



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 27, 2007

Ms. Lydia L. Perry
Law Offices of Robert E. Luna, P.C.
4411 North Central Expressway
Dallas, Texas 75205

OR2007-08083

Dear Ms. Perry:

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# 282985.

The Lewisville Independent School District (the "district"), which you represent, received a request for "all written correspondence, electronic or physical, from Superintendent Jerry Roy to all school board members" for a specified time period. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.114, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Education Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purposes of our review in the open records ruling process under the Act.¹ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). You have submitted for our review,

¹A copy of this letter may be found on the attorney general's website, available at http://www.oag.state.tx.us/opinopen/og_resources.shtml.

§ 99.3 (defining “personally identifiable information”). You have submitted for our review, among other information, redacted and unredacted education records. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to the information at issue.² Such determinations under FERPA must be made by the educational authority in possession of the education record. Accordingly, we also do not address your arguments under section 552.114 of the Government Code. *See* Gov’t Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure “student records”); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). We will, however, address the applicability of the remaining claimed exceptions to the submitted information.

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 information protected by other statutes, such as section 21.355 of the Education Code. Section 21.355 provides, “A document evaluating the performance of teachers or administrators 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)*. This office has determined 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 the evaluation. *Id.* We also determined that the word “administrator” in section 21.355 means a person who is required to and does in fact hold an administrator’s certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

You contend that Exhibit F is confidential under section 21.355 of the Education Code. Having considered your arguments and reviewed the submitted information, we conclude that you have not demonstrated that the information in question is an evaluation of a teacher or administrator for the purposes of the statute. Therefore, the district may not withhold Exhibit F under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.101 also encompasses common-law privacy.³ Common-law privacy protects information that (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

²In the future, if the district does obtain parental consent to submit unredacted education records, and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Exhibit B contains information that is highly intimate and embarrassing and is not of legitimate public interest. Therefore, the district must withhold the information we have marked in Exhibit B under section 552.101 in conjunction with common-law privacy.

You also claim section 552.111 for Exhibit F. 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.” Gov’t Code § 552.111. 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 decisionmaking 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 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, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 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).

You assert that Exhibit F consists of “advice, recommendation and evaluation of certain goals set for the Board and Superintendent on broad policy matters.” Upon review, we find that the district may withhold the information we have marked in Exhibit F under section 552.111. However, we find the district has failed to establish that the remaining information in Exhibit F consists of advice, opinion, and recommendation; therefore, the

district may not withhold any of the remaining information in Exhibit F under section 552.111.

You also assert section 552.111 for information, which you have marked, in Exhibit B. You state that the information you have marked in Exhibit B pertains to the “[s]uperintendent’s opinions, recommendations, and advice on a variety of school district policy matters.” Upon review, we find that you have established that the information you have marked in Exhibit B under section 552.111 consists of advice, opinion, or recommendations related to district policy. Therefore, the district may withhold this information under section 552.111.

Next, you claim section 552.107 for portions of information that are contained in Exhibits C, D, and E. Section 552.107(1) 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See TEX. R. EVID. 503(b)(1)(A)-(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 assert that the information you have marked under section 552.107 in Exhibits C, D, and E consists of confidential communications between district attorneys and district employees which were made for the purpose of rendering professional legal advice. You also state that these communications have not been disclosed to third parties and that the confidentiality has not been waived. Based on these representations and our review of the information at issue, we agree that the information you have marked in Exhibit E and portions of the information that we have marked in Exhibits C and D consist of privileged attorney-client communications that the district may withhold under section 552.107.⁴ However, we determine that the district has failed to demonstrate that the petition in Exhibit C and the letter in Exhibit D constitute communications within the attorney-client privilege for section 552.107 purposes because these documents are from non-privileged parties. Consequently, the district may not withhold the petition in Exhibit C or the letter in Exhibit D on this basis.

You also claim section 552.103 for the information which you have marked in Exhibits C and D. Section 552.103 of the Governmental Code 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). A 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 was pending or reasonably anticipated on the date the governmental body received the request for information, 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure for the information you have marked under section 552.107 in Exhibits D and E.

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁵ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

A portion of information you have marked in Exhibit C is a draft of an Original Petition provided to the district by the attorney representing the potential plaintiff. You state that the petition was provided to the district so that the district could join as a plaintiff voluntarily. However, if the district does not join, then the named plaintiff will join the district as an involuntary plaintiff. You also state that the Original Petition has not been filed. Based on your representations and our review of the submitted information, we find that the district reasonably anticipated litigation on the date it received the request for information. We also conclude that the petition and the additional information you have marked under section 552.103 in Exhibit C relate to this anticipated litigation. Therefore, the district may withhold this information pursuant to section 552.103.⁶

You state that information you have marked under section 552.103 in Exhibit D relates to a pending investigation by the United States Department of Justice (the “DOJ”). You also state that the district is currently in discussions and settlement negotiations with the DOJ on this matter. Therefore, we agree that the district reasonably anticipated litigation on the date it received the present request. We further find the information at issue relates to the anticipated litigation. We note, however, that both the DOJ and the district in the matter at issue have had access to the DOJ letter in Exhibit D. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open

⁵In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission. *See* Open Records Decision No. 336 (1982).

⁶As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Records Decision No. 551 (1990). Once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a). Consequently, because the information has been seen by both sides, there would be no justification for now withholding such information pursuant to section 552.103, and the letter may not be withheld on that basis. The additional information you have marked in Exhibit D, however, may be withheld under section 552.103 because this information relates to the anticipated litigation.

Next, you claim section 552.117 for portions of the information in Exhibit B. Section 552.117(a)(1) excepts from disclosure the current and former 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 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). Pursuant to section 552.117(a)(1), the district must withhold personal information that pertains to a current or former employee who elected, prior to the district's receipt of the request for information, to keep such information confidential. Such information may not be withheld for individuals who did not make timely elections. We note that the district may only withhold the cellular phone numbers we have marked 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). Accordingly, we have marked the information that must be withheld under section 552.117 if the employees whose information is at issue made timely elections to keep that information confidential.

Finally, you raise section 552.137 of the Government Code for the information in Exhibit B. 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). 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. We have marked an e-mail address to be released because it is a governmental e-mail address. Accordingly, you must withhold the remaining e-mail addresses you have marked in addition to 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 also do not inform us that the relevant members of the public have consented to the release of these e-mail addresses.

In summary, this ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information

consists of “education records” that must be withheld under FERPA, then the district must dispose of that information in accordance with FERPA, rather than the Act. The district must withhold the information we have marked in Exhibit B under section 552.101 in conjunction with common-law privacy. The district may withhold the information we have marked in Exhibit F and the information you have marked in Exhibit B under section 552.111. The district also may withhold the information it has marked in Exhibit E and the information we have marked in Exhibits C and D under section 552.107. The district may withhold the information you have marked in Exhibit C under section 552.103. Additionally, with the exception of the letter from the DOJ, the district may withhold the information you have marked in Exhibit D under section 552.103. The district must withhold the personal information we have marked in Exhibit B under section 552.117(a)(1) if the employees whose information is at issue timely elected confidentiality. We note that the district may only withhold the phone numbers we marked under section 552.117(a)(1) if they are personal cellular telephone numbers. Finally, with the exception of the governmental e-mail address marked for release, the district must withhold the e-mail addresses it has marked in addition to the ones we have marked in Exhibit B pursuant to 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).

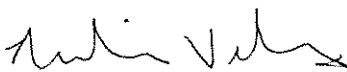
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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# 282985

Enc. Submitted documents

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