



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 5, 2004

Mr. Thomas E. Meyers  
Brackett & Ellis, P.C.  
100 Main Street  
Fort Worth, Texas 76102-3090

OR2004-0876

Dear Mr. Meyers:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 195846.

The Carroll Independent School District (the "district"), which you represent, received a request for information relating to the district's investigation of the former district transportation director, as well as any documents that relate to allegations of fiscal misconduct in the transportation department. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.117, 552.130, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). The categories of information subject to section 552.022 include "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]" and "a settlement agreement to which a governmental body is a party[.]" *Id.* §§ 552.022(a)(3), (18). The information submitted as Exhibit E includes some information in an account, voucher, or contract relating to the expenditure of public funds by the district that is subject to section 552.022(a)(3) of the Government Code. The information submitted as Exhibit C includes copies of a settlement agreement to which the district is a party, which is subject to section 552.022(a)(18) of the Government Code. This information, which we have marked, must be released unless it is confidential under other law.

You raise sections 552.103 and 552.107 for the information in Exhibit C, and you raise section 552.107 for the information in Exhibit E. Sections 552.103 and 552.107 are discretionary exceptions to disclosure that protect the governmental body's interests and are

therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the district may not withhold the information subject to section 552.022 in Exhibits C and E pursuant to sections 552.103 and 552.107 of the Government Code.

We note that you claim that the information in Exhibits C and E, as well as the information submitted as Exhibits B and F, is excepted from disclosure under section 552.103 in its entirety.<sup>1</sup> Because your claim under section 552.103 is broader than your arguments under your other claimed exceptions, we next address your claim under section 552.103 with respect to the remaining information in Exhibits C and E that is not subject to section 552.022, and to Exhibits B and F in their entirety. Section 552.103 of the Government Code provides as follows:

(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 governmental body has 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 was pending or

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<sup>1</sup> While you state your belief that "it is questionable whether [the documents in Exhibit F] are even covered by the Public Information Act [the "Act"]," you also state that "the request could be construed broadly enough" to include the information. *See* Gov't Code § 552.002 (defining "public information" that is subject to the Act). As you represent that the information in Exhibit F is excepted from disclosure pursuant to several of the Act's exceptions, and as you indicate that you have submitted the information for the purpose of obtaining a ruling from this office as to whether the information is so excepted, we find that the information is subject to the Act and we will address your claimed exceptions for Exhibit F. We note, however, that the first page of Exhibit F was created after the date the district received the present request; this page is not responsive to the request and need not be released.

reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *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 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” 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> 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. *See* Open Records Decision No. 331 (1982). Further, the fact that 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).

In this instance, you assert that the information in Exhibits B, C, E, and F relates to potential civil or criminal litigation involving the district. Upon review of your arguments and the submitted information, however, we find that you have not met your burden of demonstrating that any potential opposing party has taken objective steps toward civil litigation against the district. Furthermore, you have not explained how the information at issue relates to anticipated criminal litigation in which the district would be a party. Consequently, we find you have not demonstrated that the district reasonably anticipated litigation on the date the district received the present request. We therefore determine that the information at issue may not be withheld pursuant to section 552.103 of the Government Code.

We next address your argument that Exhibits E, F, and portions of Exhibit C are protected from disclosure pursuant to the attorney-client privilege. As noted, the information in Exhibits C and E that is subject to section 552.022 may not be withheld pursuant to section 552.107 of the Government Code. We note, however, that the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held

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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).

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, because the portions of Exhibits C and E that are subject to section 552.022 may be confidential under Rule 503 of the Texas Rules of Evidence as contemplated in *City of Georgetown*, we will consider your claim under the attorney-client privilege for the information in Exhibits C, E, and F in their entirety.

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). 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 Texas 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). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, 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)(A), (B), (C), (D), (E). 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. Finally, 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 the definition of a confidential communication 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. Generally, the attorney-client privilege protects an entire communication 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).

In this case, you state that the information in Exhibit E and portions of the information in Exhibit C consist of communications between district personnel and representatives and attorneys for the district, made in the furtherance of rendition of professional legal services to the district. You advise that these communications were intended to be confidential and

you indicate that the confidentiality has been maintained. Based on your representations and our review, we determine that the district may withhold the information in Exhibit E as information protected by the attorney-client privilege as encompassed by section 552.107 of the Government Code and Rule 503 of the Texas Rules of Evidence.<sup>3</sup> We have also marked the portions of Exhibit C that the district may withhold pursuant to the attorney-client privilege under section 552.107 and Rule 503.<sup>4</sup> With respect to the attorney notes submitted as Exhibit F, however, we find you do not indicate that the notes consist of or document confidential communications between privileged parties. Thus, we find you have failed to establish the elements of the privilege for the information in Exhibit F. Accordingly, the district may not withhold Exhibit F pursuant to the attorney-client privilege.

