OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

February 12, 2003

Ms. Shellie Hoffman Crow
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P.O. Box 2156
Austin, Texas 78768

OR2003-0951

Dear Ms. Crow:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 176392.

The Navarro Independent School District (the "district"), which you represent, received a request for all correspondence between school board members that pertained to the grievance filed against the board president. You state that the district's request for a ruling is limited to e-mail correspondence between board members. You state that, to the extent it exists, the remaining responsive information will be released. As for the e-mails at issue, you contend that they are not public information for purposes of the Act. Alternatively, you claim that these e-mails are excepted from disclosure under sections 552.026, 552.101, 552.103, 552.107, 552.109, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted e-mails.

We begin by considering your assertion that the records in question are not public information within the scope of the Act. Chapter 552 is only applicable to public information. *See* Gov't Code § 552.021. Section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Gov't Code § 552.002. You state that the submitted records are personal e-mails created by individual board members on their personal computers. You also state that the district has no right of access to a board member's personal e-mails. Moreover, you indicate that there is no law or ordinance requiring that a personal e-mail made on a home computer by a board member must be "collected, assembled, or maintained" by the district or the board. Finally, you assert that the e-mails are not public information because they are not maintained "in the connection with the transaction of official business."

Specifically, you contend that unless a record is created while the board is meeting as a quorum, it cannot be considered a record relating to the transaction of the board's official business. Instead, you characterize these documents as personal communications between colleagues, peers, and friends.

We have reviewed the information at issue and conclude that the e-mails are not "personal communications," but rather "public information" subject to the Act. The Act's definition of "public information" is not dependent on considerations such as whether the requested records are in the possession of an individual or whether a governmental body has a particular policy or procedure that establishes a governmental body's access to the information. *See* Open Records Decision No. 635 at 3-4 (1995); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, that information sent to individual school trustees' homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Furthermore, the Act's definition of "public information" does not require that an employee or official create the information at the direction of the governmental body. Thus, we do not find that your assertions about the creation or possession of the e-mails resolves the question before us.

You also argue that only those formal documents and statements that the board has adopted as a whole are subject to the Act; however, information is generally subject to the Act when it relates to the official business of a governmental body or is used by a public official or employee in the performance of official duties. *See* ORD 635 at 4. By enacting the Public Information Act, the legislature has clearly stated that citizens are entitled, with few exceptions, to *complete* information about the affairs of their government. *See generally* Gov't Code § 552.001. To conclude that a governmental body could withhold information which clearly relates to official business on the grounds that the information is not an "authorized" or "formally adopted" record, would allow the entity to easily and with impunity circumvent the Act's disclosure requirements. The legislature could not have possibly intended such an outcome. Thus, we decline to limit the Act's applicability to "official records" of a governmental body.

Finally, you argue that the e-mails are simply "personal communications" between friends and colleagues. The records at issue are communications between board members that relate *solely* to district business. Specifically, the e-mails contain detailed references to the policies and procedures of the board and the district; discussions regarding amendments to those policies and procedures; information relating to district employees and the conditions for their continued employment; and other relevant district information. Thus, after review of the submitted information, we conclude that the e-mails are subject to the Act. Accordingly, we will address your claimed exceptions to disclosure.

Initially, you argue that all of the submitted e-mails are excepted from disclosure under section 552.103 of the Government Code. To demonstrate the applicability of

section 552.103, the district must show that: 1) litigation is pending or was reasonably anticipated on the date it received the written request, and 2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *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). To demonstrate that litigation is reasonably anticipated, the district must furnish concrete evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Concrete evidence to support a claim that 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.[1] Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that 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).

You state that the e-mails relate to grievances filed by several employees alleging that the board president engaged in retaliatory conduct. You have not established, however, that the district's grievance proceedings should be considered litigation for purposes of section 552.103(a). *See, e.g.*, Open Records Decision No. 588 (1991) (stating that contested case under Administrative Procedure Act is litigation for purposes of section 552.103(a)). Furthermore, while you state that the affected parties are all represented by counsel, you have not established that any of these individuals have otherwise taken concrete steps toward litigation. Accordingly, you have not demonstrated that litigation is reasonably anticipated in this matter. *See generally,* Open Records Decision No. 452 at 4 (1986) (whether litigation is reasonably anticipated must be determined on case-by-case basis). Thus, the district may not withhold the submitted information under section 552.103.

