

Blake G. Powell  
Sara Hardner Leon  
Colby R. Nichols  
Andrew Tatgenhorst  
Darrick W. Eugene  
Annabel Canchola  
Mackenzie Lewis



Jay Youngblood  
Tyler, Texas  
John J. Janssen, Ph.D.  
Corpus Christi, Texas

William C. Bednar, *Of Counsel*  
Richard Powell, *Of Counsel*

December 1, 2016

**Via Certified Mail, RRR #7014 2870 0000 5147 7513**

Attorney General Ken Paxton  
Open Records Division  
P.O. Box 12548  
Austin, Texas 78711-2548

**RE: Public Information Act Decision Request (15-Day Letter)**

**Requestor: Jonathan M. Saenz, Esq.**  
**Date of Request: November 4, 2016**  
**Entity: Dripping Springs Independent School District**  
**AG ID#: 643264**

Dear Attorney General Paxton:

Our law firm represents Dripping Springs Independent School District (the "District"). This letter is sent in accordance with Texas Government Code §552.301 as a request for an Attorney General decision regarding the Public Information Act request made by Jonathan M. Saenz, Esq. (Requestor) to the District dated and received by the District on November 4, 2016. The District's administrative office was closed from November 21 through November 25, 2016 in observance of the Thanksgiving holiday. Accordingly, this request for an opinion is timely filed within 15 business days of receipt of the original public information act request.

In accordance with Texas Government Code §552.301(d), this letter serves as the requisite notice to the Requestor that the District wishes to withhold some of the requested information and has asked for a decision from your office whether the information falls within a statutory exception to public disclosure. The following is a detailed statement of the reasons supporting the above-referenced exceptions which we are providing to the Attorney General within the time period required by Tex. Gov't Code §552.301(e).

**Documents Requested**

On November 4, 2016, the Requestor made the following request to the District:

Any policies, procedures or guidelines adopted by your office regarding showers, locker rooms, changing rooms, Title IX, bathrooms or restrooms;

1001 ESE Loop 323, Ste. 450  
Tyler, Texas 75701  
t: 903-526-6618  
f: 903-526-5766

115 Wild Basin Rd., Ste. 106  
Austin, Texas 78746  
t: 512-494-1177  
f: 512-494-1188  
800-494-1971

802 N. Carancahua St., Ste. 655  
Corpus Christi, Texas 78401  
t: 361-452-2804  
f: 361-452-2743

[www.powell-leon.com](http://www.powell-leon.com)

All records constituting or giving evidence of communications sent or received by any officer, employee or agent of your office on any device, public or private, and on any account, public or private, regarding policies, procedures and guidelines relating to showers, locker rooms, changing rooms, Title IX, bathrooms or restrooms; and

All records constituting or giving evidence of communications sent or received by any officer, employee or agent of your office on any device, public or private, and on any account, public or private, containing any of the following terms “restroom,” “rest room,” “bathroom,” “bathroom,” “locker room,” “lockerroom,” “shower,” “toilet,” “boy's room,” “men's room,” “girl's room,” “ladies room,” “changing room,” “transgender,” “transsexual,” “bisexual,” “Title IX,” or “gender identity.”

See **Exhibit A** attached hereto and incorporated herein.

The District sought clarification from the Requestor on November 10, 2016 with regards to the scope of records sought by way of the request. To date, the Requestor has not provided the District with the requested clarification. With respect to the responsive email communications between the District's Board of Trustees and administrators, the District seeks a ruling from your office, as the responsive records in question are believed to be confidential and not subject to release.

### **Documents Provided**

On November 11, 2016, the District provided the requestor with some information it believed was responsive to the request and producible under Texas Government Code §552. See **Exhibit B** attached hereto and incorporated herein. The requestor was notified that personal information that met the statutory requirements for redaction, would be redacted from the responsive documents without the necessity of an Attorney General decision. See Texas Govt. Code. §552.137. The District has determined that some of the requested information contains personally identifiable student information confidential as a matter of law under FERPA. That information has either been withheld or produced to the requestor in redacted form.

