



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 18, 2014

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

OR2014-10558

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# 526248.

The Harris County Department of Education (the "department"), which you represent, received a request for (1) documents and communications relating to the establishment of two specified committees; (2) communications, documents, and presentations relating to three specified meetings of one of the specified committees; (3) information relating to all preschool initiatives other than Head Start or Early Head Start for a specified time period; and (4) schedules of future meetings and workshops planned for all preschool initiatives other than Head Start or Early Head Start. You state the department has made some of the requested information available to the requestor for inspection. You claim some of the requested information is not subject to the Act. Additionally, you claim the submitted information is excepted from disclosure under section 552.111 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹ We have also received and considered comments submitted by the requestor.

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

See Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

You inform us the department searched its physical files and intranet system, along with the individual computers and hard drives of department employees and members of the department's Board of Trustees (the "board") 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 id.* §§ 552.002 (public information consists of information written, produced, collected, assembled, or maintained under law or ordinance or in connection with transaction of official business by or for governmental body or by individual officer or employer of governmental body in official capacity and pertaining to official business of governmental body), .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 the department to release any information that was stored on backup tapes when the department received the present request for information.

Next, we address the requestor's assertion the department previously released some of the requested information or information relating to the requested information. The Act does not permit the selective disclosure of information. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). If information has been voluntarily released to any member of the public, then that exact same information may not subsequently be withheld

from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). However, we note section 552.007 does not prohibit an agency from withholding similar types of information that are not the exact information that has been previously released. The requestor asserts some of the requested information or information relating to the requested information was previously released. The department, however, states the submitted information consists of intra-agency communications. Whether the information at issue was released is a question of fact. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Record Decision No. 522 at 4 (1990). Accordingly, we find section 552.007 is inapplicable to the submitted information, and we will address the department's arguments against its disclosure.

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 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, writ ref'd n.r.e.); 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 also has concluded a preliminary draft of a document that has been or 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). 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.

You contend the submitted information consists of drafts of policymaking documents pertaining to the department's proposed preschool/early childhood education initiative program (the "program") and contains advice, opinion, and recommendations relating to the development of the program. You also state the department will release the drafts at issue in their final form once the program is approved by the board. Upon review, we find the information we have marked constitutes drafts of policymaking documents. Accordingly, the department may withhold the drafts we have marked in their entireties under section 552.111. However, we find the remaining documents do not consist of draft policymaking documents, but instead are communications you state were made between department board members and employees regarding the program. Based on your representations and upon our review, we find the information we have marked constitutes policymaking advice, opinion, and recommendation. As such, the department may withhold the information we have marked under section 552.111 on the basis of the deliberative process privilege. However, we find the remaining information consists of either general administrative information that does not relate to policymaking, or information that is purely factual in nature. Thus, you have failed to demonstrate how this information is excepted under section 552.111. Accordingly, we find none of the remaining information may be withheld on this basis.

Section 552.117(a)(1) applies to records a governmental body holds in an employment capacity and 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.² Gov't Code

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

§ 552.117(a)(1). Section 552.117 is also applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). 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 on behalf of a current or former official or 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 individuals whose information is at issue timely requested confidentiality pursuant to section 552.024, the cellular telephone numbers we have marked must be withheld under section 552.117(a)(1) if the cellular telephone service is not paid for by a governmental body. The department may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential or if the cellular telephone service is paid for by a governmental body.

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). 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. The e-mail addresses we have marked are not of the types specifically excluded by section 552.137(c). Accordingly, the department must withhold the e-mail addresses we have marked under section 552.137 unless the owners of the addresses affirmatively consent to their release.

In summary, the department may withhold the information we have marked, which includes the draft policymaking documents in their entirety, under section 552.111 of the Government Code. If the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, the cellular telephone numbers we have marked must be withheld under section 552.117(a)(1) of the Government Code. The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the addresses affirmatively consent to their release. The department 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,

A handwritten signature in black ink, appearing to read "Lindsay E. Hale". The signature is written in a cursive, flowing style.

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/akg

Ref: ID# 526248

Enc. Submitted documents

c: Requestor
(w/o enclosures)