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ATTORNEY GENERAL OF TEXAS

June 27, 2016

Mr. Christopher B. Gilbert
Counsel for the Houston Independent
Thompson & Horton LLP
3200 Southwest Freeway, Suite 2000
Houston, Texas 77027

OR2016-14594

Dear Mr. Gilbert:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 619743.

The Houston Independent School District (the "district"), which you represent, received requests from the same requestor for specified categories of information, including e-mail communications and cellular telephone records of named individuals.¹ The district states it is producing some of the requested information to the requestor, but claims the submitted information is excepted from disclosure under sections 552.107, 552.111, and 552.116 of the

¹The district sought and received clarification of the information requested. *See* Gov't Code § 552.222. After receiving the clarified request, the district sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See id.* § 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). The district states it received the deposit on May 2, 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 that governmental body receives deposit or bond).

Government Code and Texas Rule of Evidence 503.² We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, we note it appears the district may have previously released some of the submitted information to a member of the public in response to an earlier request for this information under the Act. Section 552.007 of the Government Code provides 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. *See* Gov't Code 552.007; Open Records Decision Nos. 518 at 3 (1989), 400 at 2 (1983). Sections 552.107, 552.111, and 552.116 of the Government Code and Texas Rule of Evidence 503 are discretionary in nature and serve only to protect a governmental body's interests. *See* Open Records Decision 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) and Texas Rule of Evidence 503 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). As such, they do not expressly prohibit the release of the submitted information or make the information confidential. Therefore, to the extent the district previously released any of the submitted information to a member of the public, the district may not now withhold any such information under section 552.107, 552.111, or 552.116 or rule 503 but, instead, must release it to the requestor. To the extent the district did not previously release the submitted information to a member of the public, we will address its arguments against disclosure.

Next, we note some of the information in Exhibit D is subject to section 552.022(a)(3) of the Government Code, which provides the following:

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:

...

²Although the district also raises section 552.101 in conjunction with the attorney-client privilege, this office has concluded section 552.101 does not encompass discovery privileges. Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990) (predecessor statute).

³We 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 those records contain substantially different types of information than that submitted to this office.

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

Gov't Code § 552.022(a)(3). Although the district asserts the information subject to section 552.022 is excepted from release under section 552.107 of the Government Code, as discussed above this section is discretionary and does not make information confidential under the Act. *See* ORD 676 at 6. Therefore, the district may not withhold the information subject to section 552.022 under section 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider the assertion of the attorney-client privilege under rule 503 for this information.

Texas Rule of Evidence 503(b)(1) provides the following:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must 1) show that the document is a communication

transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

The information subject to section 552.022 is attached to a communication that the district asserts is between attorneys for and administrators and board members of the district that was made for the purpose of rendering professional legal advice. It also asserts this communication was intended to be confidential and its confidentiality has been maintained. Upon review, we find the district has established the information subject to section 552.022 is part of a privileged attorney-client communication that the district may withhold under rule 503.

Section 552.107(1) also protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed for rule 503. 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. 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*, 922 S.W.2d at 923.

The district explains the remaining information in Exhibit D constitutes confidential communications between attorneys for and administrators and board members of the district that were made in furtherance of the rendition of professional legal services. The district also asserts the communications were intended to be confidential and their confidentiality has been maintained. Upon review, we find the district has demonstrated the applicability of the attorney-client privilege to the remaining communications in Exhibit D. We note some of these same communications are also located in the other exhibits, which we have marked. Therefore, the district may withhold the remaining information in Exhibit D and the information we have marked under section 552.107(1) of the Government Code.⁴

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

⁴As our ruling is dispositive, we do not address the other arguments of the district to withhold this information.

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 include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

The district asserts the remaining information in Exhibit E consists of communications between and among district administrators and board members regarding changes to board policy that constitute advice, opinions, and recommendations of the district pertaining to its policymaking functions. Upon review, we find the district has established the deliberative process privilege is applicable to some of this information, which we have marked. Therefore, the district may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information at issue does not consist of advice, opinion, or recommendation, but rather consists of general administrative or personnel matters or it is purely factual information. Accordingly, the district may not withhold any of the remaining information under section 552.111 and the deliberative process privilege.

Section 552.116 of the Government Code provides as follows:

(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 the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 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. The district states the remaining information in Exhibit F consists of audit working papers of an audit that was conducted by the district's Internal Auditor. The district also states the audit was authorized by specified board policies. Upon review, we agree the remaining information in Exhibit F constitutes audit working papers that the district may withhold pursuant to section 552.116(a) of the Government Code.


To conclude, pursuant to section 552.007 of the Government Code the district must provide to the requestor any of the submitted information to the extent the district previously released it to a member of the public. To the extent the information is not subject to section 552.007, the district may withhold the following: (1) the information subject to section 552.022 of the Government Code under Texas Rule of Evidence 503; (2) the remaining information in Exhibit D and the information we have marked under section 552.107(1) of the Government Code; (3) the information we have marked under

section 552.111 of the Government Code; and (4) the remaining information in Exhibit F under section 552.116(a) 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, 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 619743

Enc. Submitted documents

c: Requestor
(w/o enclosures)