



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 20, 2017

Ms. Sarah W. Langlois
Counsel for Houston Community College
Rogers, Morris & Grover
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2017-28966

Dear Ms. Langlois:

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# 688916 (HCC RR 1429).

The Houston Community College (the "college"), which you represent, received a request for e-mails and telephone records of a named individual during a specified period of time.¹ You state you have released some information to the requestor. You state you redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.² You further state you redacted

¹You state the college sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²The 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 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 education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

information pursuant to section 552.147(b) of the Government Code.³ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.111, and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, the following:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(18). Exhibit J contains a settlement agreement to which a governmental body is a party that is subject to section 552.022(a)(18). The college must release this information pursuant to section 552.022(a)(18), unless it is made confidential under the Act or other law. *See id.* Although the college raises section 552.103 of the Government Code for this information, section 552.103 is discretionary in nature and does not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76 (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). Therefore, the college may not withhold the information we have marked in Exhibit J under section 552.103. However, we will address your arguments under this section for information not subject to section 552.022.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes. As part of the Texas Homeland Security Act, sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make confidential certain information related to terrorism. Section 418.177 provides:

³Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

⁴We 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.

Information is confidential if the information:

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Id. § 418.177. Section 418.181 provides,

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. § 418.181. Section 418.182 provides, in relevant part,

(a) Except as provided by Subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

(b) Financial information in the possession of a governmental entity that relates to the expenditure of funds by a governmental entity for a security system is public information that is not excepted from required disclosure under Chapter 552.

Id. § 418.182(a), (b). The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

Upon review, the college has failed to establish any portion of Exhibit S reveals the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. *See* Open

Records Decision Nos. 542 (1990) (stating that governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). Additionally, we find the college has not demonstrated the information at issue was collected, assembled, or is maintained by or for the college for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity and relates to an assessment of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity. Further, we find the college has failed to demonstrate the information at issue relates to the specifications, operating procedures, or location of a security system used to protect public or private property from terrorism or related criminal activity. Therefore, the college may not withhold any of Exhibit S under section 552.101 of the Government Code in conjunction with section 418.177, section 418.181, or section 418.182 of the Government Code.

Section 552.101 of the Government Code also 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. Because “the right of privacy is purely personal[,]” that right “terminates upon the death of the person whose privacy is invaded[.]” *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref’d n.r.e.); see also *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded”) (quoting Restatement of Torts 2d); see Attorney General Opinions JM-229 (1984) (“the right of privacy lapses upon death”), H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 (1981) (the right of privacy is personal and lapses upon death). Thus, information pertaining solely to a deceased individual may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. Upon review, we find no portion of Exhibit R to be highly intimate or embarrassing and of no legitimate public concern. Thus, the college may not withhold any of the submitted information under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.103 of the Government Code provides in relevant part as follows:

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

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated 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). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, 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). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

This office has held, for purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* Open Records Decision No. 588 (1991).

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See* Open Records Decision No. 452 at 4 (1986). 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"). This office has stated a pending complaint with the Equal Employment Opportunity Commission (the "EEOC") indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). 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). In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the

requirements of the Texas Tort Claims Act (“TTCA”), Civ. Prac. & Rem. Code, ch. 101. 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).

You argue Attachments D, F, H, J, K, M, O and P are protected by section 552.103 of the Government Code. You state Exhibits D and P pertain pending EEOC complaints against the college alleging discrimination based on sex, age, and retaliation. You state these complaints were pending on the date the instant request was received by the college. You state Exhibit H pertains a student grade appeal and ongoing Office of Civil Rights investigation into the student’s claims of alleged discrimination and retaliation by the college. You also state, and submit documentation showing, prior to the college’s receipt of the instant request, the college received a notice of claim letter from a law firm alleging injuries sustained by its client on college property pertaining to the information in Exhibit J. You do not affirmatively represent to this office the notice of claim complies with the TTCA or an applicable ordinance; therefore, we will only consider the claim as a factor in determining whether the college reasonably anticipated litigation regarding Exhibit J over the incident in question. Nevertheless, based on your representations, we find the college reasonably anticipated litigation when it received the instant request.

