KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 29, 2015

Mr. Benjamin P. Wells
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OR2015-08329

Dear Mr. Wells:

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# 561708.

The Abilene Independent School District (the "district"), which you represent, received a request for e-mails sent to or from the district's superintendent during a specified time period containing specified terms. You state the district has redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.[1] *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), .114 (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). Further, you indicate the district will redact personal e-mail addresses under section 552.137 of the Government

[1]The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student's 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 FERPA determinations must be made by the educational authority in possession of the educational records. We have posted a copy of the letter from the DOE on the Attorney General's website at http://www.oag.state.tx.us/open/20060725usdoe.pdf.

Code pursuant to Open Records Decision No. 684 (2009).[2] You state the district will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.109, and 552.111 of the Government Code.[3] We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2105-07809 (2015). In that ruling, we concluded the district must release the submitted information. You seek to withhold the information previously ordered released in Open Records Letter No. 2105-07809 under section 552.103 of the Government Code. Section 552.007 of the Government Code provides that, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the district may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you now raise section 552.103 of the Government Code for the information at issue, this section does not prohibit the release of information or make information confidential. *See 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 at 5 (1999) (waiver of discretionary exceptions). Thus, the district may not now withhold any of the previously released information under section 552.103 of the Government Code. However, the district also raises section 552.101 of the Government Code for the information at issue. Because section 552.101 makes information confidential under the Act, we will consider the applicability of this exception to the information at issue. We will also consider your arguments for the information that was not previously ordered released.

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[2]Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain 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. *See* ORD 684.

[3]Although you raise section 552.305 of the Government Code as an exception to disclosure, this section is not an exception to public disclosure under the Act. *See* Gov't Code §§ 552.024, .301, .305. Although you also raise Texas Rule of Evidence 503 and Texas Disciplinary Rule of Professional Conduct 1.05, 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 Open Records Decision No. 676 at 1-2 (2002).

Section 552.103 of the Government Code provides, in relevant part:

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

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) applies 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 requested information is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *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). *See* ORD 551 at 4.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential

opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

First, the district asserts some of the submitted information, which pertains to certain matters involving district students and employees and the district's handling of such matters, relates to anticipated civil litigation against the district. You contend the district reasonably anticipated such litigation on the date the district received the request because the parents of one of the students at issue "was told by one of the parents that all future communications should go through their attorney." Further, you contend "[t]his reasonable anticipation was further strengthened after receiving the [present] request when the district received a letter from the parents' attorney on February 20, 2015, indicating that she is investigating [the matters at issue]." However, we note the district did not receive this letter until after the district received the present request for information. Upon review, we find the district has not demonstrated any party had taken concrete steps towards filing litigation when the district received the request for information. Thus, we find you have failed to demonstrate the district reasonably anticipated civil litigation on the date it received the request. Accordingly, the district may not withhold any portion of the information at issue under section 552.103 of the Government Code on that basis.

The district also contends some of the submitted information relates to anticipated criminal litigation. However, we note the district is not a party to the anticipated criminal litigation. Therefore, the district does not have a litigation interest in the matter for purposes of section 552.103. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (stating that predecessor to section 552.103 only applies when governmental body is party to litigation). In such a situation, we require an affirmative representation from the governmental body whose litigation interests are at stake that it seeks to withhold the information from disclosure under section 552.103, as well as a demonstration of how that exception applies to the requested information. You inform us, and have provided a letter from the Taylor County Criminal District Attorney's Office (the "district attorney's office") stating, the district attorney's office objects to disclosure of some of the submitted information, which the district attorney's office has indicated, because it relates to criminal litigation reasonably anticipated by the district attorney's office. Based on this representation and our review, we find the district attorney's office reasonably anticipated criminal litigation on the date the district received the request. Further, we find the information at issue is related to the anticipated criminal litigation. Therefore, we find the district may withhold the information we have marked under section 552.103 of the Government Code on behalf of the district attorney's office.

We note, however, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed.

Further, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

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. 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 "to facilitate 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). 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)(A), (B), (C), (D), (E). 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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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).

