



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 18, 2019

Ms. Becky N. Rangel
Legal Services Specialist
Humble Independent School District
10203 Birchridge Drive
Humble, Texas 77338

OR2019-26147

Dear Ms. Rangel:

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# 786407 (ORR# 062419-01).

The Humble Independent School District (the "district") received a request for personnel records regarding the requestor during a stated time period, including disciplinary records, administrative leave e-mails, and e-mails sent to two specified district officials during stated time periods. You state the district released some information to the requestor. You also state the district has redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code.² We have considered the claimed exceptions and reviewed the submitted representative sample of information.³

¹The 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 or student 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. A copy of this letter may be found on the Office of the Attorney General's website: <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/20060725-SDOE-FERPA.pdf>.

²Although you also 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, as in this case, is section 552.107 of the Government Code. *See* Open Records Decision No. 676 at 1 (2002).

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

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 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 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.*, 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. See *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 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 state Exhibit C consists of communications between attorneys for the district, district officials, and district staff that were made for the purpose of facilitating the rendition of professional legal services to the district. You state these communications were intended to be confidential and have remained confidential. Based upon your representations and our review, we find the district has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the district may withhold Exhibit C 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

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.
⁴As our ruling is dispositive, we need not address the remaining argument against disclosure of 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; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Tex. 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 protect facts and written observations of facts and events severable from advice, opinions, and recommendations. *See 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).

This office has also concluded a preliminary draft of a document intended for public release in its final form necessarily represents the drafter’s advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *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, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document 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 No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). 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 id.*

You seek to withhold Exhibit D under section 552.111 of the Government Code on the basis of the deliberative process privilege. You state the information at issue consists of advice, opinions, and recommendations policymaking matters of the district. You further state the information at issue includes a draft document that will be released in its final form. Based upon your representations and our review, we find some of the information at issue, which we marked, consists of advice, opinions, or recommendations on the policymaking matters of the district. Accordingly, the district may withhold the information we marked under section 552.111 of the Government Code. However, we find the remaining information at issue is either general administrative information that does not relate to policymaking, information that is purely factual in nature, or communications with a third party with whom you have not demonstrated the district shares a privity of interest or common deliberative process. Thus, we conclude you failed to demonstrate the remaining information at issue constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the district. Therefore, the district may not withhold any of the remaining information under section 552.111 of the Government Code.

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 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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find some of the remaining information, which we marked, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the district may withhold Exhibit C under section 552.107(1) of the Government Code. The district may withhold the information we marked under section 552.111 of the Government Code. The district must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



James M. Graham
Assistant Attorney General
Open Records Division

JMG/eb

Ref: ID# 786407

Enc. Submitted documents

c: Requestor
(w/o enclosures)