



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

July 15, 2016

Ms. Stephanie E. Maher  
Counsel for Tomball Independent School District  
Rogers, Morris & Grover, L.L.P.  
5718 Westheimer Road, Suite 1200  
Houston, Texas 77057

OR2016-16061

Dear Ms. Maher:

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# 616624.

The Tomball Independent School District (the "district"), which you represent, received a request for: (1) documentation relating to fifteen specified checks; (2) the current employment contract with the superintendent; (3) all communications between district administrators and board trustees with a named company for a specified time period; (4) all bids submitted by two named companies for a specified time period; (5) all communications with five specified companies; (6) reports of contributions and expenditures filed by school board candidates for two specified elections; and (7) a list of all administrators with their current positions, assignments, and annual salaries.<sup>1</sup> You state the district will release some information. You claim the submitted information is excepted from disclosure under sections 552.107, 552.110, 552.111, 552.117, 552.126, and 552.137 of the Government

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<sup>1</sup>We note the district sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the district received the deposit payment on April 8, 2016. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

Code.<sup>2</sup> You also state release of this information may implicate the proprietary interests of Arrow Educational Services, Inc.; Bob E. Griggs & Associates; and School Executive Consulting, Inc. Accordingly, you state, and provided documentation showing, you notified these third parties of the request for information and of their rights to submit arguments to this office as to why the information at issue 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). We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note the district has redacted portions of the submitted information. We understand the district redacted information under section 552.117 of the Government Code as permitted by section 552.024(c) of the Government Code and section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>4</sup> However, the district has redacted some information not subject to these exceptions. A governmental body may not withhold information from the public without asking this office for a decision under section 552.301 of the Government Code unless a provision of the Act or a previous determination specifically authorizes the governmental body to do so. *See* Gov't Code § 552.301(a); *see also* Open Records Decision No. 673 (2001) (previous determinations). You do not assert, nor does our review of the records indicate, the district has been authorized to withhold the remaining redacted information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); ORD 673. Therefore, information must be submitted in a manner that enables this office to determine whether the information comes within the

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<sup>2</sup>We understand you to raise sections 552.117 and 552.137 of the Government Code based upon your markings. Further, although you raise section 552.101 of the Government Code, you have not submitted arguments in support of that exception; therefore, we assume you have withdrawn it. *See* Gov't Code §§ 552.301, .302. We note this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1 -2 (2002), 575 at 2 (1990). Further, although you raise Texas Rule of Evidence 503, 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. *See* Open Records Decision Nos. 677 (2002), 676 at 6.

<sup>3</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>4</sup>Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, and family member information of current or former officials or employees of a governmental body. *See* Gov't Code § 552.117. Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the employee or official or former employee or official chooses not to allow public access to the information. *See id* § 552.024(c). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain 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 seeking a decision from this office.

scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of this information does not inhibit our ability to make a ruling. In the future, however, the district should refrain from redacting any information it is not authorized to withhold in seeking an open records ruling. Failure to do so may result in the presumption the redacted information is public. *See* Gov't Code § 552.302.

The district raises section 552.110 of the Government Code for the submitted information. However, we note section 552.110 protects the interests of third parties that provide information to governmental bodies, not the interests of governmental bodies themselves. *See id.* § 552.110. Thus, we do not address the district's argument under section 552.110 on behalf of third parties.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any of the third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of the third parties has protected proprietary interests in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the district may not withhold the submitted information on the basis of any proprietary interest the third parties may have in the information.

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 asserts the information it has marked under section 552.107(1) consists of confidential communications between attorneys, officials, employees, and contractors of the district that were made for the purpose of rendering professional legal advice. It also asserts the communications were intended to be confidential and their confidentiality has been maintained. Based on the district’s representations and our review, we find the district has demonstrated the applicability of the attorney-client privilege to the information we marked. Accordingly, the district may withhold the information we marked under section 552.107(1) of the Government Code.<sup>5</sup> However, some of the remaining communications at issue consist of communications with parties the district has not demonstrated are privileged. Further, we find the district failed to demonstrate the remaining information at issue constitutes privileged attorney-client communications for the purposes of section 552.107(1). Therefore, the district may not withhold the remaining information at issue under section 552.107(1).

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*, 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

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<sup>5</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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, 364 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions 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. Attorney Gen.*, 37 S.W.3d 152, 157 (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, section 552.111 protects the factual information. See Open Records Decision No. 313 at 3 (1982).

This office has also concluded section 552.111 exempts from disclosure a preliminary draft of a document intended for public release in its final form because the draft necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document. 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 of a preliminary draft of a policymaking document, including comments, underlining, deletions, and proofreading marks, that will be released to the public in its final form. See *id.* at 2.

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.

