



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 28, 2003

Ms. Dianna D. Wojcik  
Bracewell & Patterson  
500 N. Akard Street, Suite 4000  
Dallas, Texas 75201-3387

OR2003-7735

Dear Ms. Wojcik:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190173.

The Grand Prairie Independent School District (the "district"), which you represent, received a written request for copies of "Barbosa's Bulletin dated June 4, 2003 through Aug. 11, 2003, inclusive." You explain that "Dr. Barbosa, the superintendent of [the district], communicates with his Board members each Friday by use of a document called 'Barbosa's Bulletin.'" You state that most of the responsive information will be released to the requestor. You contend, however, that the remaining information coming within the scope of the request is excepted from required disclosure pursuant to sections 552.101, 552.103, 552.107(1), and 552.111 of the Government Code.

Section 552.103 of the Government Code is commonly referred to as the "litigation exception." Under section 552.103(a) and (c), the governmental body raising this exception must demonstrate that (1) litigation involving the governmental body was pending or reasonably anticipated on the date the governmental body received the records request, and (2) the information at issue is related to that litigation. *See also University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

In this instance, you have demonstrated that the information you seek to withhold pursuant to section 552.103 relates to pending litigation involving the district that was pending on the

date of the request. We therefore conclude that the district may withhold the information we have marked as coming within the protection of section 552.103 of the Government Code.<sup>1</sup>

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. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), 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, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that 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).

After reviewing your arguments and the documents you submitted to this office, we conclude that you have demonstrated the applicability of section 552.107(1) to a portion of the submitted documents. We have marked that information accordingly.<sup>2</sup>

Section 552.111 of the Government Code excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation

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<sup>1</sup>In reaching this conclusion, we assume that the opposing parties to the litigation have not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Because we resolve this aspect of your request under section 552.103, we need not address the applicability of the other exceptions you raised for this information.

<sup>2</sup>Because we resolve this aspect of your request under section 552.107(1), we need not address the applicability of section 552.101 for this information..

intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993) at 5. The purpose of this section 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); see also *City of Garland v. Dallas Morning News*, 969 S.W.2d 548 (Tex. App.—Dallas 1998), aff'd, 22 S.W.3d 351 (Tex. 2000). In Open Records Decision No. 615 at 5, this office held that

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters . . . . [Emphasis in original.]

In Open Records Decision No. 429 (1985), this office indicated that information protected by section 552.111 must be prepared by a person or entity with an official reason or duty to provide the information in question. See also Open Records Decision Nos. 283 (1981), 273 (1981). This helps assure that the information plays a role in the deliberative process; if it does not, it is not entitled to protection under section 552.111. Open Records Decision No. 464 (1987). See *Wu v. National Endowment of the Humanities*, 460 F.2d 1030 (5th Cir.), cert. denied, 410 U.S. 926 (1972). In addition, section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 at 5.

After reviewing the information at issue, we agree that some of the information you highlighted may properly be withheld pursuant to section 552.111. We note, however, that some of the information you seek to withhold under section 552.111 reflects the rationale of previously made decisions by the district, not the process of making the decision itself. Such information represents the *result* of the district's decision-making process and is therefore a post-decisional, as opposed to a pre-decisional, document, and is therefore not protected by section 552.111. See Open Records Decision No. 137 (1976) (discussing pre-decisional and post-decisional documents). We have marked the portions of the submitted documents that the district may withhold pursuant to section 552.111.

Section 552.117(a)(1) of the Government Code 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 of the Government Code. See Gov't Code § 552.117(a)(1). However, information subject to section 552.117(a)(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). For an employee who timely elected to keep his personal information confidential, you must withhold the

types of information we have marked under section 552.117(a)(1) of the Government Code. The district may not withhold this information under section 552.117(a)(1) for an employee who did not make a timely election to keep the information confidential.

Finally, we note that the submitted records contain a district student's identifying information. In this regard, section 552.026 of the Government Code 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.

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). 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); *see also* 45 C.F.R. § 99.3 (1976) (defining "personally identifiable," in part, as list of personal characteristics or other information that would make student's identity easily traceable). We have marked the student identifying information the district must withhold in accordance with FERPA.

In summary, the district may withhold the information we have marked as coming within the protection of sections 552.103, 552.107(1), and 552.111 of the Government Code, as well as section 552.117 of the Government Code if a timely election was made. Also, the district must withhold the information we have marked that is made confidential under FERPA. The remaining submitted 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 Dep't of Pub. 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



W. Montgomery Meitler  
Assistant Attorney General  
Open Records Division

WMM/lmt

Ref: ID# 190173

Enc: Submitted documents

c: Ms. Jennifer Arend  
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(w/o enclosures)