



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 7, 2013

Ms. Katheryne MarDock
Assistant General Counsel
Houston Independent School District
4400 West 18th Street
Houston, Texas 77092-8501

OR2013-09584

Dear Ms. MarDock:

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# 489406.

The Houston Independent School District (the "district") received a request for the following categories of information: (1) e-mails sent or received by two named district officials during a specified time period that contain any of sixteen specified terms; (2) the calendars or agendas of the two named officials for a specified period of time; (3) information pertaining to payments made to any financial advisors, bond advisors, bond legal counsel, or financial consultants retained for the district's 2007 bond program and 2013 bond sale, including their identities; (4) information regarding the receipt of administrative fees by contractors working on the 2007 bond program; (5) written communications between the district and any bond rating agency or the United States Securities and Exchange Commission during a specified time period; (6) documents pertaining to the selection of Borris L. Miles Insurance Agency ("Borris") and ABM Facility Services ("ABM"), including bid proposals and evaluation information; (7) information pertaining to payments made to Borris or ABM; (8) specified investigations conducted by the district's Inspector General; (9) the names and personnel information of Procurement Office employees who resigned or retired during a specified time period; (10) the cellular telephone records of one of the named officials during a specified

time period; and (11) the internet histories of specified computers.¹ You state the district has redacted bank account numbers under section 552.136 of the Government Code pursuant to Open Decision No. 684 (2009).² You also state the district does not have information responsive to portions of the request.³ You state the district will release some of the requested information. You claim the remaining requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.⁴ You also state release of some of the requested information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified ABM, Aramark Management Services (“Aramark”), Borris, GCA Services Group (“GCA”), and McGriff Seibels & Williams (“McGriff”) of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov’t Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances).

¹We note the district asked for and received clarification regarding this request. *See* Gov’t Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including routing and bank account numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision. However, on September 1, 2011, the Texas legislature amended section 552.136 to allow a governmental body to redact the information described in subsection 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov’t Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(e). Thus, the statutory amendments to section 552.136 of the Government Code supercede Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsection 552.136(b) in accordance with section 552.136, not Open Records Decision No. 684.

³We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

⁴Although you raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code and Rule 503 of the Texas Rules of Evidence, this office has concluded section 552.101 does not encompass the attorney-client privilege or other exceptions found in the Act. *See* Open Records Decision No. 676 at 1-3 (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 of the Government Code is section 552.107 of the Government Code. *See* ORD 676. Additionally, although it appears you raise section 552.022 of the Government Code as an exception to disclosure, we note section 552.022 is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are made confidential under the Act or other law. *See* Gov’t Code § 552.022.

We have received comments from ABM and GCA. We have considered the submitted arguments and reviewed the submitted representative sample of information.⁵ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the submitted information contains an agenda of a public meeting of the district's Board of Education (the "board"). Agendas of a governmental body's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See id.* §§ 551.041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), .043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). Although you seek to withhold this information under section 552.103, the exceptions to disclosure found in the Act generally do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the district must release the submitted agenda, which we have marked, pursuant to chapter 551 of the Government Code.

We also note some of the information in Attachments 3 through 10 is subject to section 552.022 of the Government Code, which provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body [and]

(3) information in an account, voucher, or contract, relating to the receipt of expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1)-(3). The submitted information includes completed audits and reports made by the district that are subject to section 552.022(a)(1). The submitted names,

⁵We 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.

titles, and termination dates of district employees, which we have marked, are subject to section 552.022(a)(2). The submitted information also includes account information pertaining to the receipt or expenditure of district funds that is subject to section 552.022(a)(3). Although you raise section 552.103 of the Government Code for the information subject to section 552.022, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 does not make information confidential for the purposes of section 552.022. Therefore, the district may not withhold the information subject to section 552.022, which we have marked, under section 552.103 of the Government Code. We note portions of the information subject to section 552.022 are subject to section 552.136 of the Government Code.⁶ Because section 552.136 makes information confidential under the Act, we will address its applicability to the information subject to section 552.022.

Section 552.136 of the Government Code states “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. Accordingly, the district must withhold the information have marked under section 552.136 of the Government Code. The district must release the remaining information subject to section 552.022.

We will now address your argument under section 552.103 of the Government Code for the remaining information in Attachments 3 through 10. Section 552.103 provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated

⁶The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Id. § 552.103(a), (c). The purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. *See id.* § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). ORD 551 at 4.

