ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 27, 2010

Ms. Chris G. Elizalde
Attorney for Mexia Independent School District
Walsh, Anderson, Brown, Aldridge & Gallegos, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2010-05965

Dear Ms. Elizalde:

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# 377144.

The Mexia Independent School District (the "district"), which you represent, received a request for (1) all e-mails sent to and received by a named individual on her school e-mail account during a specified time period; (2) all e-mails between two named individuals pertaining to a specified investigation sent during a specified time period, and (3) all e-mails sent between two different named individuals during a specified time period.[1] You state that you will release some of the requested information with student-identifying information redacted pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a).[2] *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), 552.114

[1] You inform us, and provide documentation showing, that the district sought and received clarification of the request. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may as requestor to clarify request).

[2] The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA 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 purpose of our review in the open records ruling process under the Act. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: http://www.oag.state.tx.us/open/20060725usdoe.pdf.

(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). You state you have redacted home telephone numbers, home addresses, and family member information subject to section 552.117 of the Government Code under section 552.024 of the Government Code.[3] You further state that you will redact social security numbers pursuant to section 552.147 of the Government Code.[4] You assert that portions of the submitted information are not subject to the Act. You also claim that the portions of the submitted information are excepted from disclosure under sections 552.107, 552.111, and 552.137 of the Government Code.[5] We have considered the exceptions you claim and reviewed the submitted information.[6]

Initially, we address your assertion Exhibit 5 is not subject to the Act. The Act is applicable only to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act 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.

Id. § 552.002. Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the

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[3]*See* Gov't Code § 552.024(c)(2) (if employee or official or former employee or official chooses not to allow public access to his or her personal information, the governmental body may redact the information without the necessity of requesting a decision from this office).

[4]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 under the Act. *See* Gov't Code § 552.147(b).

[5]Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). We note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 is section 552.107 of the Government Code. *See* Open Records Decision Nos. 677 (2002), 676 at 6.

[6]We assume that the representative samples of records submitted to this office are 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.

governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). You contend Exhibit 5 consists of e-mails that were not "assembled, or maintained under the requirement of law or ordinance nor [were they] assembled or maintained in connection with the transaction of official school district business." You further state that the communications contained within Exhibit 5 "relate specifically to the private interests, activities, and opinions of a [d]istrict employee" and that the e-mails are private exchanges that do not address district business. Based on your representation and our review of the information at issue, we conclude Exhibit 5 does not constitute public information for the purposes of section 552.002. *See* Open Records Decision No. 635 at 4 (1995) (section 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Therefore, Exhibit 5 is not subject to the Act and need not be released in response to this request.[7]

Section 552.107(1) of the Government Code protects information coming 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. ORD 676 at 6-7. 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. *In re Tex. 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. 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, *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. *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

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[7]As our ruling is dispositive for Exhibit 5, we need not address your remaining argument for this exhibit.

S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the e-mails submitted as Exhibit 4 constitute communications between legal counsel for the district, district employees, and consultants for the district and the district's counsel. You have identified most of the parties to the communications. Furthermore, you state that these communications were made for the purpose of facilitating the rendition of professional legal services and that the confidentiality of these communications has been maintained. Based on your representations and our review, we find that most of the information within Exhibit 4 consists of attorney-client privileged communications. However, some of the submitted communications were sent to non-privileged or unidentified parties. Therefore, we find that these communications, which we have marked for release, do not constitute privileged attorney-client communications and may not be withheld under section 552.107 of the Government Code. In addition, we note that some of the individual e-mails contained in the submitted e-mail strings consist of communications with a non-privileged party or unidentified parties. To the extent these non-privileged e-mails, which we have marked, exist separate and apart from the otherwise privileged e-mail strings, they may not be withheld under section 552.107. Accordingly, with the exception of the communications marked for release and the marked non-privileged e-mails that exist separate and apart from the otherwise privileged e-mail strings, the district may withhold Exhibit 4 under section 552.107 of the Government Code.[8]

Section 552.111 of the Government Code 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 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 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

[8]As our ruling is dispositive, we need not address your remaining argument for this information.

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* Open Records Decision Nos. 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), 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 Exhibit 3 consists of interagency and intraagency communications involving the discussion of policy issues of the district. Upon review, we agree some of the information at issue reveals advice, opinions, or recommendations that pertain to policymaking. The district may withhold these portions of the information at issue, which we have marked, under section 552.111 of the Government Code. However, we find the remaining information at issue consists either of general administrative information that does not relate to policymaking or information that is purely factual in nature. Further, we find portions of the remaining information were communicated with individuals with whom you have failed to demonstrate how the district shares a privity of interest or common deliberative process. Accordingly, you have failed to demonstrate the applicability of section 552.111 to the remaining information in Exhibit 3, and none of it may not be withheld on that basis.

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). The e-mail addresses we have marked in the remaining information do not appear to be of types specifically excluded by section 552.137(c) of the Government Code. Further, you inform us that the owners of the e-mail addresses at issue have not consented to the release

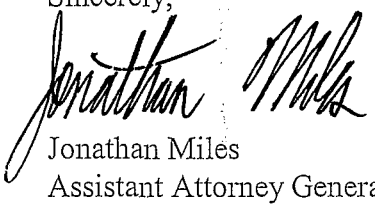
of their e-mail addresses. Therefore, the district must withhold the marked e-mail addresses under section 552.137 of the Government Code.[9]

In summary, Exhibit 5 is not subject to the Act and need not be released in response to this request. With the exception of the e-mails which we have marked for release, the district may withhold Exhibit 4 under section 552.107 of the Government Code. The district may withhold the information we have marked in Exhibit 3 under section 552.111 of the Government Code. The district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining 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, 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 377144

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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[9]We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.