



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 19, 2005

Mr. Clay T. Grover  
Feldman & Rogers, L.L.P.  
5718 Westheimer, Suite 1200  
Houston, Texas 77057

OR2005-11378

Dear Mr. Grover:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 238807.

The Fort Bend Independent School District (the "district"), which you represent, received a request for five categories of information pertaining to district board members.<sup>1</sup> You state that some of the requested information has been provided to the requestor, but claim that the submitted information is either not subject to the Act or it is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.109, 552.135, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

You assert that Exhibits C and E fall outside the scope of the Act. Section 552.002 of the Government Code defines public information as information that is collected, assembled, or

---

<sup>1</sup>You inform us that the requestor "narrowed the scope of her request" after submitting the request for information. *See generally* Gov't Code § 552.222(a) (governmental body may ask requestor to clarify request for information).

<sup>2</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 office.

maintained under a law or ordinance or in connection with the transaction of official business by a governmental body or for a governmental body, and the governmental body owns the information or has a right of access to it. Although in Open Records Decision No. 77 (1975) this office determined that personal notes made by individual faculty members for their own use as memory aids were not subject to the Act, in Open Records Decision No. 327 (1982) this office found that notes made by a school principal and athletic director relating to a teacher “were made in their capacities as supervisors of the employee” and thus constituted public information. Open Records Decision No. 327 at 2 (construing predecessor statute); *see also id.* Nos. 635 (1995) (public official’s or employee’s appointment calendar, including personal entries, may be subject to Act), 626 (1994) (handwritten notes taken during oral interview by Texas Department of Public Safety promotion board members are public information), 120 (1976) (faculty members’ written evaluations of doctoral student’s qualifying exam subject to predecessor of Act).

You inform us that Exhibit E “contains only personal, private correspondence between individual board members and their family members or friends.” You also assert that “nothing in these particular emails has anything to do with District business.” Based on your comments and our review of the e-mails at issue, we agree that these communications do not relate to the transaction of official district business, and therefore do not constitute “public information” of the district. Consequently, the district is not required to release Exhibit E pursuant to the Act. *See* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources).

You also assert that the notes in Exhibit C are “notes of certain board members taken at board meetings” and that “they consist of the authors’ personal mental impressions or the topics discussed at the board meetings.” However, based on your representations and our review of the information at issue, we believe that these handwritten notes constitute “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business.” *See* Gov’t Code § 552.002. Therefore, we conclude that these notes are subject to the Act and may only be withheld if an exception under the Act applies.

You assert that Exhibit C is excepted under section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. The legislative privilege, also known as legislative immunity, generally shields legislative actors from being required to testify about their legislative activities.<sup>3</sup> *In re Perry*, 60 S.W.3d 857, 860 (2001); *see, e.g., Gravel v. U.S.*, 408

---

<sup>3</sup>The legislative privilege also refers to a legislator’s immunity from civil liability, immunity from arrest, and legislative continuances. *E.g.*, Tex. Const. art. III, § 14 (senators and representatives generally privileged from arrest while traveling to or attending legislative sessions); Civ. Prac. & Rem. Code § 30.003 (court must grant continuance if attorney is a legislative member and will be attending legislative session); *Perry*, 60 S.W.3d at 859 (immunity from civil liability).

U.S. 606, 615-16 (1972) (senator not required to answer questions about events that occurred in senate subcommittee meeting); *see also Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (legislators “should be protected not only from the consequences of litigation’s results but also from the burden of defending themselves”). As such, it is a privilege against testifying in discovery or trial. In Open Records Decision No. 575 at 1 (1990), this office determined that discovery privileges are not covered under the statutory predecessor of the Act. Thus, the board may not withhold Exhibit C under section 552.101 in conjunction with legislative immunity.

We note, however, that the submitted documents contain information subject to the Family Educational Rights and Privacy Act of 1974 (“FERPA”), section 1232g of title 20 of the United States Code. 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 as under 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.

Gov’t Code § 552.026. In Open Records Decision No. 634 (1995), this office concluded the following: (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). We have marked information in Exhibit D that identifies a student, and that the district must withhold under FERPA. The notes pertaining to item IV (Audience Items) on the notice of regular meeting documents in Exhibit C may also contain identifying information of district students and their parents.

Thus, to the extent Exhibit C contains student identifying information, this information must also be withheld pursuant to FERPA.

You assert that Exhibit G is excepted under section 552.103 of the Government Code, which 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), (c). The 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 is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

Although you assert that Exhibit G “relates to civil litigation against [the district],” you have not provided us with any information pertaining to this litigation. Accordingly, we conclude you have not established that litigation was pending when the district received the request for information. For the same reason, we are also unable to determine that Exhibit G is related to any pending litigation against the district. Therefore, the district has failed to establish that the document in Exhibit G is excepted under section 552.103.

You assert that Exhibit F is excepted under section 552.107 of the Government Code. Section 552.107(1) 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). 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). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, 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. 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).

You assert that Exhibit F consists of confidential communications between district attorneys and district employees and board members that were made for the purpose of rendering professional legal advice. Based on this representation and our review of the information at issue, we agree that this information consists of privileged attorney-client communications that the district may withhold under section 552.107(1).

You assert that the identifying information of an informant in Exhibit H is excepted under section 552.135 of the Government Code, which provides the following:

- (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].

Gov’t Code § 552.135(a), (b). 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 that exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* § 552.301(e)(1)(A). Although you assert that the identifying information of an informant in Exhibit H is excepted under section 552.135, you have not clearly identified to this office the specific civil, criminal, or regulatory law that the informant alleges was violated; therefore, the district may not withhold any of the information in Exhibit H under section 552.135.

The district asserts that some of the remaining information is excepted under section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov’t Code* § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the district must withhold the e-mail addresses we have marked in Exhibits D and H under section 552.137.

Finally, we note that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See Open Records Decision No. 550 (1990).*

To conclude, the district must withhold pursuant to FERPA the information we have marked in Exhibit D, as well as any student-identifying information in Exhibit C. The district may withhold Exhibit F under section 552.107, and it must withhold the marked e-mail addresses under section 552.137. The district must release the remaining responsive documents, but any copyrighted information may only be released in accordance with copyright law. As our ruling is dispositive, we do not address your other arguments for exception of the submitted information.

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).

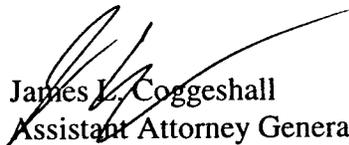
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/krl

Ref: ID# 238807

Enc. Submitted documents

c: Ms. LeeAnne Klentzman  
806 Strange Drive  
Richmond, Texas 77469  
(w/o enclosures)