



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 7, 2007

Mr. Thomas P. Brandt  
Fanning, Harper, & Martinson  
Two Energy Square  
4849 Greenville Avenue, Suite 1300  
Dallas, Texas 75206

OR2007-07157

Dear Mr. Brandt:

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# 280565.

The Carroll Independent School District (the "district"), which you represent, received a request for "[a]ny and all e-mail communication to and from Principal Daniel Presley" during a specified time period. First, you assert e-mails are not public information subject to the Act. Alternatively, you claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.111, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you claim that e-mails do not constitute public information under to the Act. You state that you have only been able to locate one attorney general decision addressing e-mails. However, a search conducted by this office returned over three thousand letter rulings that apply the Act's exceptions to e-mails. We would not have done so if e-mails categorically are not public information subject to the Act. Section 552.002(a) of the Act provides:

(a) In this chapter, "public information" means information that is collected, assembled, or maintained under a law or ordinance or in connection with transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Information is generally subject to the Act when it is held by a governmental body and it relates to the official business of a governmental body or is used by a public official or employee in the performance of official duties. *See* Open Records Decision No. 635 (1995). Pursuant to section 552.002, the Act applies to recorded information in practically any medium, including paper, tape, and a magnetic device that can store an electronic signal. Gov't Code § 552.002(b). Section 552.002(c) specifies that “[t]he general forms in which the media containing public information exist include paper, letter, document, . . . tape, . . . sound recording, . . . and a voice, data, or video representation held in computer memory.” Although you acknowledge the Act was intended to encompass records stored electronically, you incorrectly conclude that e-mails are not subject to the Act because they are more analogous to “voicemail, drafts, or similar documents of a temporary nature.” All such information is public information subject to the Act provided the information is maintained by the agency and relates to the transaction of official business. Furthermore, our office has issued many rulings regarding drafts of documents. *See* Open Records Decision No. 559 (1990) (discussing drafts as part of the internal deliberative process). You also cite to *Open Records Letter No. 2006-04250* (2006) and state that it does not address which e-mails are public information. In fact, it does. The ruling explains that because the e-mails at issue are personal e-mails that do not relate to the district’s transaction of official business, they do not fit the definition of section 552.002. The clear implication of this ruling is that while these personal e-mails are not subject to the Act, others that do relate to district business are. Finally, you recognize that section 552.137 of the Government Code was added to the Act to protect the confidentiality of private e-mail addresses. Certainly, the enactment of section 552.137 is unnecessary if as you argue all e-mails are not subject to the Act. Therefore, we reject your assertion that all e-mails are not public information subject to the Act.

Next, we address your comments regarding electronic files that have been deleted and are no longer maintained by the district. The Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3(1986). You state that “much of the responsive information has been deleted and is not maintained on the hard drives of the computers.” Thus, you state that such e-mails can only be retrieved from the backup system maintained by the district.

In general, computer software programs keep track of the location of files by storing the location of data in the “file allocation table” (FAT) of a computer’s hard disk. The software then displays the file as being in a specific storage location. Usually, but not always, when a file is “deleted,” it is not actually deleted, but the display of the location is merely shown to be moved to a “trashbin” or “recycle bin.” Later, when files are “deleted” or “emptied” from these “trash bins,” the data is usually not deleted, but the location of the data is deleted from the FAT. Some software programs immediately delete the location information from the FAT when a file is deleted. Once the location reference is deleted from the FAT, the data may be overwritten and permanently removed.

As stated above, you inform us that a portion of the requested e-mail messages were not saved to the hard drives of the computers used by the employees. You further explain that to retrieve the e-mail messages, the district would have to retrieve the information from the backup system. Based on your representations that the e-mail messages have been deleted and are not maintained on the hard drives of the computers at issue, we find that the locations of the files have been deleted from the FAT system. We, therefore, determine that the e-mail messages at issue were no longer being “maintained” by the district at the time of the request, and are not public information subject to disclosure under the Act. *See Econ. Opportunities Dev. Corp.*, 562 S.W.2d at 266; *see also* Gov’t Code § 552.002 (public information consists of information collected, assembled, or maintained by or for governmental body in connection with transaction of official business). Accordingly, we conclude that the Act does not require the district to release the e-mail messages located in the district’s backup system.

