



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 26, 2007

Ms. Marney Collins Sims
General Counsel
Cypress-Fairbanks Independent School District
P.O. Box 692003
Houston, Texas 77269-2003

OR2007-12528

Dear Ms. Sims:

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# 290054.

The Cypress-Fairbanks Independent School District (the "district") received a request for all e-mail communications regarding a specified teacher from January 2004 to July 2007. You state that the district will provide some of the requested information to the requestor. However, you claim that a portion of the requested e-mail messages is no longer in the possession of the district. You also indicate that the district will redact some of the requested information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a).¹ We understand you to claim that the submitted information is excepted from disclosure under section 552.107 of the Government Code.² You also state that you have notified an interested party of the district's receipt of the request. *See* Gov't Code

¹We 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.

²Although you assert the attorney-client privilege under section 552.101 of the Government Code, we note that section 552.107 is the proper exception to raise for your attorney-client privilege claim in this instance. *See* Open Records Decision No. 676 (1988).

§ 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exception you claim and reviewed the submitted information.

Initially, we address your contention that some of the requested e-mail messages are no longer in the district's possession. The Act does not require a governmental body to disclose information that did not exist when a request for information was received or to prepare new information in response to a request. *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 Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). You assert that, to the extent some of the responsive e-mail messages exist as computer files, they are stored remotely on the district's back up tapes retained for disaster recovery purposes only and are no longer in the possession of 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 "trash bin" 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 noted, you inform us that a portion of the requested e-mail messages are contained on the district's backup tapes. We understand you to state that the e-mail messages are not maintained on the hard drive of the computer at issue. You explain that to restore the information at issue, the district would be required to load back up tapes and restore the post office data contained on each tape. Based on your representations, we determine that the locations of the files have been deleted from the FAT system. We therefore find 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. *Econ. Opportunities Dev. Corp*, 562 S.W.2d at 266; *see also* Gov't Code §§ 552.002, 552.021 (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 requested e-mail messages at issue in this instance.

Next, we address your assertion that the submitted e-mails are purely personal information. Section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the 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." *See* Gov't

Code § 552.002(a). The district states that the e-mails at issue are not work related and are personal messages sent for communication. You state that the district, pursuant to its local policy, “does allow employees limited personal use of the District’s electronic email system.” You indicate that the submitted e-mails were not collected, assembled, or maintained under a law or other ordinance or in connection with the transaction of official business. Upon review, we find that the submitted e-mails are not “public information” under the Act because they do not relate to the transaction of official district business. *See id.* § 552.002; *see also* Open Records Decision No. 635 at 4 (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). We agree that this information consists of purely personal information that is not work related. Accordingly, the district is not required to disclose the submitted e-mails under the Act.

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,



Allan D. Meesey
Assistant Attorney General
Open Records Division

ADM/eeg

Ref: ID# 290054

Enc. Submitted documents

c: Mr. Anthony Leatherwood
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(w/o enclosures)