



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 2, 2016

Ms. Katheryne Ellison  
Assistant General Counsel  
Houston Independent School District  
Public Information Box 99  
4400 West 18th Street  
Houston, Texas 77092-8501

OR2016-19898

Dear Ms. Ellison:

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# 624995 (File No. B061516).

The Houston Independent School District (the "district") received a request for information pertaining to (1) a specified investigation; (2) certain meetings; (3) a named individual; (4) specified audits; (5) any report of a violation of law to the district's attorney regarding a named individual; (6) due diligence questionnaires and answers; (7) communications between named individuals around a specified date; (8) certain e-mails; (9) requests in the district's Office of Government Relations to provide information to the local delegation concerning bond programs; and (10) CFS management and response documents referenced in a specified conversation and memorandum.<sup>1</sup> You state you will release some information to the requestor. You state the district will rely on Open Records Letter No. 2016-00999 (2016) and withhold some of the requested information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes

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<sup>1</sup>You state, and provide documentation showing, the district sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

information is or is not excepted from disclosure). You claim some of the submitted information is not subject to the Act. Additionally, you claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107(1), and 552.116 of the Government Code.<sup>2</sup> We have considered your arguments and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we address your argument that a portion of the information is not subject to disclosure under the Act. The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002(a) defines "public information" as the following:

[I]nformation that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

*Id.* § 552.002(a). Thus, virtually all information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988).

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<sup>2</sup>Although you raise section 552.101 of the Government Code in conjunction with the attorney-client privilege encompassed by section 552.107(1) of the Government Code, this office has concluded section 552.101 does not encompass other exceptions found in the Act, nor does section 552.101 encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2(2002), 575 at 2 (1990).

<sup>3</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 contend Exhibit 10 relates to purely private and personal matters unrelated to official district business and thus, is not public information as defined by section 552.002. Based on your representation and our review, we agree the information we have indicated within Exhibit 10 is not public information for the purposes of section 552.002, and thus, is not subject to disclosure under the Act. *See Gov't Code § 552.002; see also* Open Records Decision No. 635 at 4 (1995) (section 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving no or *de minimis* use of state resources). Therefore, the information in Exhibit 10 we have indicated need not be released in response to this request for information. However, we find the remaining information in Exhibit 10 consists of personnel and administrative information maintained by the district in connection with the transaction of official district business, and, thus, is subject to the Act. Therefore, we will address your argument against disclosure of this information.

Next, you inform us some of the requested information was the subject of previous requests for rulings, as a result of which this office issued Open Records Letter Nos. 2016-19206 (2016) and 2016-19321 (2016). We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Thus, the district may continue to rely on Open Records Letter Nos. 2016-19206 and 2016-19321 as previous determinations and withhold the identical information at issue in accordance with those rulings. *See* ORD 673.

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 the doctrine of common-law privacy, which 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. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). However, information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. ORD 545. We note the payroll deductions for federal withholding tax are protected by common-law privacy and must be withheld under section 552.101, but the payroll deductions for social security, mandatory retirement, and Medicare are not protected

by common-law privacy and may not be withheld under section 552.101. *See, e.g.*, ORDs 600 at 9-12 (participation in TexFlex), 545 at 3-5; *see also* Attorney General Opinion GA-0572 at 4 (2007) (public employee's net salary protected by common-law privacy, but gross salary is not). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, you have failed to demonstrate the remaining information in Exhibit 10 is highly intimate or embarrassing and of no legitimate public interest. Thus, the district may not withhold the remaining information at issue under section 552.101 in conjunction with common-law privacy.

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. *See* ORD 676 at 6-7. First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "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).

You inform us Exhibit 11 reveals communications between district employees, the district's Board of Trustees, and outside counsel for the district. Additionally, you state these communications were made for the purpose of facilitating the rendition of professional legal services to the district, the communications were not intended to be shared with any third parties, and the confidentiality of the communications has been maintained. Based on these representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the district may withhold Exhibit 11 under section 552.107(1) of the Government Code.

Section 552.116 of the Government Code provides,

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You assert Exhibits 6 and 7 consist of audit working papers pertaining to audits conducted by the district's Internal Audit Office. You state, and provide documentation demonstrating, the audits are authorized by district board policies. *See id.* § 552.116(b)(1). Based on your representations and our review, we agree the information at issue constitutes audit working papers. Therefore, the district may withhold Exhibits 6 and 7 under section 552.116 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code, except as provided by section 552.024(a-1).<sup>4</sup> *Id.* §§ 552.117(a)(1), .024. Section 552.024(a-1) 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, a school 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 be withheld under section 552.117(a)(1) only on behalf of a current or former employee or 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 the information. Therefore, if the employee at issue timely requested confidentiality under section 552.024, the district must withhold the information we have marked under section 552.117(a)(1). Conversely, if the employee at issue did not timely request confidentiality under section 552.024, the district may not withhold the marked information under section 552.117(a)(1).

In summary, as the information we have indicated within Exhibit 10 is not public information for the purposes of section 552.002 of the Government Code, this information is not subject to the Act and need not be released in response to this request for information. The district must continue to rely on Open Records Letter Nos. 2016-19206 and 2016-19321 as previous determinations and withhold the identical information at issue in accordance with those rulings. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district may withhold Exhibit 11 under section 552.107(1) of the Government Code. The district may withhold Exhibits 6 and 7 under section 552.116 of the Government Code. If the employee at issue timely requested confidentiality under section 552.024 of the Government Code, the district

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<sup>4</sup>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)*.

must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district must release the remaining information that is subject to the Act.

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,



Cole Hutchison  
Assistant Attorney General  
Open Records Division

CH/bhf

Ref: ID# 624995

Enc. Submitted documents

c: Requestor  
(w/o enclosures)