



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 13, 2013

Ms. Leticia D. McGowan
School Attorney
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204-5491

OR2013-19812

Dear Ms. McGowan:

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# 505492 (DISD Ref. No. 12397).

The Dallas Independent School District (the "district") received a request for (1) information pertaining to a specified school services contract and (2) information requested by other media outlets related to the district's superintendent and the contract in question. You state some of the responsive information has been provided to the requestor. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information includes an affiliation agreement that is subject to section 552.022(a)(3) of the Government Code. Section 552.022(a)(3) reads as follows:

¹Although you also raise the work product privilege under Texas Rule of Civil Procedure 192.5, you have not submitted any arguments explaining how this provision applies to the submitted information. Therefore, we assume you have withdrawn it. *See* Gov't Code §§ 552.301, .302. In addition, you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence; however, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-2 (2002). Further, in this instance, the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See id.*; Open Records Decision No. 677 (2002).

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

- ...
- (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). You assert the information at issue is excepted from disclosure under section 552.107(1) of the Government Code. Section 552.107(1) is discretionary and does not make information confidential under the Act. *See* ORD 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district may not withhold the information subject to section 552.022 under section 552.107(1). However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will address your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022.

Rule 503 of the Texas Rules of Evidence enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if 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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You state the district hired outside counsel to conduct an investigation and provide legal advice pertaining to allegations of misconduct by the district’s superintendent. You state the information subject to section 552.022 was communicated between outside counsel for the district and select district staff tasked with assisting with the collection of documents for outside counsel. You state this communication was made in connection with the open investigation, and was not intended to be disclosed to third parties. You state the district has not waived the privilege. Based on your representations and our review, we find the district has demonstrated the applicability of the attorney-client privilege to the information at issue, which we have marked, and it may be withheld under Texas Rule of Evidence 503.

Now we will turn to your arguments for the remaining information not subject to section 552.022 of the Government Code. You argue some of the remaining information is excepted from disclosure under section 552.107(1) of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed for rule 503 above. 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* ORD 676 at 6-7. 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*, 922 S.W.2d at 923.

You contend the information at issue is protected by the attorney-client privilege. You state the information at issue consists of communications between outside counsel for the district and select district staff tasked with assisting with the collection of documents for outside counsel. You state these communications were made in connection with the open investigation, and were not intended to be disclosed to third parties. You state the district has not waived the privilege. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding attorney’s entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, the district may generally withhold the information at issue, which we have marked, under section 552.107 of the Government Code.

However, we note one of these otherwise privileged e-mail strings includes a communication with a third party whom you have not identified as privileged. Furthermore, if the e-mail communication received from the non-privileged party is removed from the e-mail string and stands alone, it is responsive to the present request for information. Therefore, to the extent the non-privileged e-mail, which we have marked, is maintained by the district separate and apart from the otherwise privileged e-mail string in which it appears, it may not be withheld under section 552.107(1) of the Government Code.

You assert some of the remaining information is excepted from disclosure under section 552.111 of the Government Code, which 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 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, 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, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *ORD 615 at 5; see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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)*. However, 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. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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*. We note 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.* (Gov't Code 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You assert the information at issue consists of advice, opinions, and recommendations concerning the district's policy mission. You further assert the information contains drafts of documents that will be publicly released in their final form. You also state some information consists of "draft versions of documentation related to the teacher evaluation instrument." Based on your representations and our review, we agree portions of the information at issue consist of advice, opinion, or recommendations on policy matters of the district. This information, which we have marked, may be withheld under section 552.111 of the Government Code. However, the remaining information at issue does not consist of

advice, opinions, or recommendations, or is purely factual information. In addition, we find the district has failed to explain how any of the remaining information at issue pertains to the policymaking functions of the district. Moreover, we note some of the remaining information at issue contains communications relating to contract negotiations between the district and other entities. Because the district and these entities were negotiating contracts, their interests were potentially adverse at the time the communications were made. Therefore, the district has failed to demonstrate how it shares a privity of interest or common deliberative process with these entities with respect to any of the remaining information. Accordingly, we concluded the district has failed to establish the remaining information at issue is excepted under the deliberative process privilege, and the district may not withhold any of it under section 552.111 of the Government Code.

Some of the remaining information may be protected from public disclosure by section 552.117 of the Government Code.² Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former 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). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). 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, a governmental body must withhold information under section 552.117(a)(1) on behalf of a current or former employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individual whose cellular telephone number we have marked timely requested confidentiality under section 552.024, the district must withhold her information under section 552.117(a)(1) of the Government Code if the cellular service is not paid for by a governmental body. If the individual whose cellular telephone number is at issue did not make a timely election under section 552.024 or if the cellular service was paid for by a governmental body, the district may not withhold the information we have marked under section 552.117(a)(1) of the Government Code.³

In summary, the district (1) may withhold the marked information subject to section 552.022 under Texas Rule of Evidence 503; (2) may generally withhold the information we have

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³We note section 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).

marked under section 552.107 of the Government Code, however, to the extent the marked non-privileged e-mail is maintained by the district separate and apart from the otherwise privileged e-mail string in which it appears, it may not be withheld under section 552.107(1) of the Government Code; (3) may withhold the information we have marked under section 552.111 of the Government Code; (4) must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code if the individual timely requested confidentiality under section 552.024 of the Government Code and if the cellular service is not paid for by a governmental body; and (5) 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,



Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/som

Ref: ID# 505492

Enc. Submitted documents

c: Requestor
(w/o enclosures)