



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 14, 2013

Ms. Valerie A. Carrillo
Escamilla, Poneck & Cruz, LLP
P.O. Box 200
San Antonio, Texas 78291-0200

OR2013-08000

Dear Ms. Carrillo:

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# 488295.

The Fort Worth Independent School District (the "district"), which you represent, received a request for information pertaining to a named attorney, or any other employee of a specified law firm, that advised certain members of the district's board of trustees or administration on specified matters from August 2008 to February 2011. You state that some of the requested information has been released. You further state that the district will redact any student record information protected by the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.135, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA 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. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

Initially, we note portions of the submitted information, which we have marked, are not responsive to the instant request, because they do not involve the named attorney or any other member of his law firm. The district need not release non-responsive information in response to this request, and this ruling will not address that information.

Second, you state the district sought clarification with respect to the request for information. *See id.* § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010). You state the district has not received a response from the requestor. We note a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990). In this case, as you have submitted information responsive to the request and have made arguments against disclosure of this information, we will address the applicability of your arguments to the submitted information.

Next, the requestor asserts that the district failed to respond to him within ten business days. Pursuant to subsection 552.301(d), a governmental body must provide the requestor with (1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general, and (2) a copy of the governmental body's written communication to the attorney general within ten business days of receiving the request for information. Gov't Code § 552.301(d). The district states that it received the request on February 27, 2013. The district also informed our office that it was closed for business from March 11, 2013 through March 15, 2013. Accordingly, the district's ten business day deadline was March 20, 2013. The envelope containing the district's request for a ruling is postmarked March 20, 2013. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail). The request for a ruling reveals it was copied to the requestor. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely on the facts alleged to us by the governmental body requesting our opinion or on those facts that are discernable from the documents submitted for our inspection. *See Open Records Decision No. 522 at 4 (1990)*. Therefore, based on the documentation the district supplied, we find the district complied with the procedural requirements of section 552.301(d).

Now we will turn to your arguments for the responsive 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 to only 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 to only 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). 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 Exhibit D consists of e-mails communicated between district officials and the district’s lawyers for the purpose of facilitating the rendition of legal services. You also inform us these communications were intended to be confidential and have remained confidential. Based on your representations, we find you have demonstrated the applicability of the attorney-client privilege to the responsive information. Thus, the district may generally withhold this information under section 552.107 of the Government Code. However, we note the information at issue includes a non-privileged e-mail and attachment that are included in otherwise privileged e-mail strings. Furthermore, if the e-mail and attachment are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mail and attachment, which we have marked, are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold the non-privileged e-mail and attachment under section 552.107(1) of the Government Code. However, if the non-privileged e-mail and attachment are not maintained separate and apart from the otherwise privileged e-mail strings, the district may withhold the marked e-mail and attachment under section 552.107(1) of the Government Code.

To the extent the non-privileged e-mail and attachment are maintained separate and apart from the confidential e-mail strings, we will address your remaining arguments. 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 the doctrine of common-law privacy, which

protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See Indus. Found. v. Texas 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 satisfied. *Id.* at 681-82. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include 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.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of common-law privacy to information relating to an investigation of alleged sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *See* 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating the public's interest was sufficiently served by the disclosure of such documents. *Id.* The *Ellen* court held "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* You state the requested information pertains to an investigation of claims of sexual harassment. Upon review, we find the information at issue does not contain information that identifies the victims or witnesses of a sexual harassment investigation. Therefore, this information may not be withheld based on section 552.101 of the Government Code in conjunction with common-law privacy.

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. 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).

This office has also concluded that 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 of section 552.111). 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 note section 552.111 can encompass a governmental body's communications with a third-party, including a consultant or other party with which the governmental body shares a common deliberative process or privity of interest. *See* Open Records Decision No. 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). In order 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. We note that a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process). Upon review, we find you have failed to demonstrate how the district shares a privity of interest or common deliberative process with the non-privileged parties at issue. Therefore, the information may not be withheld based on section 552.111 of the Government Code.

You also contend the information at issue is excepted under section 552.135 of the Government Code, which provides in part the following:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov't Code § 552.135(a)-(b). Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under this exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* § 552.301(e)(1)(A). Additionally, we note that individuals who provide information in the course of an investigation, but do not make the initial report are not informants for the purposes of section 552.135 of the Government Code. We note that section 552.135 protects an informer's identity, but it does not generally encompass protection for witnesses or witness statements. Upon review, we find the district has failed to demonstrate how the information at issue reveals the identity of an informer for section 552.135 purposes. Therefore, the information may not be withheld based on section 552.135 of the Government Code.

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 e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The e-mail address we have marked does not appear to be a type specifically excluded by section 552.137(c). Therefore, if the non-privileged e-mail at issue exists separate and apart from the e-mail string, the district must withhold the marked e-mail address under section 552.137 of the Government Code, unless the owner of the address affirmatively consents to its release.²

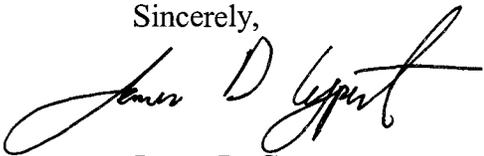
In summary, the district may generally withhold the responsive information in Exhibit D under section 552.107 of the Government Code. However, if the non-privileged e-mail and attachment we have marked exist separate and apart from the otherwise privileged e-mail strings in which they appear, then the district must release the non-privileged e-mail and attachment but withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner consents to its release.

²This office issued Open Records Decision No. 684, a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* Open Records Decision No. 684 (2009).

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,

A handwritten signature in black ink, appearing to read "James D. Cypert". The signature is fluid and cursive, with a large initial "J" and "C".

James D. Cypert
Assistant Attorney General
Open Records Division

JDC/ac

Ref: ID# 488295

Enc. Submitted documents

c: Requestor
(w/o enclosures)