The district asserts some of the remaining information at issue consists of advice, opinions, and recommendations relating to the district's policymaking. The district also states some of the information at issue consists of draft documents that will be released to the public in final form. Thus, to the extent the district will release the submitted draft documents to the public in their final forms, the district may withhold the submitted drafts documents we marked in their entireties under section 552.111 of the Government Code. To the extent the district will not release the draft documents to the public in their final forms, the district may not withhold the submitted draft documents in their entireties under section 552.111. In this case, we find portions of the draft documents constitute advice, opinions, or

recommendations relating to the district's policymaking. Thus, to the extent the draft documents will not be released in their final forms, the district may withhold the information we have marked under section 552.111 within the submitted draft documents. Further, upon review, we find the district may withhold some of the remaining information at issue, which we marked, under section 552.111.<sup>6</sup> However, because the district and a third-party consultant were negotiating a contract at the time of some of the remaining communications, their interests were adverse at the time the communications were made. Thus, we find you have failed to establish the district shared a privity of interest with the third-party consultant with respect to these communications. Further, we find the district has failed to demonstrate it shares a privity of interest or common deliberative process with other individuals in the remaining information at issue. Further, we find some of the remaining information at issue consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, we find the district has failed to demonstrate 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.

Section 552.117(a)(1) of the Government Code 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-1) 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 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. We note that section 552.117 encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cell phone service. *See Open Records Decision No. 506 at 5-6 (1988)* (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). However, section 552.117 does not encompass a personal e-mail address or a personal business address. *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 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 official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for information. Therefore, to the extent the individuals whose information is at

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<sup>6</sup>As our ruling is dispositive, we need not address the district's remaining arguments against disclosure of this information.

issue timely requested confidentiality under section 552.024, the district must withhold their personal telephone numbers and family member information under section 552.117(a)(1) of the Government Code; however, the district may not withhold their cellular telephone numbers if a governmental body pays for the individuals' cell phone services. If the individuals whose information is at issue did not timely request confidentiality under section 552.024, then the district may not withhold their personal telephone numbers and family member information under section 552.117(a)(1) of the Government Code.

Section 552.126 excepts from disclosure the "name of an applicant for the position of superintendent of a public school district . . . except that the board of trustees must give public notice of the name or names of the finalists being considered for the position at least 21 days" before a vote or final action is taken. Gov't Code § 552.126. Furthermore, this protection from disclosure extends not only to the name of the individual, but also to any information tending to identify the individual. *See* Open Records Decision No. 540 (1990) (interpreting section 552.123—which, in language similar to section 552.126, protects identities of applicants for chief executive officer of institution of higher education—as applying to identities, rather than just names of applicants). This office has previously held the type of information that identifies individuals in such cases includes, but is not limited to, resumes, professional qualifications, membership in professional organizations, dates of birth, current positions, publications, letters of recommendation, or any other information that can be uniquely associated with a particular applicant. *Id.* You state some of the information reveals the identity of applicants for the position of superintendent of the district. Accordingly, you seek to withhold the information at issue in its entirety under section 552.126. We understand prior to the date of the instant request, the district's board hired a superintendent from the applicants at issue in this instance and his information may not be withheld under section 552.126. Nor may the district withhold the information of other applicants who were named as finalists for the superintendent position. However, upon review, we agree portions of the information at issue identify or tend to identify other candidates for the position of superintendent. Therefore, the district may withhold names of the applicants who were not named finalists under section 552.126 of the Government Code. However, we find you have failed to demonstrate how the remaining information at issue identifies or tends to identify any particular candidate for the position of superintendent. Accordingly, the district may not withhold any of the remaining information under section 552.126.

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 id.* § 552.137(a)-(c). However, section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). Additionally, section 552.137 does not apply to the private e-mail

addresses of government officials who use their private e-mail addresses to conduct official government business. *Austin Bulldog v. Leffingwell*, No. 03-13-00604-CV (Tex. App.—Austin April 8, 2016) (mem. op.). The e-mail addresses at issue are not of the type excepted by section 552.137 and, thus, the district may not withhold them under section 552.137 of the Government Code.

In summary, the district may withhold the information we marked under section 552.107 of the Government Code. The district may withhold the draft documents we have marked under section 552.111 of the Government Code if the draft documents will be released in their final form. To the extent the draft documents will not be released in their final forms, the district may withhold the information we marked under section 552.111 within the submitted draft documents. The district may withhold the remaining information we marked under 552.111 of the Government Code. To the extent the officials whose information is at issue timely requested confidentiality under section 552.024, the district must withhold their personal telephone numbers and family member information under section 552.117(a)(1) of the Government Code; however, the district may not withhold their cellular telephone numbers if a governmental body pays for the individuals' cell phone services. The district must withhold the names of applicants for superintendent who were not named finalists under section 552.126 of the Government 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](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,



Ramsey A. Abarca  
Assistant Attorney General  
Open Records Division

RAA/dls

Ref: ID# 616624

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

3 Third Parties  
(w/o enclosures)