



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 23, 2006

Ms. Amanda M. Bigbee
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306 West 7th Street, Suite 1045
Fort Worth, Texas 76102

OR2006-02863

Dear Ms. Bigbee:

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# 244604.

The Athens Independent School District (the "district"), which you represent, received two requests for fourteen categories of information. You state that you have released most of the requested information, but claim that some of the information responsive to three of the categories is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.104, 552.105, 552.106, 552.107, 552.108, 552.109, 552.111, 552.114, 552.116, 552.117, 552.122, 552.130, 552.135, 552.136, 552.137, and 552.139 of the Government Code. You also assert that release of a portion of the submitted information may implicate the proprietary interests of third parties. Pursuant to section 552.305 of the Government Code, you were required to notify the third parties at issue of the request and of their opportunity to submit comments to this office explaining why their information should be withheld from disclosure. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the district's obligations under section 552.301 of the Government Code. Subsections (a) and (b) of section 552.301 require a governmental body requesting

an open records ruling from this office to “ask for the attorney general’s decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.” Gov’t Code § 552.301(a), (b). While you raised sections 552.101, 552.102, 552.103, 552.104, 552.105, 552.106, 552.107, 552.109, 552.111, 552.114, 552.117, 552.122, 552.126, 552.128, 552.135, 552.136, 552.137, and 552.139 within the ten-business-day time period as required by subsection 552.301(b), you did not raise sections 552.108, 552.116, 552.126, and 552.130 until after the ten-business-day deadline had passed. Furthermore, you did not assert that some of the information was subject to third party proprietary interests until after the ten-business-day deadline had passed. Sections 552.108 and 552.116 are discretionary exceptions to disclosure that protect a governmental body’s interests and are generally waived by the governmental body’s failure to comply with section 552.301 of the Government Code. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district may not withhold any of the submitted information under sections 552.108 and 552.116 of the Government Code. However, this office has held that a compelling reason exists to withhold information when the information is confidential under other law or affects third party interests. *See* Open Records Decision No. 150. Because sections 552.110, 552.126, and 552.130 can constitute such compelling reasons, we will consider whether these exceptions apply to the submitted information.

Next, we note that you did not submit any arguments in support of your claims under sections 552.103, 552.109, 552.122, 552.128, and 552.135. *See* Gov’t Code 552.301(e) (governmental body must provide arguments explaining why exceptions raised should apply to information requested). Therefore, we assume you have withdrawn these exceptions to disclosure.

We also note that a portion of the submitted information, which we have marked, was created after the district received these requests. Because the district did not maintain this information at the time it received these requests, the information is not encompassed by the requests, and we do not address it in this ruling. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ *dism’d*); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at the time request was received).

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” Gov’t Code § 552.101. Section 552.101 encompasses the Family Educational Rights and Privacy Act of 1974 (“FERPA”), which 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 FERPA and section 552.114 of the Government Code. *See* Open Records Decision No. 539 (1990).

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. *See* Open Records Decision No. 634 at 6-8 (1995). In this instance, you have submitted information that you contend is confidential under FERPA. Accordingly, we will address your claim.

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). Such information includes both information that directly identifies a student, as well as information that, if released, would allow the student’s identity to be easily traced.

However, we note that FERPA provides that “directory information” may be released to the public if the institution or agency complies with section 1232g(a)(5)(B) of title 20 of the United States Code. “Directory information” includes the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student. 20 U.S.C. § 1232g(a)(5)(A). Section 1232g(a)(5)(B) provides as follows:

[a]ny educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent’s prior consent.

20 U.S.C. § 1232g(a)(5)(B). The district claims that portions of Exhibit I must be withheld under FERPA. However, Exhibit I includes announcements and other documentation regarding students’ participation in officially recognized activities and sports. Thus, if the

district has designated participation in officially recognized activities and sports as directory information, the district must release this type of information. If the district has not designated participation in officially recognized activities and sports as directory information, then the district must withhold this information under FERPA. Although we generally agree that the remaining information the district has marked must be withheld under FERPA, we have marked some information for release. We have also marked a small amount of additional information that must be withheld under FERPA in Exhibit A and Exhibit I.

The district claims section 552.102 of the Government Code for portions of the submitted information. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. Therefore, information must be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). As the privacy test for sections 552.102 and 552.101 are identical, we will address the district's privacy claims under sections 552.102 and 552.101 together.

