



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 20, 2006

Ms. Ellen Huchital Spalding  
McGinnis, Lochridge & Kilgore, L.L.P.  
1221 McKinney Street, Suite 3200  
Houston, Texas 77010

OR2006-07877

Dear Ms. Spalding:

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# 254570.

The Eanes Independent School District (the "district"), which you represent, received a request for 1) any and all documents related to the surveys conducted by the district during the 2005-2006 school year; 2) the salary and benefit information of the superintendent; and 3) the minutes from the district's board meeting on April 26, 2006. You state that at the time of the request, the district did not have information responsive to the third part of the request. We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received.<sup>1</sup> You also state that the requestor has agreed to allow the district to withhold student-identifying information pursuant to the Family Educational Rights and Privacy Act of 1974, e-mail addresses of members of the public, and account numbers. Therefore, this information is not at issue in this ruling. You also state that the district has released a portion of the requested information to the requestor. You claim that the remaining requested information is excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>2</sup> We have also considered

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<sup>1</sup>See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.— San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

<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.

comments submitted by the requestor. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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.” Gov't Code § 552.111. This exception encompasses the deliberative process privilege. See Open Records Decision No. 615 at 2 (1993). 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). In *Gilbreath*, the Third Court of Appeals found that the deliberative process privilege aspect of section 552.111 was analogous to Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5). See ORD 615 at 2 (quoting *Gilbreath*, 842 S.W.2d at 412). The court found that subsequent to the passage of the Act by the Texas Legislature, federal court decisions and decisions from this office were interpreting the deliberative process privilege too broadly, straying from the interpretation for Exemption 5 that Congress intended. See *id.* The court held that this privilege “exempts those documents, and only those documents, normally privileged in the civil discovery context.” *Id.* Therefore, at the direction of the court, this office narrowed the scope and interpretation of the deliberative process privilege, applying the same discovery-based approach applied by federal courts in early interpretations of this privilege. See *id.* at 3. Prior to the passage of the Act, the United States Supreme Court in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), determined that the purpose of the privilege was to promote the frank discussion of legal or policy matters within governmental agencies. ORD 615 at 3 (quoting *Mink*, 410 U.S. at 87). Likewise, the court in *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), stated that the purpose of the privilege was to foster “frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to operate.” ORD 615 at 4 (quoting *Carl Zeiss*, 40 F.R.D. at 324). The court in *Simons-Eastern Co. v. United States*, 55 F.R.D. 88, 88-89 (N.D. Ga. 1972), held that the privilege applies to “opinions, conclusions, and reasoning reached by Government officials in connection with their official duties.” ORD 615 at 5 (quoting *Simons-Eastern*, F.R.D. at 88-89). In *Ackerly v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970), the court held that the privilege was intended to protect “those internal working papers in which opinions are expressed and policies formulated and recommended.” ORD 615 at 5 (quoting *Ackerly*, 420 F.2d at 1341). In light of these court decisions, this office has determined that section 552.111 excepts from disclosure only the advice, recommendations, and opinions of members of the governmental body at issue that relate to a policymaking matter. See ORD 615 at 5. Furthermore, the fact that a document may have been used in the policymaking process does not bring that information within the privilege. Additionally, 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. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Most of the information you claim is excepted under the deliberative process privilege consists of survey answers provided by parents and students of the district. Since section 552.111 only excepts the advice, recommendations, and opinions of employees and other individuals upon whom rests the responsibility for making policy decisions, the survey responses of the parents and students do not fall under the deliberative process privilege. You have also submitted survey answers provided by staff members of the district. You state, however, that district officials have reviewed all of the submitted survey responses and used them "to make recommendations for policies and procedures" for the district. Thus, it is clear from your arguments that the submitted information itself does not reveal the internal deliberations of the district. Therefore, the staff responses also do not fall within the deliberative process privilege.

Finally, you claim that the submitted survey responses should be withheld as a draft under section 552.111. This office has concluded that section 552.111 protects from disclosure the preliminary draft of a policymaking document that will be released to the public in its final form. *See* Open Records Decision 313 at 2 (1982). Because the survey responses do not reveal the internal deliberations of the district, these documents are not policymaking documents. Therefore, these documents cannot serve as drafts of policymaking documents intended for public release in their final form. Accordingly, the district may not withhold any of the survey answers under section 552.111. As you raise no other exceptions to disclosure, 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, 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,



Candice M. De La Garza  
Assistant Attorney General  
Open Records Division

CMD/krl

Ref: ID# 254570

Enc. Submitted documents

c: Ms. Dianna Pharr  
2204 Westlake Drive  
Austin, Texas 78746  
(w/o enclosures)