### **Excepted Documents**

Attached hereto as **Exhibit C and Exhibit D** are true and correct copies of documents that the District seeks to except from disclosure based upon the following provisions:

- Intra-agency memorandum and preliminary documents intended for public release are excepted from disclosure under Government Code §§552.111.
- Attorney/client communications are excepted from disclosure under Texas Government Code §§552.022, 552.103 and 552.107; and are privileged under Texas Rule of Evidence 503.

The requestor seeks to obtain copies of all District communications regarding the District's policies, procedures or guidelines adopted by the District regarding showers, locker rooms, changing rooms, Title IX, bathrooms or restrooms. The requestor has been provided with a copy of the Title IX policy adopted by the District. The District seeks an opinion with respect to working papers used by the District in deliberating policy considerations. Moreover, the District sought the opinion of counsel during the deliberative process. The District's Superintendent, Dr. Bruce Gearing, communicated by email with the Board of Trustees about said policy deliberations and shared material considerations regarding the policy. Moreover, Dr. Gearing requested opinion letters regarding the policy from the District's outside legal counsel and assistance therewith. The representative sample of documents attached hereto as **Exhibit C** and **Exhibit D** contain the internal email memoranda, as well as the related attorney/client communications and attorney work/product associated therewith.

#### A. Section 552.111

Section 552.111 of the Government Code excepts from disclosure . . . [a]n interagency or intra-agency 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 refd n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, the Attorney General reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.-Austin 1992, no writ) and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *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.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6.

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). Additionally, Section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S. W.3d at 160; ORD 615 at 4-5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, section 552.111 protects the factual information. *See* Open Records Decision No. 313 at 3 (1982).

The Attorney General has also concluded that Section 552.111 exempts from disclosure a preliminary draft of a document intended for public release in its final form because the 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.

The information submitted as **Exhibit C** relates to the policy considerations that reflects the deliberative process. The disclosure of such information about policy deliberations will inhibit the free discussion of policy issues among District personnel and District Board of Trustee Officers. Any factual information contained therein is so inextricably intertwined with material involving advice, opinion or recommendations such that severance of the factual data is impractical, and is therefore protected by section 552.111.

### **B. Attorney/Client Privilege**

The Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, documents contained within **Exhibit D** are protected by the attorney-client privilege under Texas Rule of Evidence 503 and the attorney work product privilege under Texas Rule of Civil Procedure 192.5.

Texas Rule of Evidence 503 encompasses the attorney-client privilege, providing in relevant part:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; 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 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). Thus, in order to withhold 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. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.-Houston [14th Dist.] 1993, no writ). Section 552.107(1) of the Government Code 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).

The representative communications contained within **Exhibit D** between Superintendent Dr. Bruce Gearing and the District's attorneys contain confidential communications between the District and counsel for the district. Those communications were made for the purpose of facilitating the rendition of professional legal services to the District. Further, the communications were made in confidence and have not been shared with others outside of the District. Accordingly, the District is entitled to withhold the information we have marked on the basis of the attorney-client privilege under Texas Rule of Evidence 503.

For the reasons stated and briefed herein, the District respectfully requests a decision authorizing that the documents attached hereto as **Exhibit C** and **Exhibit D** be excepted from disclosure.

Sincerely,



Annabel Canchola

AMC/dt

Encl. Exhibit A – PIA Request dated 11/04/16  
Exhibit B – Production of Responsive Material correspondence dated 11/11/16  
Exhibit C – Representative Sample (Section 552.111 material)  
Exhibit D – Representative Sample (Section 552.101, 552.107 material)

Cc: Jonathan M. Saenz, Esq.  
900 Congress, #220  
Austin, Texas 78701  
Via Email (letter only): [jsaenz@txvalues.org](mailto:jsaenz@txvalues.org) &  
Via Regular First Class Mail - ***Without Exhibits C & D***

Dr. Bruce Gearing, Superintendent of Schools  
Dripping Springs Independent School District  
Via Email: [bruce.gearing@dsisdtx.us](mailto:bruce.gearing@dsisdtx.us)