The district claims that all of Exhibit A and most of Exhibit N are protected by common law privacy. However, Exhibit A pertains to the district's investigation of an employee's misconduct. This information relates solely to the work behavior and job performance of an employee, and, as such, cannot be deemed to be outside the realm of public interest. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (statutory predecessor applicable when information would reveal intimate details of highly personal nature), 405 at 2 (1983) (manner in which employee performed his job cannot be said to be of minimal public interest), 400 at 5 (1983) (statutory predecessor protected information only if its release would lead to clearly unwarranted invasion of privacy).

Exhibit N contains the applications, references, and resumes of applicants for the position of assistant superintendent. Generally, however, the public has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 at 5 (1990) (information in public employee's resume not protected by constitutional or

common law privacy under statutory predecessors to section 552.101 and section 552.102). Therefore, based on our review of the information in Exhibits A and N, we conclude that none of it is protected from disclosure under common law privacy. Thus, the district may not withhold any information in either Exhibit A or Exhibit N on this basis.

The district also claims that the home addresses and home and cellular telephone numbers of private citizens in Exhibit F are subject to common law privacy. However, this office has found that the names, addresses, and telephone numbers of members of the public are not excepted from required public disclosure under common law privacy. *See* Open Records Decision No. 455 (1987) (absent special circumstances, the home addresses and telephone numbers of private citizens are generally not protected under the Act's privacy exceptions). As such, none of Exhibit F may be withheld on the basis of common law privacy.

The district also claims that Exhibits F-1, F-2, and F-3 contain medical and financial information subject to common law privacy. While common law privacy may protect an individual's medical history, it does not protect all medically-related information. *See* Open Records Decision No. 478 (1987). Individual determinations are required. *See* Open Records Decision No. 370 (1983). This office has found that the following types of information are excepted from required public disclosure under common law privacy: 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); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990). After carefully reviewing the documents and your arguments, we find that the district has not demonstrated that any of the information in Exhibits F-1, F-2, and F-3 is medical information subject to common law privacy. Furthermore, the district has failed to demonstrate that these exhibits contain personal financial information subject to common law privacy.

The district also asserts some of the remaining information is protected from disclosure by the attorney-client privilege. Section 552.107 of the Government Code protects information that comes 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. *See* 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. *See* 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. *See 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 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. See 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. See *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 claim that Exhibits A, C, D, I, and J contain information that reveals or reflects confidential communications between representatives of the district and its attorneys. You have also identified the principal parties to the communications. Based on your representations and our review of the submitted information, we agree that Exhibits A, C, D, and I contain information that reveals confidential communications between privileged parties. Accordingly, we have marked the information in Exhibits A, C, D, and I that is protected by the attorney-client privilege and may be withheld pursuant to section 552.107. However, you have failed to demonstrate how the remaining information in Exhibit A or the information you have marked in Exhibit J and Exhibit D constitutes confidential communications between representatives of the district and its attorneys. Therefore, this information may not be withheld under section 552.107.

The district also asserts that some of the remaining information is protected from disclosure by the attorney work product privilege. 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” and encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including

the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. Tex. R. Civ. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You state that Exhibit B was created by the district and its attorneys in anticipation of litigation. After reviewing the information in Exhibit B and your arguments, we agree that Exhibit B was prepared in anticipation of litigation and may be withheld as attorney work product under section 552.111. However, you do not demonstrate how the remaining documents in Exhibits A and D were prepared or developed in anticipation of litigation. Thus, the remaining documents in Exhibits A and D may not be withheld as attorney work product under section 552.111.

You also claim that Exhibits E and E-1 contain computer usernames and passwords protected from disclosure under section 552.139 of the Government Code. Section 552.139 provides as follows:

(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, or 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. We note that the usernames and passwords you have marked pertain to the access of external websites by district employees, not to the district's own computer network. You have failed to demonstrate the applicability of section 552.139 to these usernames and passwords. Therefore, the district may not withhold any of the information in Exhibits E and E-1 under section 552.139.

The district also claims that the usernames and passwords in Exhibit E are access device numbers subject to section 552.136 of the Government Code, which states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. Although you assert that the usernames and passwords you have marked are access device numbers, you have not submitted any arguments explaining how the usernames and passwords at issue are access device numbers for purposes of section 552.136. See Gov't Code 552.301(e)(governmental body must provide arguments explaining why exceptions raised should apply to information requested). As such, the district may not withhold any information under section 552.136.

