



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 25, 2014

Ms. Ramona Soto
Attorney
Office of Legal Services
Fort Worth Independent School District
100 North University Drive, Suite SW172
Fort Worth, Texas 76107

OR2014-15011

Dear Ms. Soto:

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# 534132.

The Fort Worth Independent School District (the "district") received a request for any e-mails sent or received by the district's former superintendent discussing five specified topics. You state you have released some information to the requestor. You further state the district does not have any information responsive to one of the specified topics.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.116 of the Government Code.² We have considered the

¹The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²Although you also raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, we note the proper exceptions to raise when asserting the attorney-client privilege and attorney work product privilege for information not subject to section 552.022 of the Government Code are section 552.107 of the Government Code and section 552.111 of the Government Code, respectively. See Open Records Decision Nos. 677 (2002), 676 at 1-2, 6 (2002).

exceptions you claim and reviewed the submitted information, a portion of which consists of a representative sample.³

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses other statutes, such as section 21.355 of the Education Code, which provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355(a). This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). Additionally, a court has concluded that a written reprimand constitutes an evaluation for purposes of section 21.355, as it “reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). In Open Records Decision No. 643, we concluded that a “administrator” for purposes of section 21.355 means a person who is required to, and does in fact, hold an administrator’s certificate under subchapter B of chapter 21 of the Education Code, and is performing the functions as an administrator, as that term is commonly defined, at the time of the evaluation. *See* ORD 643.

You assert Exhibit C consists of a communication that reveals the results of an evaluation of the district’s former superintendent by the district’s board of trustees that is confidential under section 21.355. You state release of Exhibit C “is tantamount to release of [the former superintendent’s] evaluation.” You inform us, and provide documentation showing, the former superintendent held the appropriate certification at the time of this evaluation. Based on your representations and our review, we agree the information we have marked would reveal the results of an evaluation as contemplated by section 21.355. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.⁴ However, we find you have failed to demonstrate how any of the remaining information in Exhibit C consists of documents evaluating the performance of a teacher or administrator for purposes of section 21.355 of the Education Code, or reveals the results of such an evaluation. Accordingly, none of the remaining information in Exhibit C may be withheld under section 552.101 of the Government Code on that basis.

Section 552.103 of the Government Code provides in relevant part as follows:

³We 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 that submitted to this office.

⁴As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

(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 governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *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.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See ORD 452 at 4. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *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. Open Records Decision No. 555 (1990); see 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. 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 that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

We understand you to assert the district reasonably anticipates litigation involving the former superintendent. You state Exhibit F relates to settlement negotiations regarding an employment dispute between the district and the former superintendent. You state the district and the former superintendent were represented by attorneys during these

negotiations. You have not, however, informed us the former superintendent or his legal counsel has taken any concrete steps toward the initiation of litigation. *See* ORDs 452, 555. Furthermore, you have provided documentation demonstrating that a settlement agreement related to this employment dispute had been executed prior the district's receipt of the instant request. Therefore, after reviewing your arguments, we find you have not established the district reasonably anticipated litigation when it received the request for information. Further, we find you have failed to demonstrate litigation was pending on the date the district received the request for information. Consequently, the district may not withhold any portion of Exhibit F under section 552.103 of the Government Code.

Section 552.107(1) of the Government Code protects information coming 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. ORD 676 at 6-7. First, a governmental body must demonstrate 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 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 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 assert the remaining information in Exhibit C consists of a communication between the former superintendent and an attorney for the former superintendent that is excepted under section 552.107(1) because it consists of a privileged attorney-client communication. We note, however, section 552.107(1) is a discretionary exception, designed to protect the interests of a governmental body as opposed to the interests of a third party. In this instance, the information at issue consists of a communication between the former superintendent and his personal attorney. Accordingly, this information does not constitute a communication made for the purpose of facilitating the rendition of professional legal services to the client governmental body. Thus, the district may not withhold any of the remaining information in Exhibit 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.” *See* Gov’t Code § 552.111. This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4-8. Rule 192.5 defines work product as:

(1) [M]aterial prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*; ORD 677 at 6-8. The test to determine whether information was created or developed in anticipation of litigation is the same as that discussed above concerning rule 192.5.

You argue the remaining information in Exhibit C consists of attorney work product. Upon review, we find you have failed to demonstrate how the remaining information at issue constitutes material prepared, impressions developed, or a communication made in anticipation of litigation by or for the district. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, the district may not withhold the remaining information in Exhibit C under section 552.111 of the Government Code on the basis of the work-product privilege.

Section 552.111 also 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 consisting of advice, recommendations, opinions, 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).

Additionally, section 552.111 does not generally except from disclosure purely factual information severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5. 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. We note a governmental body does not share a privity of interest with a third party when the governmental body and the third party are involved in contract negotiations, as the parties interests are adverse.

You argue the deliberative process privilege is applicable to Exhibits E and F. We note the information at issue includes draft documents and information relating to those draft documents. However, you do not state whether the draft documents will be released to the public in their final form. Therefore, if the draft documents will be released to the public in their final form, then the district may withhold the draft documents we have marked in Exhibit E in their entireties under section 552.111 of the Government Code. If the draft documents will not be released to the public in their final form, then the district may not withhold them in their entireties under section 552.111. Further, we find the information we have marked, including information within the draft documents if they will not be released in final form, consists of advice, opinions, and recommendations pertaining to a policymaking matter. Accordingly, the district may withhold the information we have marked in Exhibit E under section 552.111. However, we find the remaining information in Exhibit E consists of general administrative information, factual information, or pertains to personnel matters not of a broad scope. Furthermore, we find the information in Exhibit F has been shared with individuals with whom the district does not share a privity of interest or common deliberative process. Thus, we find you have failed to demonstrate how the remaining information is excepted under section 552.111 and the deliberative process privilege. Accordingly, the remaining information at issue may not be withheld under section 552.111 of the Government Code on that basis.

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. You claim the remaining information in Exhibit E constitutes audit working papers under section 552.116. You state the information at issue "is required under No Child Left Behind legislation and mandated by the State of Texas." However, you do not inform this office of, and we are not aware of, the specific authorization for any audit. Thus, upon review, we find you have not demonstrated how the remaining information in Exhibit E 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 remaining information in Exhibit E under section 552.116 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).⁵ *See* Gov't Code § 552.137(a)-(c). The e-mail address we have marked is not of a type specifically excluded by section 552.137(c). Accordingly, the district must withhold the e-mail address we have marked under section 552.137, unless its owner affirmatively consents to disclosure.

In summary, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. If the draft documents will be released to the public in their final form, then the district may withhold the draft documents we have marked in Exhibit E in their entirety under section 552.111 of the Government Code. The district may withhold the information

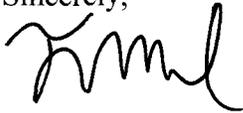
⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

we have marked in Exhibit E, including information within the draft documents if they will not be released in final form, under section 552.111. The district must withhold the e-mail address we have marked under section 552.137, unless its owner affirmatively consents to disclosure. 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,

A handwritten signature in black ink, appearing to read 'Tim Neal', written in a cursive style.

Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 534132

Enc. Submitted documents

c: Requestor
(w/o enclosures)