



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 3, 2011

Mr. Christopher B. Gilbert  
Thompson & Horton LLP  
For the Houston Independent School District  
711 Louisiana Street, Suite 2100  
Houston, Texas 77002-2746

OR2011-01772

Dear Mr. Gilbert:

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# 408138.

The Houston Independent School District (the "district"), which you represent, received a request for electronic communications to and from district trustees or five named district employees during a specified period that relate to or mention several specified terms. You claim the submitted information is exempted from disclosure under sections 522.107 and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information, a portion of which consists of a representative sample.<sup>2</sup> We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

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<sup>1</sup>Although you also raise section 552.101 of the Government Code in conjunction with section 552.107, this office has concluded that section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

<sup>2</sup>We assume 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.

You raise section 552.107 of the Government Code for the e-mails in Exhibit B. Section 552.107(1) protects information coming within the attorney-client privilege. *Id.* § 552.107(1). 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. 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. *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). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. 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.*, 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 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the e-mails in Exhibit B were communicated between district trustees, administrators, and employees and attorneys for the district in furtherance of the rendition of legal services to the district. You state the e-mails have not been and were not intended to be disclosed to third parties. Upon review, we agree the e-mails in Exhibit B constitute privileged attorney-client communications. We conclude the district may generally withhold the marked e-mails under section 552.107 of the Government Code. However, we note some of the individual e-mails in two of the otherwise privileged e-mail chains were sent by an individual whom you have not identified. You have not explained the district’s relationship with this individual or how he is privileged with respect to the communications to which he

is a party. Accordingly, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the submitted e-mail chains, they may not be withheld under section 552.107.

You claim the e-mails submitted in Exhibit A are excepted from disclosure 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." 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 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). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. See Open Records Decision No. 561 at 9 (1990).

You state the e-mails and attachments in Exhibit A contain discussions about district policy with respect to the district's magnet program. You have identified most of the individuals who are parties to these communications and state they are district officials, employees, and representatives. Upon review, we have marked the information in Exhibit A that consists of advice, opinions, and recommendations of the individuals you identified regarding district

policy; therefore, the district may withhold the marked information under section 552.111 of the Government Code. However, the remaining portions of Exhibit A are either purely factual in nature or reflect they were communicated with parties you have not identified as sharing a common deliberative process with the district. Thus, we conclude you failed to demonstrate the applicability of the deliberative process privilege to the remaining information, and the district may not withhold the remaining information in Exhibit A under section 552.111 of the Government Code.

We note a portion of the remaining information in Exhibit A may be confidential under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. We have marked the personal information of a district employee. To the extent this employee timely elected to restrict access to this personal information under section 552.024, the district must withhold this information under section 552.117(a)(1) of the Government Code.

We note the remaining information in Exhibit A and the non-privileged e-mails in Exhibit B contain e-mail addresses of members of the public. 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). *See* Gov't Code § 552.137(a)-(c). We note section 552.137 is not applicable to an e-mail address of a person who has a contractual relationship with a governmental body. The e-mail addresses we marked are not the type excluded by subsection (c). Accordingly, unless the owners of the e-mail addresses we marked consent to their release, the district must withhold these e-mail addresses under section 552.137.<sup>3</sup>

In summary, the district may generally withhold the e-mails in Exhibit B under section 552.107 of the Government Code. However, to the extent the non-privileged e-mails we have marked in the otherwise privileged e-mail chains exist separate and apart from these privileged e-mail chains, the district may not withhold these e-mails under section 552.107

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<sup>3</sup>Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

of the Government Code. The district may withhold the information we have marked in Exhibit A under section 552.111 of the Government Code. If the employee whose personal information we have marked in Exhibit A timely elected to withhold this information under section 552.024 of the Government Code, the district must withhold the marked information under section 552.117(a)(1) of the Government Code. The district must withhold the e-mail addresses we have marked under section 552.137, unless the owners of the e-mail addresses have consented to their release. The district must release the remaining information.

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,



Kate Hartfield  
Assistant Attorney General  
Open Records Division

KH/em

Ref: ID# 408138

Enc. Submitted documents

c: Requestor  
(w/o enclosures)