



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 17, 2009

Mr. Joseph E. Hoffer  
Feldman, Rogers, Morris & Grover, L.L.P.  
517 Soledad Street  
San Antonio, Texas 78205-1508

OR2009-03502

Dear Mr. Hoffer:

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# 337446.

The Judson Independent School District (the "district"), which you represent, received a request for: 1) all enclosures accompanying correspondence dated August 14, 2008 from a named individual; 2) any severance or separation agreements between the district and a named individual; 3) any public information requests received by the district from a named individual during a specified time; 4) a specified report; and 5) itemized bills for district work from a specified law firm. You state you have released some of the requested information. You claim that the remaining information is excepted from disclosure under sections 552.101, 552.102, and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503.<sup>1</sup> We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments submitted by a representative of the requestor. *See Gov't Code § 552.304* (interested party may submit written comments regarding availability of requested information).

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<sup>1</sup>We note that, in comments submitted to this office, the requestor has agreed to allow the district to withhold private e-mail addresses from the responsive information. Therefore, any private e-mail addresses within the submitted documents are not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request and the district is not required to release that information in response to the request. Accordingly, we need not address your arguments against disclosure under section 552.137.

Initially, we address the requestor's contention that the district did not comply with the procedural requirements of the Act in requesting our decision. The requestor asserts that district failed to comply with subsection 552.301(e-1) of the Government Code. Section 552.301(e-1) provides the following:

A governmental body that submits written comments to the attorney general under Subsection (e)(1)(A) shall send a copy of those comments to the person who requested the information from the governmental body. If the written comments disclose or contain the substance of the information requested, the copy of the comments provided to the person must be a redacted copy.

Gov't Code § 552.301(e-1). Upon review, we find that the district did not redact information pertaining to the substance of the information requested. Thus, we conclude that the district fully complied with the requirements of section 552.301 in requesting this decision.

Next, we address the requestor's contention that the district previously released a small portion of the requested information, the specified report, to the public. We note that section 552.007 of the Government Code prohibits selective disclosure of information. Thus, a governmental body cannot withhold information from a requestor that it has voluntarily made available to another member of the public unless the information is confidential by law. *See id.* § 552.007(b). As a general rule, if a governmental body releases information to one member of the public, the Act's exceptions to disclosure are waived unless the information is deemed confidential under the Act. Open Records Decision Nos. 490 (1988), 400 (1983). Although you assert that the specified report is protected under Texas Rule of Evidence 503 and section 552.107 of the Government Code, this rule and this exception are discretionary and may be waived. As such, they do not make information confidential for purposes of section 552.007. *See id.* (prohibiting selective disclosure of information that governmental body has voluntarily made available to any member of the public); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally). In this case, if the district previously released the requested report to a member or members of the public, the district cannot now withhold such information under rule 503, and must release the requested report.

To the extent the district has not released the requested report to the public, you inform this office that the requested report was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-12570 (2008). We also note that the requested settlement agreement was the subject of a previous request, as a result of which this office issued Open Records Letter No. 2009-02244 (2009). In 2008-12570, this office held that the completed investigation report constituted a privileged attorney-client communication that may be withheld under Texas Rule of Evidence 503. In 2009-02244, we ordered the district to release the requested settlement agreement. You do not indicate that there has been any change in the law, facts, and circumstances on which

the previous rulings are based. We therefore conclude that the district must dispose of this information in accordance with Open Records Letter Nos. 2008-12570 and 2009-02244. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under section 552.301(a)).

Next, we note, and you acknowledge, that the information submitted as Exhibit E is subject to section 552.022(a)(16) of the Government Code, which provides that information in a bill for attorney's fees must be released unless it is privileged under the attorney-client privilege or is expressly confidential under other law. *See* Gov't Code § 552.022(a)(16). The Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication

transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You claim that the fee bills in their entirety are confidential under Texas Rule of Evidence 503. However, section 552.022(a)(16) of the Government Code provides that information “that is *in* a bill for attorney’s fees” is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. *See* Gov’t Code § 552.022(a)(16) (emphasis added). This provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld. *See* ORD No. 676 (attorney fee bill cannot be withheld in entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)); 589 (1991) (information in attorney fee bill excepted only to extent information reveals client confidences or attorney’s legal advice). This office has found that only information that is specifically demonstrated to be protected by the attorney-client privilege or made confidential by other law may be withheld from fee bills. *See* ORD No. 676. You also have marked information in the submitted fee bills that you claim consists of confidential attorney-client communications that were made in furtherance of the rendition of professional legal services to the district. You have identified the parties to the communications. You state that these communications have remained confidential and have not been revealed to any third party. Based on your representations and our review of the submitted information, we agree that some of the information you have marked reveals confidential communications between privileged parties. However, the remaining information you have marked does not constitute or reveal communications between privileged parties. Accordingly, we have marked the information that is protected by the attorney-client privilege and may therefore be withheld pursuant to Rule 503 of the Texas Rules of Evidence. The district may not withhold any of the remaining information in Exhibit E on this basis.

Next, we address your arguments for the information not subject to 552.022. 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. Section 21.355 of the Education Code provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” 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 administrator. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, this office also concluded that an administrator is someone who is required to hold and does hold a certificate required under

chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id* at 4. You contend that Exhibit C constitutes evaluations for the purpose of section 21.355 of the Education Code. You state that the employees at issue held administrator certificates under subchapter B of chapter 21 of the Education Code and were performing the functions of administrators at the time of the evaluations. Upon review, we agree that a portion of the information, which we have marked, consists of evaluations of the administrators at issue. Accordingly, we find that the information we have marked is subject to section 21.355 of the Education Code, and the district must withhold the marked information under section 552.101 of the Government Code. However we find that remaining information does not evaluate the administrators as contemplated by section 21.355. Accordingly, the district may not withhold any of the remaining information in Exhibit C under section 552.101 on this basis.

Section 552.101 also encompasses the doctrine of common-law privacy, while section 552.102(a) 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 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, *writ ref'd n.r.e.*), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the common-law privacy test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). Accordingly, we will consider your section 552.101 and section 552.102(a) privacy claims together for Exhibit B and the remaining information in Exhibit C.

Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. This office has found there is a legitimate public interest in the qualifications of a public employee and how that employee performs job functions and satisfies employment conditions. *See generally* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find that the information in Exhibit B is highly intimate or embarrassing information for the purposes of common-law privacy and are not of legitimate public interest. Consequently, the district must withhold Exhibit B under sections 552.101

and 552.102(a) of the Government Code.<sup>2</sup> However, we find that the remaining information in Exhibit C consists of employment information that is not highly intimate and embarrassing and is of a legitimate public interest. Accordingly, the district may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with common-law privacy or section 552.102(a) of the Government Code.

You assert that Exhibit F is excepted 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.” See Gov’t Code § 552.111. Section 552.111 encompasses the deliberative process privilege. See Open Records Decision No. 615 at 2 (1993). In Open Records Decision No. 615, this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, and opinions reflecting the policymaking processes of the governmental body. See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); see also *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin, 2001, no pet.). The purpose of section 552.111 is “to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.).

An agency’s policymaking functions do not encompass internal administrative or personnel matters. Disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. See ORD 615 at 5-6. However, 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). 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 state that the information within Exhibit F consists of the advice, opinions, and recommendation of a district’s Board of Trustees. After review of your arguments and the information at issue, we find you have failed to establish that Exhibit F, which generally consists of e-mails containing factual information and information pertaining to routine administrative and personnel matters, constitutes the district’s advice, opinion, or

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

recommendation reflecting its policymaking process. Therefore, the district may not withhold Exhibit F under section 552.111 and the deliberative process privilege.

In summary, the district may continue to rely on Open Records Letter No. 2008-12570 as a previous determination and withhold the specified investigation report in accordance with that ruling, and must continue to rely on Open Records Letter No. 2009-02244, and release the requested settlement agreement. The district may withhold the confidential attorney-client communications we have marked in Exhibit E under Texas Rule of Evidence 503. The district must withhold Exhibit B under sections 552.101 and 552.102(a) of the Government Code, and the information we have marked in Exhibit C under section 552.101 in conjunction with section 21.355 of the Education Code. The remaining responsive information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Paige Savoie  
Assistant Attorney General  
Open Records Division

PS/eb

Ref: ID#337446

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)