We also understand you to represent that Exhibit F is excepted from disclosure under section 552.101 of the Government Code in conjunction with rule 192.5 of the Texas Rules of Civil Procedure, which encompasses the attorney work product privilege. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” As this office recently reaffirmed in Open Records Decision No. 676 (2002), section 552.101 does not encompass the Texas Rules of Evidence and Civil Procedure. *See* Open Records Decision No. 676 at 2. While the Texas Supreme Court has held that the Texas Rules of Civil Procedure are “other law” that can make information expressly confidential for the purposes of section 552.022 of the Government Code, the information in Exhibit F does not come within the scope of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Therefore, *City of Georgetown* is not applicable to the information in Exhibit F. Accordingly, the district may not withhold Exhibit F under section 552.101 of the Government Code in conjunction with Rule 192.5 of the Texas Rules of Civil Procedure.

Next, you contend that Exhibit F is excepted from disclosure under section 552.111 of the Government Code as an interagency or intraagency memorandum. 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 deliberative or policymaking processes of the governmental body. Open Records Decision No. 615 at 5-6 (1993). We note that section 552.111 is applicable to communications that involve a governmental body’s consultants. *See* Open Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for

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<sup>3</sup> Based on this finding, we do not reach your other claimed exceptions for this information.

<sup>4</sup> Based on this finding, we do not reach your claims under section 552.111 of the Government Code or Rule 192.5 of the Texas Rules of Civil Procedure for this information.

governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant). Section 552.111 is not applicable, however, to communications with a party with which the governmental body has no privity of interest or common deliberative process. *See* Open Records Decision No. 561 at 9 (1990). In this case, you have not explained how the information in Exhibit F constitutes internal communications of the district reflecting the deliberative or policymaking processes of the district, and nor have you established that Exhibit F consists of policymaking communications between the district and its outside counsel. Thus, we determine that you have not established that section 552.111 of the Government Code is applicable to Exhibit F. Accordingly, the district may not withhold Exhibit F pursuant to section 552.111 of the Government Code.

We next address your claim under section 552.135 of the Government Code for the information in Exhibit B. Section 552.135 provides:

(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.

Gov't Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under section 552.135 must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A). You have not demonstrated that any district employee identified in Exhibit B has reported a violation of a specific civil, criminal, or regulatory law. Accordingly, we determine that the district may not withhold any portion of Exhibit B under section 552.135 of the Government Code.

We note that the documents information in Exhibits B and C contain information that may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) 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 timely elect to keep this information confidential pursuant to 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(a)(1) on behalf of current or former officials or employees who elected to keep information confidential pursuant to section 552.024 prior to the date on which the request for this information was made. You have provided documentation showing that the former district transportation director timely elected to keep such information confidential. Accordingly, the district must withhold the former transportation director's home address, telephone number, social security number, and family member information pursuant to section 552.117(a)(1) of the Government Code. We note that the documents at issue also contain information pertaining to other district employees. 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(a)(1) for those employees who did not make a timely election to keep the information confidential.

In the event section 552.117(a)(1) is not applicable, we note that the social security number of a district employee contained in Exhibit B may be excepted under section 552.101 in conjunction with federal law.<sup>5</sup> A social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal

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<sup>5</sup> Section 552.101 encompasses information that other statutes make confidential.

Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security number at issue is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the district should ensure that no such information was obtained or is maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

We also note that Exhibit B contains a small amount of information that is protected by common-law privacy.<sup>6</sup> Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (*citing United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)), personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have marked the information in Exhibit B that the district must withhold under section 552.101 of the Government Code in conjunction with common-law privacy.

Finally, we note that portions of the information in Exhibit C are excepted under section 552.130 of the Government Code. Section 552.130 provides in pertinent part:

- (a) Information is excepted from the requirements of Section 552.021 if the information relates to:

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<sup>6</sup> Section 552.101 also encompasses the doctrine of common-law privacy.

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130. We have marked the motor vehicle license and registration information in Exhibit C that the district must withhold pursuant to section 552.130 of the Government Code.

In summary, the district may withhold the information in Exhibit E, and the information we have marked in Exhibit C, pursuant to the attorney-client privilege as encompassed by section 552.107 of the Government Code and Rule 503 of the Texas Rules of Evidence. The district must withhold the home address and family member information of the former district transportation director from the information in Exhibit C pursuant to section 552.117(a)(1) of the Government Code. Provided the district employees whose home address, home telephone number, and family member information appears in Exhibit B timely elected to keep this information confidential, the district must withhold the information we have marked in Exhibit B pursuant to section 552.117(a)(1) of the Government Code. The social security number of a district employee contained in Exhibit B may be excepted under section 552.101 in conjunction with federal law. We have marked information in Exhibit B that must be withheld under section 552.101 in conjunction with common-law privacy. We have also marked the information in Exhibit C that the district must withhold pursuant to section 552.130 of the Government Code. The remainder of the 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,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/sdk

Ref: ID# 195846

Enc: Submitted documents

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