



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

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Ms. Ylise Y. Janssen  
Senior School Law Attorney  
Austin Independent School District  
1111 West 6<sup>th</sup> Street  
Austin, Texas 78703

OR2005-00797

Dear Ms. Janssen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 217677.

The Austin Independent School District (the "district") received a request for correspondence between the district and Edusoft Solutions ("Edusoft"), and for information relating to the disclosure of certain district records by Edusoft. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.139 of the Government Code. You also indicate that release of the information may implicate the proprietary interests of Edusoft. *See* Gov't Code § 552.305(d) (regarding governmental body's notice to interested third party); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

As a preliminary matter, we note that the submitted information includes documents that were created after the date the district received the present request. Information created after the date the district received the present request is not responsive to the request and need not be released at this time.

Next, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if

any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Edusoft has not submitted any comments to this office explaining how release of the requested information would affect its proprietary interests. Therefore, Edusoft has provided us with no basis to conclude that it has a protected proprietary interest in any of the submitted information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). We therefore find the submitted information may not be withheld from disclosure on that basis.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. You contend that the submitted information is excepted under section 552.101 in conjunction with provisions of chapter 421 of the Government Code. You state:

In [section] 421.002(6) of [chapter 421], one of the strategies contemplated by statute is the "detecting, deterring, and defending against terrorism, including cyber-terrorism..." The [Texas Homeland Security Act] also attempts to protect "critical infrastructure" as defined in [section] 421.002(2). . . . Given that this statute specifically protects the state's systems and allows for its protection from cyber-terrorism, we assert that the release of the requested data compromises the District's computer security and jeopardizes critical systems.

Section 421.002 of the Government Code articulates certain general goals and guidelines for state policy concerning homeland security and defense against terrorism. However, section 421.002 does not make any information confidential by law. We therefore find that none of the submitted information may be withheld under section 552.101 on the basis of section 421.002. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public).

You also contend that the submitted information is excepted from disclosure under section 552.139 of the Government Code, which provides:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

- (1) a computer network vulnerability report; and
- (2) any other assessment of the extent to which data processing operations, a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

Gov't Code § 552.139. The information at issue pertains to the accidental release of some of the district's data as the result of an error made by a third party software vendor. You have not explained, nor do the submitted documents indicate, how the accidental disclosure of the district's information in the possession of a third party is related to the security of the district's computer network. *See id.* § 552.139(a). Further, upon review, we find that the submitted information does not consist of a computer network vulnerability report or an assessment of the extent to which the district's network is vulnerable to unauthorized access or harm. *Id.* § 552.139(b). Based on your comments and our review, we determine that the submitted information does not relate to computer network security or to the design, operation, or defense of a computer network, and is not excepted from disclosure pursuant to section 552.139 of the Government Code.

Next, 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." 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). The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). An agency's policymaking functions, however, 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. Open Records Decision No. 615 at 5-6 (1993). You state that the submitted information "reflect[s] the policymaking process of [the district], especially as it concerns the security of the District's computer system." Upon review, however, we find that the submitted documents are solely related to an internal administrative matter and do not reflect the internal deliberations of the district on matters

concerning the policy mission of the district. We therefore determine the information is not excepted under section 552.111 and may not be withheld on that basis.

You have identified a portion of the information that you contend is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts from disclosure information protected by 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.<sup>1</sup> TEX. R. EVID. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives.<sup>2</sup> TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body seeking to establish that a communication is protected by the attorney-client privilege must inform this office of the identity and capacity of each individual involved in the communication. Finally, the attorney-client privilege applies only to a communication that is confidential. *Id.* 503(b)(1). A confidential communication is a communication that 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. Section 552.107(1) of the

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<sup>1</sup> The privilege does not apply when an attorney or representative is acting in a 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). 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.

<sup>2</sup> Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; between the lawyer and the lawyer’s representative; by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer”).

Government Code 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 state, and the documents reflect, that the information you seek to withhold under section 552.107 consists of confidential communications between district attorneys and district staff, made for the purpose of rendering legal services to the district. You state that these communications were intended to be confidential, and that the confidentiality has been maintained. Based on your representations and our review, we agree that this portion of the submitted information is protected by the attorney-client privilege. We have therefore marked the information the district may withhold under section 552.107(1) of the Government Code.

In summary, we have marked the portion of the submitted information that the district may withhold pursuant to section 552.107(1) as information protected by the attorney-client privilege. The remainder of the submitted information is not excepted from disclosure and 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 thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten 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 ten 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 ten 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); *Tex. 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 ten calendar days of the date of this ruling.

Sincerely,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 217677

Enc: Submitted documents

c: Dr. Michael James McAleer  
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(w/o enclosures)