In regard to Exhibit F, you explain an employee has hired an attorney and filed a grievance with the college, and the college has issued a “litigation hold” on all matters related to the employee and grievance. We understand the college’s policy includes a three-level process wherein supervisors hear the grievance at Levels I and II. At Level III, the college’s president, vice chancellor, or an administrative equivalent may hear the grievance, or the president, vice chancellor, or an administrative equivalent may recommend a review panel or mediation. We understand that during these hearings the grievant is allowed to be represented by counsel, present favorable evidence to the college, and present witnesses. Lastly, you state, and provide documentation showing, a lawsuit styled *Lewis v. Houston Community College*, Cause No. 2015-77438, was pending Harris County district court when the college received the request for information. Further, you inform us the information at issue is related to the subject matters of the pending and the anticipated litigation. Therefore, we conclude the college may generally withhold Exhibits D, F, H, J, K, and P under section 552.103 of the Government Code.⁵ However, upon review, the college does not inform our office that, at the time the college received the present request, anyone had taken any concrete steps toward the initiation of litigation regarding the matters in Exhibits M and O. Thus, we conclude the college has failed to demonstrate the applicability of section 552.103

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

for Exhibits M and O and no portion of the remaining information may be withheld under section 552.103(a) of the Government Code.

We note, however, it appears one of the opposing parties at issue has seen or had access to some of the information at issue, which we have marked, and it may not be withheld under section 552.103. The purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, information that has either been obtained from or provided to all parties to the litigation may not be withheld under section 552.103(a). However, the college may withhold the remaining information at issue under section 552.103. Further, the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

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, orig. proceeding); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, orig. proceeding). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). However, a governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; ORD 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You state Exhibit T consists of advice, opinions, and recommendations of college employees and legal counsel relating to the college's policy. However, we find the information at issue either consists of factual information, consists of internal administrative matters that do not rise to the level of policymaking, or was communicated with parties you have not identified as sharing a privity of interest or common deliberative process with the college. Therefore, we conclude you have failed to demonstrate the information at issue constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the college. Consequently, the college may not withhold any of the remaining information under section 552.111 of the Government Code.

Section 552.139 of the Government Code provides, in relevant part:

- (a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

Gov't Code § 552.139(a). Section 2059.055 of the Government Code provides, in pertinent part:

- (b) Network security information is confidential under this section if the information is:

- (1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;
- (2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or
- (3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). The college states some of the remaining information is protected from disclosure by section 552.139(a). However, upon review, we find the college has failed to demonstrate any portion of the information at issue relates to computer network security, to restricted information under section 2059.055, or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). Accordingly, the college may not withhold any portion of the remaining information under section 552.139 of the Government Code.

You state you will redact the information you have marked under section 552.117(a)(1) of the Government Code pursuant to section 552.024(c)(2) of the Government Code.⁶ However, we note the remaining information contains additional information subject to section 552.117(a)(1). 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. *See id.* §§ 552.117(a)(1), .024. Section 552.117 also encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular telephone 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). 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, to the extent the employees whose information is at issue timely elected confidentiality under section 552.024, the college must withhold the information you have marked and we have marked under section

⁶Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See Gov't Code § 552.024(c)(2)*.

552.117(a)(1) of the Government Code; however, the cellular telephone number may only be withheld if the cellular telephone service was not paid for by a governmental body. However, if the employees at issue did not make a timely election under section 552.024, then the system may not withhold the marked information under section 552.117(a)(1).

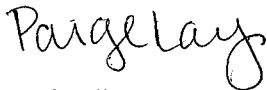
Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). 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). In *Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.), the court concluded section 552.137 does not except from disclosure the private e-mail addresses of government officials who use their private e-mail addresses to conduct official government business. *See Austin Bulldog*, 490 S.W.2d at 491. Thus, to the extent the e-mail addresses within the remaining information are not the personal e-mail addresses of college officials or employees and subsection (c) does not apply, this information is subject to section 552.137 and the college must withhold such e-mail addresses under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release.

In summary, with the exception of the information subject to section 552.022(a)(18) and the information we have marked for release, the college may withhold Exhibits D, F, H, J, K, and P under section 552.103 of the Government Code. To the extent the employees whose information is at issue timely elected confidentiality under section 552.024, the college must withhold the information you have marked and we have marked under section 552.117(a)(1) of the Government Code; however, the cellular telephone number may only be withheld if the cellular telephone service was not paid for by a governmental body. To the extent the e-mail addresses within the remaining information are not the personal e-mail addresses of college officials or employees and subsection (c) does not apply, this information is subject to section 552.137 and the college must withhold such e-mail addresses under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release. The college 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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/gw

Ref: ID# 688916

Enc. Submitted documents

cc: Requestor
(w/o enclosures)