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ATTORNEY GENERAL OF TEXAS

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

OR2022-10448

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# 938034 (Ref. Nos. HC011922F and HC011922G).

The Houston Independent School District (the "district") received two requests from the same requestor for audits involving a named employee during a specified time period, notices of termination during a specified time period, communications involving specified keywords during a specified time period, the personnel file of a named individual, and any memos sent to a named individual during a specified time period. You state the district will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.116 of the Government Code and privileged under Texas Rule of Evidence 503. Additionally, you state release of the information at issue may implicate the interests of the Texas Education Agency ("TEA"). Accordingly, you state the district notified TEA of the requests for information pursuant to section 552.304 of the Government Code. *See Gov't Code* § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have received comments from TEA. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

¹ 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 those records contain substantially different types of information than that submitted to this office.

Initially, you note Exhibit 4 is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Id. § 552.022(a)(1). You state Exhibit 4 is part of a completed investigation that is subject to section 552.022(a)(1). The district must release this information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* The district seeks to withhold portions of Exhibit 4 under section 552.107 of the Government Code. However, section 552.107 is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the district may not withhold the information at issue under section 552.107 of the Government Code. The Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider the district's assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence.

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

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* ORD 676 at 6-7. 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).

You state Exhibit 4 consists of communications between outside counsel for the district and district employees and officials. You also state the communications at issue were made for the purpose of facilitating the rendition of professional legal services to the district. You assert the information at issue was intended to be confidential and confidentiality has been maintained. Based on these representations and our review, we find the district has established the information at issue constitutes privileged attorney-client communications under rule 503. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney’s entire investigative report protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Thus, the district may withhold Exhibit 4 under Texas Rule of Evidence 503.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov’t Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed above 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. 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.

You state Exhibit 2 consists of communications involving the district’s attorney and district employees and officials. You state these communications were made in furtherance of the rendition of professional legal services to the district. You state these communications were confidential and have been kept confidential. Based on your representations and our

review, we find the district may generally withhold Exhibit 2 under section 552.107(1) of the Government Code. We note, however, some of these otherwise privileged e-mail strings at issue include e-mails received from non-privileged parties. Furthermore, if these e-mails are removed from the otherwise privileged e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we marked, are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

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 of the Government Code encompasses information protected by other statutes, such as section 21.355 of the Education Code. Section 21.355 provides, in relevant part, “[a] document evaluating the performance of a teacher or administrator is confidential under [the Act].” Educ. Code § 21.355(a). This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined an “administrator” for purposes of section 21.355 means a person who is required to, and does in fact, hold an administrator’s certificate under subchapter B of chapter 21 of the Education Code, and is performing the functions as an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

You state Exhibit 5 consists of a confidential evaluation of an administrator by the district. You provide documentation showing the administrator at issue was certified as an administrator by the State Board of Educator Certification and was acting as an administrator at the time the evaluation was prepared. Based on your representations and our review, we find the district must withhold Exhibit 5 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.101 of the Government Code also encompasses section 39.004 of the Education Code which provides, in part:

(e) Unless otherwise provided by law, all evidence collected by the [TEA] in connection with a special investigation, including witness statements and videos of agency interviews, are confidential and not subject to disclosure under [the Act], except that evidence described by this section may be disclosed:

(1) to a person with a legitimate interest in the investigation; or

(2) in connection with an administrative or other legal proceeding brought under this title.

Educ. Code § 39.004(e). The TEA states Exhibit 7 was collected and prepared by the TEA’s Division of Investigations in conjunction with a pending special investigation. The TEA also states the special investigation was authorized by section 39.003(a)(17) of the

Education Code. *See id.* § 39.003 (listing circumstances in which the commissioner shall authorize investigations). Based on these representations and our review, we agree Exhibit 7 constitutes evidence collected by the TEA in connection with a special investigation. Accordingly, the district must withhold Exhibit 7 under section 552.101 of the Government Code in conjunction with section 39.004(e) of the Education Code on behalf of the TEA.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, 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 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).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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 a preliminary draft of a document that is 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,

² As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

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.

You state Exhibit 9 consists of advice, opinions, and recommendations of district employees regarding policymaking matters and includes a draft policymaking document. The submitted information reflects the draft document at issue was released in its final form. Based on these representations and our review, we find you have demonstrated some of the information at issue consists of advice or recommendations on the policymaking matters of the district. Thus, the district may withhold the information we marked in Exhibit 9 under section 552.111 of the Government Code. However, we find the remaining information at issue is general administrative and purely factual information or does not pertain to policymaking. Thus, we find the district has not shown the remaining information at issue consists of internal communications containing advice, opinions, or recommendations of the policymaking matters of the district. Accordingly, the district may not withhold the remaining information at issue under section 552.111 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former 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).³ Gov't Code § 552.117(a)(1); *see also id.* § 552.024(a-1). We note, for purposes of section 552.117, "family member" means a spouse, minor child, or adult child who resides in the person's home. *Id.* § 552.117(c) (providing that "family member" has meaning assigned by Fin. Code § 31.006(d)). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117(a)(1) on behalf of a current or former employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employee whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, the district must withhold the cellular telephone number we marked under section 552.117(a)(1) of the Government Code.

In summary, the district may withhold Exhibit 4 under Texas Rule of Evidence 503. The district may generally withhold Exhibit 2 under section 552.107(1) of the Government Code; however, if the marked non-privileged e-mails are maintained separate and apart from the otherwise privileged e-mail strings in which they appear, the district must release

³ 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).

them. The district must withhold Exhibit 5 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold Exhibit 7 under section 552.101 of the Government Code in conjunction with section 39.004(e) of the Education Code on behalf of the TEA. The district may withhold the information we marked in Exhibit 9 under section 552.111 of the Government Code. To the extent the employee whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, the district must withhold the cellular telephone number we marked 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 <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,

Chase D. Young
Assistant Attorney General
Open Records Division

CDY/jm

Ref: ID# 938034

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)