You also argue that all but one of the submitted e-mails is protected by common-law privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section also encompasses the doctrine of common-law privacy. Information is excepted from required public disclosure by a common-law right of privacy if the information (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied,* 430 U.S.

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[1]In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

931 (1977). You also assert that these records are excepted from disclosure under section 552.109. Section 552.109 of the Government Code excepts from required public disclosure private correspondence and communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy. This office has ruled that the test to be applied to information claimed to be protected under section 552.109 is the same test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy. Open Records Decision No. 506 at 3 (1988). Accordingly, we will address your claims under sections 552.101 and 552.109 together.

We note that the information you seek to withhold under these exceptions does not concern the intimate aspects of an individual's private affairs, but instead directly pertains to the work behavior and job performance of district employees and officials. As we have frequently stated, information pertaining to the job performance of public employees and officials cannot be deemed outside the realm of public interest. *See generally* Open Records Decision Nos. 473 (1987) (even highly subjective evaluations of public employees may not ordinarily be withheld as private information), 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, based on our review of the records, we conclude that none of the submitted information is protected by common-law privacy.

You also assert that portions of the submitted e-mails must be withheld pursuant to sections 552.026 and 552.114 of the Government Code and the Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. In Open Records Decision No. 634 (1995), this office concluded that: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Pursuant to FERPA, the district has redacted student names and other identifying information from the documents prior to submitting them to this office for review. Thus, in accordance with Open Records Decision No. 634, you must withhold the redacted information from disclosure. We have marked additional information that is also protected by FERPA.

We also note that some of the submitted information may be protected from disclosure under section 552.117 of the Government Code. Section 552.117 excepts from required public disclosure the home addresses, telephone numbers, social security numbers, or information revealing whether a public employee has family members when the public employee requests that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold this information of a current or former employee or official who requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold the information of a current or former employee or official who made the request for confidentiality under section 552.024 after this request for information was made. Open Records Decision No. 530 at 5 (1989) (whether particular piece of information is public must be determined at time request for it is made). Therefore, if the official has elected to limit public access to this information in accordance with the procedures of section 552.024 of the Government Code, you must withhold this information from required public disclosure pursuant to section 552.117. We have marked the information that must be withheld if the official made a proper election under section 552.024.

Next, you claim that certain portions of the submitted documents are excepted from disclosure under section 552.107. 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 "for the purpose of facilitating 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 Texas 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)(A), (B), (C), (D), (E). 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 to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of 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, no writ). 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 state that the information that you have marked reveals communications between district officials and legal counsel that were made in the furtherance of the rendition of legal services. You also indicate that the marked material was not intended to be disclosed to outside parties. After reviewing your arguments and the submitted documents, we agree that a portion of information that you seek to withhold contains privileged attorney-client communications. We have marked the information that may be withheld under section 552.107.

Finally, we note that the submitted documents contain e-mail addresses that are excepted from disclosure under section 552.137. Section 552.137 of the Government Code requires a governmental body to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with the governmental body, unless the member of the public has affirmatively consented to its release. Consequently, unless the individuals to whom these addresses belong have consented to release, the district must withhold the marked e-mail addresses from disclosure.

In summary, we conclude that the district must withhold student identifying information under FERPA. If the official restricted access to her personal information in accordance with section 552.024, you must withhold the marked information from disclosure under section 552.117(1). We have marked the information that the district may withhold under section 552.107. Finally, under section 552.137, the district must withhold personal e-mail addresses of those individuals who have not consented to their release. The remaining responsive information, however, must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

June B. Harden
Assistant Attorney General
Open Records Division

JBH/seg

Ref: ID# 176392

Enc: Submitted documents

c: Mr. Chris Lykins
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(w/o enclosures)