we have marked in Exhibit D-4 under section 552.117(a)(1) of the Government Code if the employee concerned timely requested confidentiality for the information under section 552.024 of the Government Code. HCDE must release the rest of the submitted information, but any copyrighted information must be released in accordance with copyright law.

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](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,

A handwritten signature in black ink that reads "James W. Morris III". The signature is written in a cursive style with a large initial "J" and a distinct "III" at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/bhf

Ref: ID# 468959

Enc: Submitted documents

c: Requestor  
(w/o enclosures)

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