



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 12, 2009

Mr. David P. Backus
Underwood Attorneys and Counselors
P.O. Box 16197
Lubbock, Texas 79490

OR2009-03311

Dear Ms. Backus:

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# 337126 (Frenship ISD # 426741).

The Frenship Independent School District (the "district"), which you represent, received a request for five categories of information pertaining to the requestor's client. You state that you will release some of the requested information. You also state that the district does not possess information responsive to a portion of the request.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

Initially, we note that a portion of the submitted information, which we have marked, is not responsive to the instant request because it was created after the date of this request. The

¹We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²We note the district has redacted information from the submitted documents pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. We note our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made. Therefore, we will not address the applicability of FERPA to any of the submitted information.

district need not release non-responsive information in response to this request, and this ruling will not address that information.

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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* 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 the submitted information consists of confidential communications between the district’s administration and its lawyer made for the purpose of rendering professional legal services. You further inform us that the communications were intended to be and have remained confidential. Based on your representations and our review, we conclude that the

district may withhold the information we have marked under section 552.107 of the Government Code.³

However, we note that the remaining information does not consist of communications between the district's administration and its lawyer. This remaining information does not constitute attorney-client privileged communications and may not be withheld under section 552.107 of the Government Code.

Next, we consider the district's section 552.103 assertion for the information is not excepted from disclosure under section 552.107. Section 552.103 of the Government Code provides in part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Id. § 552.103(a), (c). A governmental body that raises section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

To establish that litigation is reasonably anticipated for the purposes of section 552.103, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See Open Records Decision*

³Because section 552.107 is dispositive, we do not address the district's other arguments for this information.

No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is "realistically contemplated." *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

You inform us, and provide documentation showing, that prior to the receipt of the present request, the requestor's client had been put on administrative leave by the district. You also inform us that the district informed the requestor's client that the district was "investigating potentially pursuing a nonrenewal of the client's employment contract with the district." You state that Chapter 21 of the Texas Education Code affords a term contract employee of a school district an administrative due process hearing prior to the district's failure to issue a new contract for the following school year.

Section 21.256 of the Education Code provides that hearings requested under section 21.253 of the Education Code "shall be conducted in the same manner as a trial without a jury in a district court of [Texas]." Educ. Code § 21.256(e). Section 21.256 also specifically affords a teacher the right to be represented by a representative of the teacher's choice; the right to hear the evidence on which the charges are based; the right to cross-examine each adverse witness; and the right to present evidence. *See id.* § 21.256(c). Section 21.256(d) provides that the Texas Rules of Evidence apply at the hearing. *See id.* § 21.256(d). We also note that, in a chapter 21 hearing, the hearing examiner may issue subpoenas for the attendance of witnesses and the production of documents; an appeal of the proceedings to the commissioner of education is based only on the record of the local hearing; and in a judicial appeal of the commissioner's decision, the court must review the evidence pursuant to the substantial evidence rule. *Id.* §§ 21.255(a) (subpoena power of examiner), 21.301(c) (appeal based solely on local record), 21.307(e) (substantial evidence rule for judicial review). Having considered your arguments, we find that litigation in the form of a hearing under chapter 21 of the Education Code was reasonably anticipated when the district received these requests for information. *See* Open Records Decision Nos. 588 (1991) (contested case under Administrative Procedure Act, Gov't Code ch. 2001, qualifies as litigation under statutory predecessor to section 552.103), 301 (1982) (litigation includes contested case before administrative agency). We also find that the information at issue is related to the anticipated litigation. Thus, we conclude that the district may generally withhold the remaining submitted information under section 552.103.⁴

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information.

⁴As our ruling is dispositive, we need not address your remaining argument for this information.

Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the district may withhold the attorney-client privileged documents we have marked under section 552.107 of the Government Code. The district may generally withhold the remaining information under section 552.103 of the Government Code; however, any information that has been previously seen by an opposing party may not be withheld under this exception and must be released to the requestor.

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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 337126

Enc. Submitted documents

c: Requestor
(w/o enclosures)



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 12, 2009

Mr. Hans P. Graff
Assistant General Counsel
Houston Independent School District
Mattie Mae White Educational Support Center
4400 West 18th Street
Houston, Texas 77092-8501

OR2009-03313

Dear Mr. Graff:

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# 335862.

The Houston Independent School District (the "district") received a request for information pertaining to vendor proposal submissions for RFP 08-03-05. You do not take a position as to whether the submitted information is excepted under the Act; however, you indicate that you notified the following third parties of the district's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released to the requestor: Centennial Contractors Enterprises, Inc. ("Centennial"); Fort Bend Mechanical, Ltd.; The Gil Ramirez Group, LLC; Hallmark Group; Horizon Group International LLLC; KBR (Regional Office); P2MG, Inc.; Reytec/CBIC ("Reytec"); RHJ-JOC, Inc. ("RHJ-JOC"); The Trevino Group, Inc.; and Warcon Facilities Services. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). In correspondence to this office, Centennial and RHJ-JOC assert that some of the requested information is excepted under section 552.110 of the Government Code, while Reytec asserts sections 552.101, 552.104, and 552.110 of the Government Code. We have reviewed the submitted arguments and information.