The district states the information it marked consists of communications involving attorneys for the district, district representatives, and other district employees and officials. The district states the communications were made in confidence for the purpose of facilitating the rendition of professional legal services to the district and these communications have remained confidential. Upon review, we find you failed to demonstrate some of the e-mail strings you seek to withhold under section 552.107(1) of the Government Code were communicated between privileged parties; accordingly, the district may not withhold this

information on this basis. However, we find you have demonstrated the applicability of the attorney-client privilege to the remaining information at issue. Thus, with the exception of the non-privileged e-mail strings, which we have marked for release in their entireties, the district may generally withhold the information you have marked under section 552.107(1) of the Government Code.[4]

We note, however, some of the e-mails at issue, which we have marked, have been shared with individuals whom you have not demonstrated are privileged parties. Furthermore, if the e-mails at issue are removed from the communications and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails we have marked are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold the marked non-privileged information under section 552.107(1) of the Government Code. In that instance, we will address the district's remaining arguments against disclosure of the non-privileged e-mails.

Section 552.111 of the Government Code 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, writ ref'd n.r.e.); 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 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 severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex.*

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[4]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Attorney Gen., 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). 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.

You indicate the information you have marked consists of advice, recommendations, and opinions of district employees relating to policymaking decisions. Upon review, we find the district may withhold the information we have marked under section 552.111 of the Government Code.[5] However, we find the remaining information at issue is general administrative information that does not relate to policymaking or information that is purely factual in nature, or the information at issue was shared with a party whom you have not demonstrated shares a common deliberative process with the district. Thus, we find you have failed to demonstrate how the remaining information at issue is excepted under section 552.111. Accordingly, the district may not withhold the remaining information at issue under section 552.111 of the Government Code.

Some of the remaining information may be subject to section 552.117 of the Government Code.[6] Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code, except as provided by section 552.024(a-1). *See* Gov't Code §§ 552.117(a)(1), .024. Section 552.024(a-l) of the Government Code provides, "A school district may not require an employee or former employee of the district to choose whether to allow public access to the employee's or former employee's social security number." *Id.* § 552.024(a-1). Thus, the

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[5]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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

district may only withhold under section 552.117 the home address and telephone number, emergency contact information, and family member information of a current or former employee or official of the district who requests this information be kept confidential under section 552.024. 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. Therefore, to the extent the current or former employees whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024, the district may not withhold the information we have marked under section 552.117(a)(1).

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. Section 552.101 encompasses section 21.355 of the Education Code, which provides, "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355(a). 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 at 3 (1996). We have determined an "administrator" for purposes of section 21.355 means a person who is required to, and does in fact, hold an administrator's certificate or permit under chapter 21 of the Education Code and is performing the functions of an administrator at the time of the evaluation. *See id.* at 4. Additionally, the Third Court of Appeals has concluded a written reprimand constitutes an evaluation for purposes of section 21.355, as it "reflects the principal's judgment regarding [a teacher's] actions, gives corrective direction, and provides for further review." *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You indicate the administrator at issue held the appropriate certification at the time of the evaluation. Upon review, we find the information we have marked constitutes an evaluation as contemplated by section 21.355. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. Upon review, we find none of the remaining information constitutes an evaluation of an administrator for purposes of section 21.355. Accordingly, the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.101 of the Government Code also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Upon review, we find you have failed to demonstrate the remaining information is highly intimate or embarrassing and of no legitimate public interest. Thus, the district may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find you have failed to demonstrate how any portion of the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the district may not withhold any portion of the remaining information under section 552.101 on the basis of constitutional privacy.

Section 552.109 of the Government Code excepts from disclosure "[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy [.]" Gov't Code § 552.109. This office has held the test to be applied to information under section 552.109 is the same as the common-law privacy standard under section 552.101 of the Government Code as discussed above. *See Indus. Found.*, 540 S.W.2d at 685; Open Records Decision Nos. 506 (1988), 241 (1980), 212 (1978); *see also* Open Records Decision No. 40 (1974) (statutory predecessor to Gov't Code §552.109 may protect content of information, but not fact of communication)." Upon review, we find you have failed to demonstrate how any of the remaining information constitutes highly intimate or embarrassing information that is of no legitimate concern to the public. Therefore, the district may not withhold any portion of the remaining information under section 552.109 of the Government Code.

In summary, the district may withhold the information we have marked under section 552.103 of the Government Code on behalf of the district attorney's office. With the

exception of the e-mail strings we have marked for release, the district may withhold the information it marked under section 552.107(1) of the Government Code; however, if the non-privileged e-mails we have marked are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, the district must release the non-privileged e-mails. The district may withhold the information we have marked under section 552.111 of the Government Code. To the extent the current or former employees at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Lee Seidlits
Assistant Attorney General
Open Records Division

CLS/som

Ref: ID# 561708

Enc. Submitted documents

c: Requestor
(w/o enclosures)