



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 10, 2013

Ms. Melanie L. Hollmann
Atkins, Hollmann, Jones, Peacock, Lewis & Lyon, P.C.
3800 East 42nd Street, Suite 500
Odessa, Texas 79762

OR2013-17701

Dear Ms. Hollmann:

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# 501903.

The Ector County Independent School District (the "district"), which you represent, received a request for (1) e-mails sent to and received by a named individual during a specified time period and (2) a specified plan.¹ You state you have released some of the requested information to the requestor. You also state the district has redacted personal information of a district employee in set G subject to section 552.117 of the Government Code pursuant to section 552.024 of the Government Code.² You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

¹We note the district received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request).

²Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2).

Initially, we note the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental or an adult student's 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").

You state you have redacted student identifying information pursuant to FERPA. However, we note you have submitted unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the educational authority in possession of the education records. However, we will consider your arguments against disclosure of the submitted information.

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 other statutes make confidential. You assert the information in set E is protected by the Privacy Act of 1974, section 552a of title 5 of the United States Code ("Federal Privacy Act"). However, the Federal Privacy Act applies only to a federal agency. *See* 5 U.S.C. §§ 552(f), 552a(a). State and local government agencies are not covered by the Federal Privacy Act. *See Davidson v. Georgia*, 622 F. 2d 895, 896 (5th Cir. 1980); *see also* Attorney General Opinion MW-95 (1979). Because the district is not a federal agency, it is not bound by the Federal Privacy Act's confidentiality provisions as would be a federal agency. *See* 5 U.S.C. §§ 552a(a)(1), 552(f) (defining "agency" for purposes of Federal Privacy Act). Therefore, the information in set E cannot be considered confidential by law pursuant to section 552.101 of the Government Code in conjunction with the Federal Privacy Act.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 satisfied. *Id.* at 681-82.

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

Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation, Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Ordinarily, only highly intimate information that implicates the privacy of an individual is withheld. However, in certain instances, where it is demonstrated the requestor knows the identity of the individual involved as well as the nature of certain incidents, the information must be withheld to protect the individual's privacy.

In this instance, although you claim the information in set F is protected in its entirety by common-law privacy, you have not demonstrated, nor does it otherwise appear, that this is a situation in which this information must be withheld in its entirety on the basis of common-law privacy. However, upon review, we find that some of the submitted information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district must withhold the information we have marked in sets E and F under section 552.101 of the Government Code in conjunction with common-law privacy. However, you have failed to demonstrate any of the remaining information at issue is highly intimate or embarrassing and of no legitimate public concern. Consequently, the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.103 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the

governmental body received the request for information, and (2) the requested information is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); ORD 551 at 4. The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁴ *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983). For the purposes of section 552.103(a), litigation includes civil lawsuits and criminal prosecutions, as well as proceedings that are governed by the Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, or are otherwise conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 588 (1991), 474 (1987), 368 (1983), 336.

You assert the district is currently a party to an ongoing grievance proceeding and the submitted information in set D-2 is directly related to the ongoing grievance proceeding. However, you have not explained how the grievance process constitutes litigation of a judicial or quasi-judicial nature for purposes of section 552.103. *See generally* Open Records Decision No. 301 (1982) (discussing meaning of “litigation” under predecessor to section 552.103). Further, although you claim the district anticipates litigation regarding this matter, you have not informed us, nor does the submitted information reveal, that the employee who filed the grievance has actually threatened litigation against the district or otherwise taken any concrete steps toward the initiation of litigation against the district. Consequently, you have not established that litigation was pending or that the district

⁴This office also has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

reasonably anticipated litigation when it received the request for information. Accordingly, the district may not withhold any of the submitted information in set D-2 under section 552.103 of the Government Code.

You claim the information in set D-1 is related to pending litigation to which the district is a named defendant. You inform us that litigation in the form of a special education due process hearing is pending before a hearing officer with the Texas Education Agency (the "TEA") in cause number 156-SE-0313. We note such due process hearings are governed by the APA. *See* 19 T.A.C. § 249.4(a)(1); ORD 588 (contested case under APA constitutes litigation for purposes of statutory predecessor to section 552.103). You state the information in set D-1 is related to the pending lawsuit. Upon review, we find litigation was pending when the district received the request for information and the information in set D-1 is related to the pending litigation for the purposes of section 552.103.

