



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 21, 2013

Ms. Sarah W. Langlois  
Counsel for Harris County Department of Education  
Rogers, Morris & Grover, L.L.P.  
5718 Westheimer Road, Suite 1200  
Houston, Texas 77057

OR2013-14618

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# 496961.

The Harris County Department of Education (the "department"), which you represent, received a request for four categories of information concerning the appointment of a specified trustee position. You state you have made some of the responsive information available to the requestor. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note, and you acknowledge, a portion of the submitted information is not responsive to the instant request because it was created after the request was received by the department. This ruling does not address the public availability of that non-responsive information, which you have marked, and the department is not required to release it in response to this request.

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<sup>1</sup>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.

Next, you inform us additional information responsive to the request, beyond that which was released to the requestor or represented by the submitted representative sample of information, may exist in the personal e-mail account of a member of the department's board of trustees. You state the trustee has not provided any such information to the department. Further, you state the department does not have access to information in the trustee's personal account. You provide correspondence from an attorney representing the trustee who argues the information in the trustee's personal e-mail account is not subject to the Act. Thus, we address the arguments concerning this information.

We note the Act is applicable to "public information." *See id.* § 552.021. Section 552.002 of the Act provides "public information" consists of "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). Thus, virtually all information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). Moreover, section 552.001 of the Act provides it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See* Gov't Code § 552.001(a). However, the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ *dism'd*); Open Records Decision No. 452 at 3 (1986).

We further note the characterization of information as "public information" under the Act is not dependent on whether the requested records are in the possession of an individual or whether a governmental body has a particular policy or procedure that establishes a governmental body's access to the information. *See* Open Records Decision No. 635 at 3-4 (1995) (finding information does not fall outside definition of "public information" in Act merely because individual member of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, information sent to individual school trustees' homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Furthermore, this office has found information in a public official's personal e-mail account and home telephone records may be subject to the Act where the public official uses the personal e-mail account and home telephone records to conduct public business. *See* ORD 635 at 6-12 (appointment calendar owned by a public official or employee is subject to the Act when it is maintained by another public employee and used for public business). We note a governmental body

may not circumvent the applicability of the Act by conducting official public business in a private medium. *See* ORDs 635 at 12, 425 at 2. Accordingly, if the requested e-mails in the trustee's personal e-mail account exist and were made in connection with the transaction of the official business of the department, they are subject to the Act and must be released unless they are excepted from disclosure under the Act. However, if the requested e-mails do not exist or were not made in connection with the transaction of the official business of the department, then they are not subject to the Act, and the department is not required to release them in response to the request for information.

To the extent information in the trustee's personal e-mail account constitutes official business of the city, we note that, pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving the request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). You inform us the department received the request for information on May 31, 2013. However, as of the date of this letter, you have not submitted to this office a copy or representative sample of the personal e-mails at issue. Consequently, we find the department has failed to comply with the procedural requirements of section 552.301 with respect to that information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See 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* Open Records Decision No. 630 (1994). Generally, 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). As no exceptions to disclosure have been raised for this information, to the extent the requested information in the trustee's personal e-mail account constitutes official business of the department, the department must release this information pursuant to section 552.302 of the Government Code.

You also inform us the department searched its physical files, along with the individual computers and hard drives of employees and certain consultants for information responsive to the present request. You state, in addition to the information that was located, the department may have information responsive to the request that exists only as backup data on magnetic tapes. You explain that once information has been deleted from the

department's intranet system/portal or an individual department computer's hard drive, such information exists only as backup data on magnetic tapes, unless the user personally archives the information. You state that in order to restore archived information that exists on backup tapes, the department 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 the department 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. Therefore, we agree any such information was no longer being "maintained" by the department 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; *Bustamante*, 562 S.W.2d 266. Thus, the Act does not require the department to release any information that was stored on backup tapes when the department received the present request for information.

Next, we address your claim for the submitted responsive information under section 552.107(1). 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 at issue consists of communications among an attorney for the department, department employees, and members of the department’s board of trustees. You state these communications were made in connection with the rendition of legal services to the department. You state the communications were intended to be and have remained confidential. Based on your representations and our review, we conclude the department may withhold the submitted responsive information under section 552.107(1) of the Government Code.<sup>2</sup>

In summary, to the extent any requested e-mails in the trustee’s personal e-mail account existed at the time of the request and were made in connection with the transaction of official department business, they are subject to the Act and must be released. The department may withhold the submitted responsive information under section 552.107(1) of the Government Code.

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.texasattorneygeneral.gov/open\\_orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open_orl_ruling_info.shtml), or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

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<sup>2</sup>As we are able to make this determination, we need not address your remaining claim for this information.

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle R. Garza", with a long horizontal flourish extending to the right.

Michelle R. Garza  
Assistant Attorney General  
Open Records Division

MRG/som

Ref: ID# 496961

Enc. Submitted documents

c: Requestor  
(w/o enclosures)