Next, you claim that the e-mails contained in Exhibits 4 and 5 are not subject to the Act. The Act is only applicable to public information. *See* Gov’t Code § 552.002. After reviewing Exhibits 4 and 5, we find that they do not relate to the district’s transaction of official business.<sup>1</sup> *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). Exhibits 4 and 5 consist of personal e-mails maintained by the principal. However, the remaining submitted e-mails contain information that is collected for the transaction of official business. Therefore, this information is public information subject to the Act and we will address the applicability of the claimed exceptions to the remaining submitted e-mails.

You claim section 552.107 for the information contained in Exhibit 6. Section 552.107(1) of the Government Code 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

---

<sup>1</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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.*, 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 indicate that the marked paragraph and e-mails in Exhibit 6 reflect or consist of confidential communications between district attorneys and district administrators which 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 the information consists of privileged attorney-client communications that the district may withhold under section 552.107.<sup>2</sup>

You next state that Exhibit 7 is excepted from disclosure under section 552.111 of the Government Code. 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.” This exception encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2* (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the policymaking 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*, 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, opinions, and other material reflecting the policymaking processes of the governmental body. *See ORD 615 at 5*. A governmental body’s policymaking

---

<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure for this information.

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). 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). Further, a 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. See Open Records Decision No. 559 at 2 (1990).

You state that Exhibit 7 is an e-mail of a draft memorandum. After review of your arguments, we find that, although you state that Exhibit 7 consists of a draft, this draft pertains to a personnel matter, not a policy matter of the district for purposes of section 552.111. Accordingly, we find Exhibit 7 is not excepted under section 552.111. Therefore, the district may not withhold it on that ground.

You also claim that Exhibit 7 is excepted from disclosure pursuant to section 552.102. Section 552.102 of the Government Code excepts from public 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). Section 552.102(a) protects private information that relates to public officials and employees. The privacy analysis under section 552.102(a) is the same as the test for common-law privacy under section 552.101 of the Government Code. See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). Therefore, we will determine whether Exhibit 7, which you seek to withhold under section 552.102(a), is protected by common-law privacy under section 552.101.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We conclude that Exhibit 7 is not highly intimate or embarrassing. Furthermore, there is a legitimate public interest in a public employee's work performance. See Open Records Decision No. 444 at 5-6 (1986) (public has interest in public employee's qualifications, work performance, and circumstances of employee's resignation or termination). Accordingly, the district may not withhold any of the information in Exhibit 7 on the basis of common-law privacy.

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 of the Government Code. Gov't Code §§ 552.024, .117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You inform us, and provide documentation showing, that the employees whose information is at issue in Exhibit 8 made timely elections for confidentiality under section 552.024. We, therefore, conclude that the district must withhold the information we have marked in Exhibit 8 under section 552.117(a)(1). We note that the district may only withhold the phone number we have marked in Exhibit 8 if it is a home or personal cellular phone number. As you have raised no further arguments against disclosure for the remaining information in Exhibit 8, it must be released.

Finally, you raise section 552.137 of the Government Code for the information in Exhibit 10. Section 552.137 of the Government Code 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). *Id.* § 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. Accordingly, you may withhold the e-mail addresses we have marked under section 552.137. These e-mail addresses do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that the relevant members of the public have consented to the release of these e-mail addresses. Therefore, the district must withhold the e-mail addresses we have marked in Exhibit 10 under section 552.137. The remaining e-mail addresses are governmental employees' e-mail addresses and may not be withheld.

In summary, the district need not release Exhibits 4 and 5 because they contain personal e-mails and are not subject to the Act. The district may withhold the marked paragraph and e-mails in Exhibit 6 pursuant to section 552.107 of the Government Code. The district must withhold the information we have marked in Exhibit 8 under section 552.117(a)(1). Finally, the district must withhold the e-mail addresses we have marked in Exhibit 10 under section 552.137. 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).

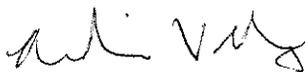
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Melanie J. Villars  
Assistant Attorney General  
Open Records Division

MJV/jb

Ref: ID# 280565

Enc. Submitted documents

c: Mr. Brandon Todd  
Fox TV  
c/o Thomas P. Brandt  
Two Energy Square  
4849 Greenville Avenue, Suite 1300  
Dallas, Texas 75206  
(w/o enclosures)