We note, however, that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Therefore, if the opposing party has seen or had access to information relating to pending litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the opposing party in the pending litigation has already seen or had access to most of the information in set D-1. Thus, the information which has been seen by the opposing party may not be withheld from the requestor under section 552.103 of the Government Code. The district may withhold the remaining information in set D-1, which we have marked, under section 552.103.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* 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 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. 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). 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 state the information in set C consists of confidential attorney-client communications. You state these communications were made “for the purpose of facilitating the rendition of professional legal services” to the district. You state these communications were intended to be confidential and confidentiality has been maintained. Although you failed to identify any of the parties to the communications at issue, we are able to discern from the face of the documents that certain individuals are privileged parties with the district. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the district may withhold the information in set C 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. 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); *see also 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 that section 552.111 excepts 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. *See id.*; *see also City of Garland v. The 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. *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 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.

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 No. 561 at 9 (1990)* (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). 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 assert the information in set A is protected by the deliberative process privilege. We note you failed to identify any of the parties to the communications at issue. However, we are able to discern from the face of the documents that certain individuals are in privity with the district. We note some of the information at issue consists of a draft document. You do not state whether the draft document will be released to the public in final form. Thus, to the extent the draft document will be released to the public in final form, the district may withhold it in its entirety under section 552.111. If the draft document will not be released to the public in final form, then the district may not withhold it in its entirety under section 552.111. Further, we find the information we have marked, including information within the draft document if it will not be released in final form, consists of advice, opinions, and recommendations pertaining to policymaking matters of the district. Accordingly, the district may withhold the information we have marked under section 552.111 of the

Government Code. However, we find you have failed to demonstrate, and we are unable to discern, how the district shares a privity of interest or common deliberative process with some of the individuals in the remaining communications. Additionally, we note some of the remaining communications consist of general administrative, routine personnel, and purely factual information. Thus, we find you have not demonstrated how the remaining communications consist of advice, opinions, or recommendations pertaining to policymaking matters of the district. Accordingly, we conclude the district may not withhold any of the remaining information in set A under section 552.111 of the Government Code.

Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. We understand you to claim the information in set B constitutes audit working papers under section 552.116. The documents at issue reveal internal audits were conducted by the district into several matters. However, you do not inform this office

of the authorization for any audit. Thus, upon review, we find you have not demonstrated how the information in set B was prepared or is maintained in relation to an audit authorized or required by any of the laws or authorities specified in section 552.116(b)(1) or in conducting an audit or preparing an audit report within the meaning of section 552.116(b)(2). *See id.* § 552.116(b); *see also* Open Records Decision No. 580 (1990) (addressing statutory predecessor to Gov't Code § 552.116). Accordingly, we conclude the district may not withhold the information in set B under section 552.116 of the Government Code.

We note some of the remaining information in set F is subject to section 552.117 of the Government Code.⁵ Section 552.117(a)(1) 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 of the Government Code. Gov't Code §§ 552.117(a)(1), .024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You inform us the employee whose information is at issue made a timely election under section 552.024. Therefore, the district must withhold the information we have marked in set F pursuant to section 552.117(a)(1) of the Government Code.

We note section 552.137 of the Government Code provides that “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). *Id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. *See id.* § 552.137(c). Accordingly, 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 affirmatively consent to disclosure.

To summarize: The district must withhold the information we have marked in sets E and F under section 552.101 of the Government Code in conjunction with common-law privacy. The district may withhold the information (1) we have marked in set D-1 under section 552.103 of the Government Code and (2) in set C under section 552.107(1) of the Government Code. To the extent the marked draft document in set A will be released to the

⁵The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

public in final form, the district may withhold it in its entirety under section 552.111. The district may also withhold the advice, opinions, and recommendations we have marked in set A, including information within the draft document if it will not be released in final form, under section 552.111. The district must withhold the information we have marked in set F pursuant to section 552.117(a)(1) of the Government Code. Unless the owners of the e-mail addresses affirmatively consent to disclosure, the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The district must release the remaining information.

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

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 501903

Enc. Submitted documents

c: Requestor
(w/o enclosures)