



January 8, 2002

Mr. Therold I. Farmer
Attorney for Willis I.S.D.
Walsh, Anderson, Brown, Schulze & Aldridge
P.O. Box 2156
Austin, Texas 78768

OR2002-0134

Dear Mr. Farmer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 157047.

The Willis Independent School District (the "district"), which you represent, received a request for information relating to the school superintendent's contract that was presented to the board of trustees. You claim that this information is excepted from disclosure under sections 552.102, 552.103, 552.106, 552.107, and 552.111 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

Section 552.102(a) of the Government Code protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]"¹ The test of employee privacy under section 552.102 is the same as the test under section 552.101 in conjunction with common-law privacy.² Under section 552.101, common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Because of the greater legitimate public interest in matters involving employees of governmental bodies, privacy under section 552.102 is confined to information that reveals "intimate details of a highly personal nature." *See*

¹Anything relating to an individual's employment and its terms constitutes information relevant to the individual's employment relationship and is a part of the individual's personnel file. *See* Open Records Decision No. 327 at 2 (1982).

²Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

Hubert v. Harte-Hanks Tex. Newspapers, Inc., 652 S.W.2d 546, 549-51 (Tex. App.-- Austin 1983, writ ref'd n.r.e.); Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). Thus, public employee privacy under section 552.102 is "very narrow." See Open Records Decision No. 400 at 5 (1983).

You assert that "[t]he only purpose which would be served by the release of the information in question would be to hold the Superintendent up to public scorn and ridicule." We disagree. We find that the public has a legitimate interest in the requested information. Therefore, the district may not withhold this information under section 552.102. See also Open Records Decision Nos. 444 at 5 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (information may not be withheld under section 552.102 if it is of sufficient legitimate public interest, even if person of ordinary sensibilities would object to release on grounds that information is highly intimate or embarrassing).

You also raise section 552.103 of the Government Code. This exception provides in 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 governmental body must provide relevant facts and documents sufficient to establish the applicability of section 552.103 to the information at issue. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for the information and (2) that the requested information is related to the litigation. See *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); see also Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). 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." *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You assert that although the district has not been explicitly threatened with litigation, one of the documents at issue "clearly was proposed by the Superintendent's attorney as an alternative to or as a prelude to litigation." Having considered your argument, we find that you have not shown that the district reasonably anticipated litigation when it received this request for information. Therefore, the district may not withhold the requested information under section 552.103. *See also* Open Records Decision Nos. 518 at 5 (1989) (governmental body must furnish evidence that litigation involving a specific matter is realistically contemplated and more than mere conjecture), 361 at 2 (1983) (fact that an individual has hired an attorney or that a request for information was made by an attorney does not, without more, demonstrate that litigation is reasonably anticipated).

Next, we address your arguments under section 552.106 of the Government Code. Section 552.106 excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation" and "[a]n internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation[.]" Gov't Code § 552.106(a)-(b). Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See* Open Records Decision No. 460 at 1 (1987). The purpose of this exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body; therefore, it does not except from disclosure purely factual information. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.*

You state that the documents in question involve a request for action by the board of trustees and a proposal that would require action by the board. You contend that these documents thus constitute working papers involved in proposed legislation and are therefore protected by section 552.106. Having considered your arguments, we conclude that the submitted documents pertain to a routine personnel matter. There is no indication that these documents constitute a draft or working paper involved in the preparation or enactment of proposed legislation. Therefore, the submitted documents may not be withheld from disclosure under

section 552.106. *See generally* Open Records Decision No. 248 (1980) (concluding that drafts of municipal ordinances and resolutions that reflect policy judgments, recommendations, and proposals are types of information protected by section 552.106).

You also contend that the submitted documents are protected by section 552.107 of the Government Code. Section 552.107(1) excepts from disclosure "information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct[.]" This exception protects information that an attorney cannot disclose because of a duty to the client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *See id.* at 5. Section 552.107(1) does not protect purely factual information and thus does not except from disclosure factual recounting of events or documentation of calls made, meetings attended, and memos sent. *Id.*

You inform this office that the superintendent's attorney prepared the submitted documents. You do not inform us that an attorney-client relationship exists between the superintendent's attorney and either the district or the board of trustees. Thus, you have not demonstrated that these documents constitute privileged attorney-client communications. Therefore, they are not excepted from disclosure under section 552.107(1).

You also raise section 552.111 of the Government Code. Section 552.111 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." The purpose of this exception 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); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), 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, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 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.* 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).

You assert that the submitted documents constitute "communications between the Superintendent and the Board on policy-related matters." We conclude, however, that these documents pertain only to a specific personnel matter. Therefore, they may not be withheld from disclosure under section 552.111. *See also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (personnel-related communications not involving policymaking not excepted from disclosure under section 552.111).

In summary, the requested information is not excepted from disclosure under sections 552.102, 552.103, 552.106, 552.107, or 552.111 of the Government Code. Therefore, the district must release this information in its entirety.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

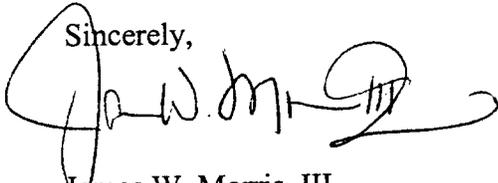
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 157047

Enc: Submitted documents

c: Ms. Nancy Flake
The Courier
P.O. Box 609
Conroe, Texas 77306-0609
(w/o enclosures)