The district also claims that Exhibit J is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from public disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. Section 552.111 encompasses the deliberative process privilege. See Open Records Decision No. 615 at 2 (1993). The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. See *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect the policymaking processes of the governmental body. See Open Records Decision No. 615 at 5. A governmental body's

policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; see also *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. See Open Records Decision No. 631 at 3 (1995). Furthermore, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. See Open Records Decision No. 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982).

The district explains that Exhibit J contains the advice, opinions, and recommendations of district employees regarding the development of new district policies. Having considered your arguments and reviewed the submitted information, we agree that section 552.111 is applicable to some of Exhibit J. We have marked the information that the district may withhold in Exhibit J pursuant to section 552.111 of the Government Code. However, some of the remaining information consists of facts or written observations of facts not subject to section 552.111. Furthermore, you have not explained, nor does it appear, that other documents reveal the internal deliberations of the district. Thus, these documents may not be withheld under section 552.111.

The district claims that Exhibit K contains teacher and administrator evaluations made confidential by section 21.355 of the Education Code. Section 552.101 encompasses section 21.355 of the Education Code, which provides, "A document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, we concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* Similarly, we concluded that an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id.* Although some of the documents in Exhibit K discuss the standards for evaluating the superintendent, none of the documents in Exhibit K actually evaluates the performance of a teacher or administrator. Accordingly, we conclude that none of Exhibit K is confidential under section 21.355. However, Exhibit N contains two documents that evaluate an individual's performance as an administrator. Accordingly, we conclude that these documents, which we have marked, are confidential under section 21.355 and must be withheld under section 552.101 of the Government Code.

The district claims section 552.104 of the Government Code for Exhibits M and M-1. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978). The district states that Exhibit M is a bidder's response to a proposal for which a contract has not been awarded. Based on your representations and our review of the information at issue, we find that you have adequately demonstrated that the release of Exhibit M would harm the interests of the district. *See* Open Records Decision No. 592 (1991). Accordingly, we conclude that the district may withhold Exhibit M pursuant to section 552.104 of the Government Code.

The district also claims that Exhibit M-1 is subject to section 552.104, and explains that Exhibit M-1 pertains to the process of hiring an architect. However, you have not explained how this hiring process constitutes a competitive situation for purposes of section 552.104. Furthermore, you have submitted no evidence that the hiring process is currently ongoing such that release of Exhibit M-1 would harm or disadvantage the district in any way. Thus, we find that the district has not adequately demonstrated how Exhibit M-1 is subject to section 552.104, and Exhibit M-1 may not be withheld on that basis.

The district claims section 552.126 of the Government Code for Exhibit N, which contains the applications, references, and resumes of applicants for the position of assistant superintendent. Section 552.126 excepts from disclosure the "name of an applicant for the position of superintendent of a public school district . . . except that the board of trustees must give public notice of the name or names of the finalists being considered for the position at least 21 days" before a vote or final action is taken. Gov't Code § 552.126. However, the applicants at issue sought a position as assistant superintendent, not superintendent. Although you argue that the reasoning in section 552.126 "applies with equal strength to applicants for an assistant superintendent position," statutory confidentiality requires express language making the information at issue confidential. Open Records Decision No. 478 at 2 (1987); *see also* Open Records Decision No. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure). As the language of section 552.126 is expressly limited to applicants for the position of superintendent, section 552.126 is inapplicable to Exhibit N and none of the information may be withheld on that basis.

The district also argues that some of the information in Exhibit N is proprietary information subject to section 552.110 of the Government Code. Section 552.110(b) of the Government Code excepts from disclosure "[c]ommercial or financial information for which it is

demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” Section 552.110(b) requires a specific factual or evidentiary showing that substantial competitive injury would likely result from release of the requested information, not conclusory or generalized allegations. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

As of the date of this letter, none of the third parties at issue have submitted to this office any reasons explaining why their information should not be released. The district, though, claims that revealing the identities of the applicants may result in substantial competitive harm to them if “his or her employer is made aware of the fact that he or she has sought employment elsewhere.” However, the district provides no specific factual evidence to support this claim. The district also claims that the applicants’ resumes are proprietary information subject to section 552.110(b). However, this office has repeatedly found that resumes are not proprietary information. *See* Open Records Decision Nos. 319 at 2 (1982), 306 at 1 (1982), 175 at 4 (1977). Accordingly, none of the information in Exhibit N may be withheld under section 552.110(b) of the Government Code.