You assert Attachments 3 through 10 relate to pending litigation. You state, and provide documentation showing, a lawsuit styled *Gil Ramirez Group, L.L.C. v. Houston Independent School District*, Case No. 4:10-CV-04872, was filed against the district in the United States District Court for the Southern District of Texas, Houston Division, prior to the district's receipt of the instant request for information. As such, litigation was pending against the district at the time of the request. You explain the remaining information in Attachments 3 through 10 consists of information related to the subject of the pending lawsuit. Based on your representations and our review, we find the information at issue is related to the pending litigation. Accordingly, the district may withhold the remaining information in Attachments 3 through 10 under section 552.103 of the Government Code.⁷

We note, however, once the information at issue has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. Gov't Code § 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 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

⁷As our ruling on this information is dispositive, we need not address the district's remaining arguments, ABM's arguments, or GCA's arguments against its disclosure.

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). 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). 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 information you have highlighted in Exhibit B consists of confidential communications between attorneys for the district, members of the board, and the district’s superintendent. You state these communications were made in the further of the rendition of legal services to the district and were not intended to be disclosed to third parties. Further, you inform this office these communications have remained confidential. Based on your representations and our review, we find the district may withhold the information we have marked under section 552.107(1) of the Government Code. However, the remaining information you seek to withhold consist of a communication to an individual you have not demonstrated is a privileged party. Accordingly, we find you have failed to demonstrate the applicability of the attorney-client privilege to the remaining information you have marked, and the district may not withhold this information under section 552.107(1).

You assert Exhibits A1 and A2 and Attachment 2 are excepted from disclosure under section 552.111 of the Government Code, which excepts from disclosure “[a]n 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, orig. proceeding); 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, orig. proceeding). 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. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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). However, 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. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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, including a consultant or other party with a privity of interest. *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.

This office has also concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be

excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You state the information in Exhibits A1 and A2 and Attachment 2 consist of communications between district staff, board members, attorneys for the district, and a district consultant. You state the communications pertain to policy issues pending before the board. We note some of this information consists of draft documents. However, you do not state whether the draft documents will be released to the public in their final form. Thus, if the draft documents we have marked in Exhibits A1 and A2 and Attachment 2 will be released in their final form, the district may withhold them in their entirety under section 552.111. However, if the draft documents will not be released in their final forms, the district may not withhold them in their entireties on the basis of section 552.111. In this instance, we find the information we have marked consists of advice, opinions, and recommendations pertaining to the policymaking matters of the district. Accordingly, if the draft documents will not be released in their final form, the district may withhold the information we have marked within the draft documents under section 552.111. Further, we conclude the district may withhold the additional information we have marked in Exhibits A1 and A2 and Attachment 2 under section 552.111 of the Government Code. However, the remaining information at issue either consists of factual information, consists of internal administrative matters that do not rise to the level of policymaking, or was communicated with parties you have not identified as sharing a privity of interest or common deliberative process with the district. Therefore, we conclude you have failed to demonstrate the remaining information at issue constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the district. Consequently, the district may not withhold any of the remaining information in Exhibits A1 and A2 and Attachment 2 under section 552.111 of the Government Code.

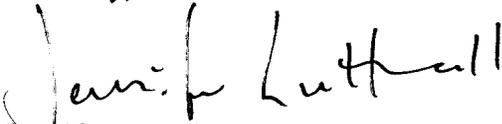
We note some of the remaining information in Exhibits A1 and A2 and Attachment 2 consists of personal e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating 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). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

In summary, the district must release the submitted agenda, which we have marked, pursuant to chapter 551 of the Government Code. Except for the information we have marked under section 552.136 of the Government Code, which the district must withhold, the district must release the information subject to section 552.022 of the Government Code. The district may withhold the remaining information in Attachments 3 through 10 under section 552.103 of the Government Code. The district may withhold the information we have marked under sections 552.107(1) of the Government Code. If the draft documents we have marked in Exhibits A1 and A2 and Attachment 2 will be released in their final form, the district may withhold them in their entirety under section 552.111 of the Government Code. If the draft documents will not be released in their final form, the district may withhold the information we have marked within the draft documents under section 552.111 of the Government Code. The district may withhold the remaining information we have marked in Exhibits A1 and A2 and Attachment 2 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, unless the owners of the e-mail addresses affirmatively consent to their release. 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 489406

Enc. Submitted documents

c: Requestor
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