



February 13, 2002

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OR2002-0693

Dear Ms. Whatley and Mr. Johnson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158599.

The Fort Worth Independent School District (the "district") received two requests for information from the same requestor, and in response, the district sent this office two separate requests for decision. Because of their related nature, we will address both of the district's requests for decision in this single ruling. In the first request for information, the requestor seeks a copy of "[a]ll outside attorney billing statements received by the district during the time period of January 2, 2000 [through] November 19, 2001," and in the second request for information, the requestor seeks information related to certain interviews conducted on September 5, 2001 and September 7, 2001. The district informs us that some of the requested information will be released; however, it further claims that the information submitted for our review is excepted from disclosure under sections 552.026, 552.103, 552.107, 552.111, 552.114, and 552.135 of the Government Code. We have considered the exceptions claimed and the information submitted, some of which consists of representative samples.<sup>1</sup>

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<sup>1</sup>We assume that 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 that those records contain substantially different types of information than that submitted to this

Initially, we address the contention that the interview notes are not subject to the Public Information Act (the "Act") because they are private records of a law firm representing the district. In response to this contention, we note that, in general, records held by a private attorney that are related to legal services performed by the attorney at the request of a governmental body are subject to the Public Information Act. *See* Open Records Decision No. 499 (1988); *see also* Gov't Code § 552.002 (defining public information). In this case, it is clear to us, after reviewing the submitted information, that the notes relate to legal services provided to the district by its outside counsel. Specifically, we find that the notes were formulated during interviews that the district requested their outside counsel perform, and as a consequence, the interview notes are subject to the Act.

We next note that a portion of the submitted information is subject to section 552.022 of the Government Code. This section enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. Section 552.022(a)(16) defines one category as "[i]nformation that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege." In the instant matter, the submitted information contains attorney fee bills that must be released under section 552.022(a)(16) unless the information is expressly made confidential under other law. The district claims that the information is excepted from disclosure under sections 552.103 and 552.107(1); however, sections 552.103 and 552.107 are discretionary exceptions under the Public Information Act and do not constitute "other law" for purposes of section 552.022. Open Records Decision Nos. 663 (1999) (governmental body may waive sections 552.103 and 552.111), 630 at 4 (1994) (governmental body may waive section 552.107(1)), 522 at 4 (1989) (discretionary exceptions in general).

The attorney-client privilege, however, is also found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the information is confidential under Rule 503.

Rule 503(b)(1) provides:

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:

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office.

(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.

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. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that 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 that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. After reviewing the submitted fee bills, we find that in some instances they contain information protected by Rule 503. We have marked the attorney fee bills accordingly.

You also contend that portions of the fee bills are excepted from disclosure under section 552.135, which provides as follows:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or

former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Here, we understand the district to claim that an informer provided it with information regarding an educator's fitness to practice the profession under section 247 of title 19 of the Texas Administrative Code. However, the district does not provide us with a name that should be protected, nor does the district indicate how the information it seeks to withhold under section 552.135 would reveal the identity of an informer. Because the district has not named any specific individual whose identity it seeks to withhold, we conclude that the district may not withhold any portion of the attorney fee bills under section 552.135.

We next address your claims regarding the remaining information that is not an attorney fee bill and, therefore, not subject to section 552.022(a)(16). The district first claims that the remaining information is excepted from disclosure under section 552.103. Section 552.103 was intended to prevent the use of the Public Information Act (the "Act") as a method of avoiding the rules of discovery in litigation. *See* Attorney General Opinion JM-1048 at 4 (1989). The purpose of section 552.103 is to protect a governmental body's position in litigation by forcing parties to obtain information relating to the litigation through the discovery process. *See* Open Records Decision No. 551 (1990). Further, section 552.103 only applies where the litigation involves or is expected to involve the governmental body which is claiming the exception. *See* Open Records Decision No. 392 (1983) (finding predecessor to section 552.103 only applicable to governmental body who has the litigation interest). Section 552.103 provides in pertinent 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.

The district maintains the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also 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 district must meet both prongs of this test for information to be excepted under section 552.103(a). Further, the litigation must be pending or reasonably anticipated on the date that the information is requested. *See Gov't Code* § 552.103(c). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See Open Records Decision No. 588 at 7 (1991).*

A governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture" when establishing that litigation is reasonably anticipated. *See Open Records Decision No. 452 at 4 (1986).* 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.<sup>2</sup> *See Open Records Decision Nos. 555 (1990), 518 at 5 (1989)* (litigation must be "realistically contemplated"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).*

The district claims that section 552.103 is applicable in this situation because the requestor has threatened to sue the district and because of numerous complaints that have been filed

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<sup>2</sup>In addition, this office has concluded that 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).*

with the State Board for Educator Certification (“SBEC”) concerning district teachers and administrators. After careful review of the district’s assertions and the submitted information, we find that, while the requestor may have threatened to sue the district, he did not take any objective steps toward litigation that would lead to a reasonable anticipation of litigation. Moreover, as to the matters before the SBEC, the district does not indicate, nor can we ascertain, that the district is a party to any contested case hearing before that regulatory body. Therefore, we conclude that the district may not withhold any of the remaining information under section 552.103.

The district also claims that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) excepts information encompassed by the attorney–client privilege from disclosure. 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. *See* Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except purely factual information from disclosure, including factual recountings of events, documentation of calls made, meetings attended, or memos sent. *See id.* After careful review of the district’s arguments and the submitted documents, we conclude that none of the remaining information constitutes either a client confidence or an attorney’s legal advice or opinion; rather, the information appears to consist solely of factual recountings of events. Therefore, the district may not withhold any of the submitted information from disclosure pursuant to section 552.107(1) of the Government Code.

The district further claims that portions of the submitted information are excepted from disclosure under 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.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.–Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See 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.). The purpose of section 552.111 is “to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.–San Antonio 1982, writ ref’d n.r.e.) (emphasis added). Section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5.

An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *See* Open Records Decision No. 615 at 5-6 (1993). In this case, the district cites to section 552.111, but does not explain how that provision is applicable to the district's policymaking functions under the circumstances presented. Moreover, after reviewing the remaining information, we find that the documents involve an internal personnel matter to which section 552.111 is inapplicable. Consequently, we conclude that the district may not withhold any of the remaining information under section 552.111.

The district also asserts that some of the remaining information must be withheld pursuant to sections 552.026 and 552.114 of the Government Code, and pursuant to the Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). Accordingly, the district may

release information that identifies students only if the district has authority under FERPA to do so.

We note that section 552.117 may also be applicable to some of the submitted information. Section 552.117 excepts from disclosure the home addresses and telephone numbers, 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. Whether a particular piece of information is protected by section 552.117 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 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. For those employees who timely elected to keep their personal information confidential, the district must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The district may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. We have marked possible 552.117 information with a green flag.

In sum, we have marked the portions of the attorney fee bills that the district may withhold under Rule 503. Likewise, additional portions of the submitted information must be withheld under sections 552.026 and 552.114 to the extent it identifies students. Furthermore, the district must withhold the personal information of current or former employees to the extent those employees timely elected to keep their information confidential under section 552.024. The remaining information must be released to the requestor.

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

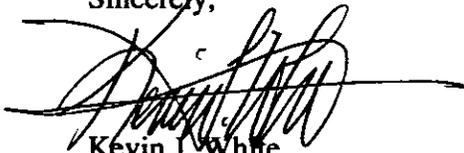
statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records 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,



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Assistant Attorney General  
Open Records Division

KJW/seg

Ref: ID# 158599

Enc. Submitted documents

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