The district also claims that a driver’s license number in Exhibit N is protected from disclosure under section 552.130 of the Government Code, which excepts from disclosure information that “relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state.” Gov’t Code § 552.130. However the driver’s license number at issue was not issued by an agency of the State of Texas. As such, it is not subject to section 552.130.

The district also claims that Exhibit P is excepted from disclosure under section 552.105 of the Government Code, which excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov’t Code § 552.105. This provision is designed to protect a governmental body’s planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted so long as the transaction is not complete. *See* Open Records Decision No. 310 (1982). A governmental body may withhold information “which, if released, would impair or tend to impair [its] ‘planning and negotiating position in regard to particular transactions.’” Open Records Decision No. 357 at 3 (1982) (quoting Open Records Decision No. 222 (1979)). In this instance, the district

does not submit any arguments explaining how the release of Exhibit P would impair the district's acquisition of the land. *See* Gov't Code 552.301(e) (governmental body must provide arguments explaining why exceptions raised should apply to information requested). As such, Exhibit P may not be withheld under section 552.105.

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 request that this information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). 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). We note that section 552.117 also encompasses a personal cellular telephone number, provided that the cellular phone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). However, an individual's personal post office box number is not a "home address" for purposes of section 552.117, and therefore may not be withheld under section 552.117. *See* Open Records Decision No. 622 at 4 (1994) (purpose of section 552.117 is to protect public employees from being harassed at home); *see also* Open Records Decision No. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied). Therefore, the district must withhold the home address, home telephone number, social security number, and family member information of any employee who chose to withhold that information under section 552.024. Additionally, if the district does not pay the cellular phone service for the numbers listed in the submitted information, those numbers must also be withheld under section 552.117(a)(1) if their owners elected non-disclosure of their home telephone numbers; otherwise, the cellular numbers must be released. We have marked the documents accordingly.

Lastly, the submitted information contains e-mail addresses obtained from the public. Section 552.137 makes certain e-mail addresses confidential. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). You do not inform us that any member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The district must, therefore, withhold the e-mail addresses of members of the public under section 552.137. We generally agree that the email addresses the district has marked must be withheld under section 552.137. However, we note that section 552.137 does not apply to government email addresses or any type of internet address. Accordingly, we have marked some information for release. We have also marked some additional email addresses that must be withheld.

In summary, a portion of the submitted information, which we have marked, was created after the district received this request and is not addressed by this ruling. If the district has not designated participation in officially recognized activities and sports as directory information, then the district must withhold this information under FERPA. Although we generally agree that the remaining information the district has marked must be withheld under FERPA, we have marked some information for release. We have also marked a small amount of additional information that must be withheld under FERPA in Exhibits A and I. We have marked the information in Exhibits A, C, D, and I that is protected by the attorney-client privilege and may be withheld pursuant to section 552.107. Exhibit B may be withheld under section 552.111 as attorney work product. The district may withhold the information we have marked in Exhibit J under section 552.111. We have marked the documents in Exhibit N that are confidential under section 21.355 and must be withheld under section 552.101. The district may withhold Exhibit M pursuant to section 552.104. The district must withhold the home address, home telephone number, social security number, and family member information of any employee who timely chose to withhold that information under section 552.024. Additionally, if the district does not pay the cellular phone service for the numbers listed in the submitted information, those numbers must also

be withheld under section 552.117(a)(1); otherwise, the cellular telephone numbers must be released. Although we generally agree that the email addresses the district has marked must be withheld under section 552.137, we have marked some information for release. We have also marked some additional email addresses that must be withheld. The remaining information must be released.

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).

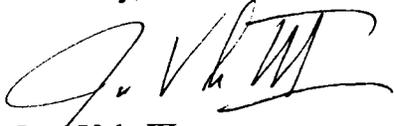
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in black ink, appearing to read 'Jose Vela III', written in a cursive style.

Jose Vela III
Assistant Attorney General
Open Records Division

JV/krl

Ref: ID# 244604

Enc. Submitted documents

c: Mr. Fred Head
Attorney & Counselor
P. O. Box 312
Athens, Texas 75751-0312
(w/o enclosures)