



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 31, 2007

Ms. Amanda M. Bigbee
Henslee, Fowler, Hepworth & Schwartz, L.L.P.
306 West 7th Street, Suite 1045
Fort Worth, Texas 76102

OR2007-09684

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# 285674.

The Burleson Independent School District (the "district"), which you represent, received a request for eleven categories of information pertaining to the district budget, personnel, performance evaluations of district principals, and the provision of special education services. You state that some of the requested information will be released, but claim that the submitted information is excepted from disclosure under sections 552.101, 552.111, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.²

You assert that the documents submitted as Exhibits A and B "are evaluations of the performance of two of [the district's] principals." Section 552.101 excepts from disclosure

¹You indicate that the district is withholding some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a). We note that our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made; therefore, we will not address the applicability of FERPA to any of the submitted records.

²We 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.

“information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 21.355 of the Education Code, which provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). The Third Court of Appeals has held that a memorandum from a principal to a teacher was an evaluation for purposes of section 21.355, because it reflected the principal’s judgment regarding the teacher’s actions, gave corrective direction, and provided for further review. *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). In Open Records Decision No. 643, we determined that for purposes of section 21.355, 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 the documents submitted as Exhibits A and B are confidential under section 21.355 as evaluative documents of the two principals. Upon review, we agree that the information submitted as Exhibit A falls within the scope of section 21.355 and must be withheld under section 552.101 of the Government Code, provided the employee at issue was required to hold and did hold the appropriate certificate and was serving as an administrator at the time of the submitted evaluations. We find, however, that the information in Exhibit B does not evaluate the performance of an administrator as provided by section 21.355 of the Education Code. Therefore, none of the information in Exhibit B may be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

You seek to withhold some of the submitted information under section 552.111 of the Government Code, which 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 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 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, 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)*.

Section 552.111 can also encompass communications between a governmental body and a third-party consultant. *See ORD 631 at 2* (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority); *see also Open Records Decision Nos. 561 at 9 (1990)* (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See ORD 561 at 9*.

You assert that the submitted information in Exhibits C, D, and E consists of exchanges of opinion, advice, and recommendations regarding "the delivery of special education services [and the district's] mission to educate special education students." Upon review, we find that you have established that some of the information you seek to withhold under section 552.111 consists of advice, opinion, or recommendations related to district policy. Therefore, the district may withhold the information in Exhibit E under section 552.111 of the Government Code. The information in Exhibits C and D, however, consists of factual information or fails to reveal the actual advice, recommendation, or opinion at issue, and must be released.

Finally, we address your argument that some of the remaining information is excepted under section 552.117. Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses, 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 § 552.117(a)(1). Whether a particular piece of information is protected under 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 indicate that the employees at issue elected to keep their information confidential, but you do not inform us that the election was made prior to the district's receipt of the present request. If these employees did make such an election prior to the district's receipt of the present request, then the district must withhold the information you have marked under section 552.117(a)(1). The district may not withhold this information for those employees who did not make a timely election to keep the information confidential.

In summary, the information submitted as Exhibit A falls within the scope of section 21.355 and must be withheld under section 552.101 of the Government Code, provided the employee at issue was required to hold, and did hold, the appropriate certificate and was serving as an administrator at the time of the submitted evaluations. The district may withhold the information in Exhibit E under section 552.111 of the Government Code. The district must withhold the information you have marked under section 552.117(a)(1) provided that a timely election was made. 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 285674

Enc. Submitted documents

c: Darren & Carol Yancy
233 Sherry Lane
Burleson, Texas 76028
(w/o enclosures)