



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 4, 2019

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

OR2019-03176

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# 748586 (Ref. No. Wische KPRC 101618).

The Houston Independent School District (the "district") received a request for all e-mails sent to or received from ten named individuals during a stated time period.¹ You state the district will release some information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.107, 552.111, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹You state the district sent the requestor a cost estimate of charges pursuant to section 552.2615 of the Government Code, and the requestor accepted the cost estimate. *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, and provide documentation demonstrating, the district received the required deposit on November 5, 2018. *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).

²We 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.

Initially, you inform us some of the responsive information was the subject of two previous requests for information, in response to which this office issued Open Records Letter Nos. 2019-00668 (2019) and 2019-01421 (2019). In Open Records Letter No. 2019-00668, we concluded the district: (1) may withhold the information it marked under section 552.107(1) of the Government Code; (2) may withhold the information we marked under section 552.111 of the Government Code; and (3) must release the remaining information. In Open Records Letter No. 2019-01421, we concluded the district: (1) may withhold Exhibit 2 under section 552.107(1) of the Government Code; and (2) may withhold Exhibits 4 and 5 under section 552.116 of the Government Code. We have no indication the law, facts, and circumstances on which Open Records Letter Nos. 2019-00668 and 2019-01421 were based have changed. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, the district may continue to rely on Open Records Letter Nos. 2019-00668 and 2019-01421 as previous determinations and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, 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 that information is or is not excepted from disclosure). To the extent the submitted information is not encompassed by the previous rulings, we will consider your arguments against disclosure of the information at issue.

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). 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 assert the information you marked within Exhibit 3 is protected from disclosure under section 552.107(1). You state the information at issue consists of communications between district employees, district trustees, and in-house and outside counsel for the district. You further state these communications consist of legal advice made in furtherance of the rendition of professional legal services to the district, and these communications were intended to be and have remained confidential. Based on your representations and our review, we find the information at issue consists of privileged attorney-client communications. Accordingly, the district may withhold the information it marked in Exhibit 3 under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

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

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 such a 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.

You assert the information submitted as Exhibit 5 consists of advice, opinions, and recommendations of administrators of the district relating to the district's policymaking. You further state the information at issue contains draft documents that are intended to be released to the public in their final forms. Upon review, we find the district may withhold the information we marked in Exhibit 5 under section 552.111 of the Government Code. However, we find the remaining information at issue consists of information that is administrative or purely factual in nature. Thus, you have failed to demonstrate the remaining information reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, the district may not withhold any portion of the remaining information at issue under section 552.111 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. The district seeks to withhold the information submitted as Exhibit 6 under section 552.116 of the Government Code. However, the purpose of section 552.116 is to protect the interests of the auditor, not the auditee or any other entity. In this instance, you inform us the information at issue consists of communications from the Texas Education Agency (the "TEA") that are marked by the TEA as audit working papers. Although the information the district seeks to withhold consists of audit working papers for the TEA, we note the information at issue is maintained by the district and this office has received no arguments from the TEA seeking to withhold the information at issue under section 552.116 of the Government Code. Accordingly, the district may not withhold any portion of Exhibit 6 under section 552.116 of the Government Code.

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.³ See Gov't Code § 552.117(a)(1). Section 552.117(a)(1) is applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. See Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and 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, if the cellular telephone number we marked pertains to an employee that timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service was not paid for by a governmental body, then the district must withhold this information under section 552.117(a)(1) of the Government Code. However, if the

³The 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).

cellular telephone number we marked does not pertain to an employee that timely requested confidentiality under section 552.024 of the Government Code or the cellular telephone service was paid for by a governmental body, then the district may not withhold the information at issue under section 552.117(a)(1) of the Government Code.

In summary, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, the district may continue to rely on Open Records Letter Nos. 2019-00668 and 2019-01421 as previous determinations and withhold or release the identical information in accordance with that ruling. The district may withhold the information it marked in Exhibit 3 under section 552.107(1) of the Government Code. The district may withhold the information we marked in Exhibit 5 under section 552.111 of the Government Code. If the cellular telephone number we marked pertains to an employee that timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service was not paid for by a governmental body, then the district must withhold this information under section 552.117(a)(1) 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,



Blake Brennan
Attorney
Open Records Division

BB/eb

Ref: ID# 748586

Enc. Submitted documents

c: Requestor
(w/o enclosures)