



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

October 13, 2009

Ms. Elisabeth Donley  
Law Office of Robert E. Luna, P. C.  
4411 North Central Expressway  
Dallas, Texas 75205

OR2009-14436

Dear Ms. Donley:

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# 358089.

The Carrollton-Farmers Branch Independent School District (the "district"), which you represent, received a request for all documents relating to the requestor "beginning on June 2, 2008, and to include all documents up to the date of reviewing all documents."<sup>1</sup> You state the district has released some of the responsive information. You state the district is redacting some of the responsive information pursuant to the federal Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>2</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.117, 552.136, 552.137, and 552.147 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.<sup>3</sup> We have considered the exceptions you claim and reviewed the submitted information, a portion of

---

<sup>1</sup>We note the district asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify the request); see also Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

<sup>2</sup>We note our office is prohibited from reviewing 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 information.

<sup>3</sup>We note you did not raise section 552.117 of the Government Code as an exception to disclosure within ten business days of the date the district received the request. *See* Gov't Code §§ 552.301(b), .302. However, because section 552.117 is a mandatory exception that can provide a compelling reason to withhold information from disclosure, we will consider your claim under section 552.117. *See id*; see also Open Records Decision Nos. 150 at 2 (1977), 319 (1982). Furthermore, we note that although you raise other exceptions under the Act, including section 552.137, you have not provided arguments under these exceptions and this ruling will not address these exceptions.

which is a representative sample.<sup>4</sup> We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304(a) (providing that a person may submit comments stating why information should or should not be released).

Initially, you assert that the present request for information is, in part, a standing request. It is implicit in several provisions of the Act that the Act applies only to information already in existence. *See id.* §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 87 (1975). Consequently, a governmental body is not required to comply with a standing request to supply information on a periodic basis as such information is prepared in the future. *See* Attorney General Opinion JM-48 at 2 (1983); *see also* Open Records Decision Nos. 476 at 1 (1987), 465 at 1 (1987). Thus, the only information encompassed by this request consists of documents that the district maintained or had a right of access to as of the date that it received the request.

Next, you inform us that portions of the submitted information, which you have marked, are not responsive as they pertain to district employees other than the requestor. We note the requestor excluded information pertaining to certain district employees other than the requestor from her request, as well as information pertaining to bank account and routing numbers, and information subject to FERPA. The district need not release non-responsive information in response to this request, and this ruling will not address that information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W. 2d 266 (Tex. Civ. App.— San Antonio 1978, writ dismissed).<sup>5</sup>

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. This exception encompasses information other statutes make confidential, such as section 301.466 of the Occupations Code, which provides:

(a) A complaint and investigation concerning a nurse under this subchapter and all information and material compiled by the board in connection with the complaint and investigation are:

(1) confidential and not subject to disclosure under Chapter 552, Government Code; and

---

<sup>4</sup>We 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.

<sup>5</sup>As the requestor excluded this information from her request, we need not address your arguments under section 552.117 and 552.136 of the Government Code for the submitted information.

(2) not subject to disclosure, discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or board employee or agent involved in license holder discipline.

(b) Notwithstanding Subsection (a), information regarding a complaint and an investigation may be disclosed to:

(1) a person involved with the board in a disciplinary action against the nurse;

(2) a nursing licensing or disciplinary board in another jurisdiction;

(3) a peer assistance program approved by the board under Chapter 467, Health and Safety Code;

(4) a law enforcement agency; or

(5) a person engaged in bona fide research, if all information identifying a specific individual has been deleted.

(c) The filing of formal charges against a nurse by the board, the nature of those charges, disciplinary proceedings of the board, and final disciplinary actions, including warnings and reprimands, by the board are not confidential and are subject to disclosure in accordance with Chapter 552, Government Code.

Occ. Code § 301.466. Section 301.466 only applies to information created or compiled by the Board of Nursing (the "board") as part of an investigation by the board. Upon review, we agree that the records you seek to withhold were created or compiled by the board as part of an investigation. You state the requestor is not entitled to receive this information under section 301.466(b) and that the information does not fall under section 301.466(c). Based on your representations and our review, we conclude the district must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 301.466(a)(1) of the Occupations Code.

Section 552.101 also encompasses section 402.083 of the Labor Code, which provides that "[i]nformation in or derived from a claim file regarding an employee is confidential and may not be disclosed by the division except as provided by this subtitle[.]" *Id.* § 402.083(a). In Open Records Decision No. 533 (1989), the City of Brownsville had received a request for similar information. This office construed the predecessor to section 402.083(a) to apply only to information that the governmental body obtained from the Industrial Accident Board, subsequently the Texas Workers' Compensation Commission, and now the division. *See* Open Records Decision No. 533 at 3-6; *see also* Labor Code § 402.086 (transferring confidentiality conferred by Labor Code § 402.083(a) to information that other parties obtain from division files). Accordingly, information in the possession of the district that was not

obtained from the division may not be withheld on the basis of section 402.083(a). Furthermore, this office has interpreted section 402.083 to protect only that “information in or derived from a claim file that explicitly or implicitly discloses the identities of employees who file workers’ compensation claims.” Open Records Decision No. 619 at 10 (1993). However, we also have stated that “[w]hether specific information implicitly discloses the identify of a particular employee must be determined on a case-by-case basis.” *Id.*

In this instance, the requestor seeks access to information in the file of a named workers’ compensation claimant. Thus, we conclude that section 402.083 is applicable to Exhibit C in its entirety. Therefore, the district must withhold the information at issue under section 552.101 of the Government Code in conjunction with section 402.083 of the Labor Code.<sup>6</sup>

Section 552.107(1) of the Government Code 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. 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 a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* 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, 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 pet.). 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).

---

<sup>6</sup>As our ruling is dispositive, we do not address your other argument against disclosure for this information.

You indicate the information you have marked consists of confidential communications to and from the district and its attorneys. You have identified the parties to the communications. You state these communications were made for the purpose of facilitating the rendition of professional legal services. Based on your representations and our review, we find the district may withhold the information you have marked under section 552.107 of the Government Code.

You contend that a portion of the submitted information 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 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* Open Records Decision No. 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. *See 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). Upon review, we determine that the information at issue pertains to a personnel matter and not issues of broad scope that affect the governmental body's policy mission. Thus, we find that the district may not withhold this information under section 552.111 of the Government Code.

Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147. Although you raise section 552.147 for a portion of the remaining information, we note the requestor has a special right of access to her own social security number. *See* Gov't Code 552.023(b) (a governmental body may not deny access to information to the person to whom the information relates on privacy grounds). Therefore, the district may not withhold this information from the requestor under section 552.147.

In summary, the district must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 301.466 of the Occupations Code. The district must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 402.083 of the Labor

Code. The district may withhold the information you have marked under section 552.107 of the Government Code. The remaining information must be released.<sup>7</sup>

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, toll free, at (888) 672-6787.

Sincerely,



Pamela Wissemann  
Assistant Attorney General  
Open Records Division

PFW/jb

Ref: ID# 358089

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

---

<sup>7</sup>We note that because the requestor has a right of access to information being released that would otherwise be confidential, the district must again seek a decision from this office if it receives another request for the same information from another requestor.