



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

January 7, 2003

Mr. Roger D. Hepworth
Henslee, Fowler, Hepworth & Schwartz
Attorneys at Law
800 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701

OR2003-0120

Dear Mr. Hepworth:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 174642.

The Skidmore-Tynan Independent School District (the "district"), which you represent, received a written request from a district trustee for four categories of information, including a certain legal opinion from the district's attorney. You inform us that the district has released most of the requested information, but contend that the information you submitted to this office is excepted from required public disclosure pursuant to section 552.107(1) of the Government Code. You inquire as to whether the requestor/trustee has a right of access to the legal opinion or whether the district may withhold the legal opinion from him.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, information that reflects either client confidences to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). You explain that the submitted communication

contains legal advice about recusal given by [the district's] attorney, which was made in confidence in furtherance of the attorney rendering professional legal services to [the district]. . . . The communication is confidential because it was shown only to board members. The communication was for legal advice. This communication was between the superintendent and board of trustees of [the district] and this law firm, on behalf of the school district.

Given these representations and our review of the submitted communication, we agree that the document at issue constitutes a privileged attorney-client communication, and thus, may be withheld from the public in its entirety pursuant to section 552.107(1) of the Government Code.

You inform us, however, that the district has not provided the requestor/trustee access to the legal opinion because the requestor had previously recused himself from consideration on a matter related to the subject of the requested legal opinion. In Attorney General Opinion JM-119 (1983), this office addressed a similar situation where a member of the board of trustees of the Alamo Community College requested, and was then denied, access to certain records held by the district. This office concluded that

when a trustee of a community college district, acting in his official capacity, requests information maintained by the district, he is not a member of the 'public' for purposes of the Open Records Act. On the contrary, he is a member of the board which at least constructively maintains all records in the district's possession

Because such a trustee is not merely a member of the public, his request for records in the district's possession cannot, in our opinion, be treated as a request for information under the Open Records Act.

Attorney General Opinion JM-119 at 2 (1983) (emphasis in original), *reaffirmed in* Attorney General Opinion JC-0120 (1999). Attorney General Opinion JM-119 then went on to conclude that although the Public Information Act governs the release of information to members of the general public,

[i]t cannot, in our view, control the right of access of a member of a governmental body to information in that governmental body's possession. Since the governmental body – in this instance the board of trustees of the district – at least constructively maintains records in the district's possession, we believe it logically follows that a member of that board has an inherent right of access to such records, *at least when he requests them in his official capacity.*

Id. at 3 (emphasis added).

Consequently, whether the requestor in this instance has a right of access to the requested information depends on whether he is seeking the legal opinion in his official capacity. This is a fact question, which cannot be resolved in the open records process. *See* Open Records Decision Nos. 554 (1990), 552 (1990). Consequently, we conclude that the district must determine whether the requestor is seeking the legal opinion in his capacity as a member of the board of trustees or as a member of the public. If the former, he has an inherent right of

access to the information and it must be provided to him. If the latter, the district may withhold the legal opinion in its entirety pursuant to section 552.107(1) of the Government Code.

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,



Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/RWP/lmt

Ref: ID# 174642

Enc: Submitted documents

c: Mr. Budd Howard
c/o Skidmore-Tynam Independent School District
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(w/o enclosures)