



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 15, 2009

Ms. Ellen H. Spalding
Feldman, Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77507

OR2009-14586

Dear Ms. Spalding:

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# 358434.

The Eanes Independent School District (the "district"), which you represent, received a request for all e-mails between the district board members and superintendent sent during a specified period of time. You state the district is redacting some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).¹ You claim portions of the submitted information are excepted from disclosure under sections 552.103, 552.107, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments received from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request because it was not created within the time frame specified

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

by the requestor. This ruling does not address the public availability of any information that is not responsive to the request, and the district is not required to release non-responsive information in response to this request.

We next note the submitted information includes a press release and published articles, which the district seeks to withhold under section 552.103. Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further public disclosure unless release of the information is prohibited by law or the information is confidential under law. *See* Gov't Code 552.007; Open Records Decision No. 518 at 3 (1989). Section 552.103 is a discretionary exception to disclosure and does not prohibit the release of information or make information confidential under law. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, because the district has previously made the information we have marked available to the public, they may not be withheld under section 552.103 and must be released. *See also* Gov't Code § 552.022(a)(15) (providing for release of information open to public under agency's policies).

Section 552.103 of the Government Code provides 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). The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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.); ORD 551 at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state prior to the district's receipt of this request, a civil lawsuit regarding the district's alleged violation of the Americans with Disabilities Act (the "ADA") was filed in a federal court. The district is a defendant in this lawsuit, Cause No. 1:09-CV-00362-LY1. You state the lawsuit is pending. Thus, based on your representations and our review, we find litigation was pending on the date the district received the request for information. Further, most of the information you have marked contains discussion concerning the pending litigation, as well as the district's compliance with the ADA, which is at issue in the pending lawsuit. Therefore, we find most of the information you have marked relates to the pending litigation, and it may generally be withheld under section 552.103. However, the remaining information you seek to withhold under section 552.103 relates to open meeting procedures. You have failed to demonstrate this information is related to the pending litigation. Thus, the district may not withhold the remaining information at issue, which we have marked, under section 552.103 of the Government Code.

We note the opposing party in the pending litigation has seen or had access to some of the information subject to section 552.103. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the information the opposing party in the pending litigation has seen or had access to is not protected by section 552.103 and may not be withheld on that basis. Further, we note the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Accordingly, the district may withhold the remaining information that is related to the pending litigation and that the opposing party to the litigation has not seen or had access to under section 552.103.

Section 552.107(1) of the Government Code protects information that comes 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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. *See 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1). 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, 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). 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 information you have marked consists of confidential communications between district officials and the district’s attorney. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the district. Further, you represent the communications at issue were intended to be and have remained confidential. Based on your representations and our review, we find the district may withhold the information you have marked under section 552.107 of the Government Code.

We note section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code.² *See* Gov’t Code §§ 552.117(a)(1), .024. Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The district may only withhold information under section 552.117(a)(1) on behalf of a former or current official or employee who has made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. Therefore,

²The Office of the Attorney General will raise 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).

if the official whose cellular telephone number we have marked timely elected to keep his information confidential under section 552.024 and pays for the cellular telephone service with his own funds, the district must withhold this information, which we have marked, pursuant to section 552.117(a)(1). If the official at issue did not make a timely election for confidentiality, or the district pays for the cellular telephone service, such information may not be withheld under section 552.117(a)(1).

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137 (a)-(c). The e-mail addresses you have marked are not of a type specifically excluded by section 552.137(c). *Id.* § 552.137(c). We note you have marked information under section 552.137 which is not part of an e-mail address and may not be withheld under section 552.137. Accordingly, except for where we have marked for release, the district must withhold the e-mail addresses you have marked, in addition to the e-mail address we have marked, pursuant to section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong have affirmatively consented to their public disclosure. *See id.* § 552.137(b).

In summary, with the exception of information subject to section 552.007 of the Government Code, the information already seen by the opposing party, and the information not related to the litigation, the district may withhold the information you have marked under section 552.103 of the Government Code. The district may withhold the information you have marked under section 552.107 of the Government Code. If the official at issue timely elected to keep his personal information confidential under section 552.024 and pays for the cellular telephone service with his own funds, the district must withhold the cellular telephone number we have marked pursuant to section 552.117(a)(1). Except where we have marked for release, the e-mail addresses you have marked, as well as the additional e-mail address we have marked, must be withheld under section 552.137 of the Government Code, unless owners have affirmatively consented to release. The remaining information must be released.

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, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script, appearing to read "Karen E. Stack".

Karen E. Stack
Assistant Attorney General
Open Records Division

KES/cc

Ref: ID# 358434

Enc. Submitted documents

c: Requestor
(w/o enclosures)