



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

February 14, 2011

Ms. Stephanie S. Rosenberg
General Counsel
Humble Independent School District
P.O. Box 2000
Humble, Texas 77347-2000

OR2011-02204

Dear Ms. Rosenberg:

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# 409048.

The Humble Independent School District (the "district") received eleven requests from the same requestor for correspondence with the Office of the Attorney General during specified months. You claim the requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

You inform us some of the requested information was the subject of several prior requests for information received by the district, as a result of which this office issued Open Records Letter Nos. 2010-18323 (2010) and 2011-01014 (2011). In Open Records Letter No. 2011-010147, we concluded the district must withhold certain information under section 552.101, and in Open Records Letter No. 2010-18323, we concluded the district may withhold the submitted information under section 552.104 of the Government Code. We understand the law, facts, and circumstances on which these prior rulings were based have not changed. Accordingly, with respect to this information, the district may continue to rely on these

¹Although you raise section 552.101 of the Government Code in conjunction with the attorney-client privilege under Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, we note that while you claim some information is excepted under sections 552.301(e-1) and 552.3035 of the Government Code, sections 552.301 and 552.3035 are not exceptions to disclosure under the Act. *See* Gov't Code §§ 552.301(e-1), .3035.

rulings as previous determinations and withhold or release the previously ruled upon information in accordance with Open Records Letter Nos. 2010-18323 and 2011-01014. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). With respect to the remaining requested information that was not the subject of these prior rulings, we will consider your arguments against disclosure.

Section 552.103 of the Government Code provides in relevant 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.

Gov't Code § 552.103(a), (c). The district has the burden of providing relevant facts and documents to show that the section 552.103 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.); Open Records Decision No. 551 at 4 (1990). The district must meet both prongs of this test for information to be excepted under section 552.103.

This office has long held that for the purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (1982) (concerning hearing before Public Utilities Commission). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has focused on the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding

where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* ORD 588.

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* This office has found a pending Equal Employment Opportunity Commission ("EEOC") complaint and a pending complaint filed with the Texas Workforce Commission's Civil Rights Division ("CRD") indicate litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state Exhibit B relates to a requestor who filed a grievance on behalf of her client with the district. You explain that grievances filed with the district are "litigation" in that the district follows administrative procedures in handling such disputes. You indicate, and provide documentation showing, the district's grievance policy includes a three-level process wherein an administrator and the superintendent hear the grievance at Levels I and II, and the district's board of trustees hears the grievance if the grievant appeals to Level III. You explain that during these hearings, the grievant is allowed to be represented by counsel, present favorable evidence to the district, and present witnesses to "testify" on her behalf. You state the grievant must complete the grievance process before she can appeal to the Texas Education Agency and eventually a district court. Based on your representations and documentation, we find you have demonstrated the district's administrative procedure for grievance disputes is conducted in a quasi-judicial forum and thus constitutes litigation for purposes of section 552.103. You state the individual at issue in Exhibit B filed her grievance before the instant request was received. Thus, we determine that the district was involved in pending litigation related to Exhibit B at the time it received the instant request for information. You state the information at issue directly relates to the pending litigation against the district. Accordingly, we conclude section 552.103 is generally applicable to Exhibit B.

You state, and provide documentation showing, the individual at issue in Exhibit C filed EEOC and CRD claims against the district prior to the district's receipt of the present request for information. Thus, based on your arguments and our review of the information at issue, we find the district reasonably anticipated litigation on the date the instant request was received. Additionally, you state, and we agree, the submitted information is related to the anticipated litigation. Accordingly, we conclude section 552.103 is generally applicable to Exhibit C.

We note, however, that the opposing parties in the pending and anticipated litigation have seen or had access to the information at issue. 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. Therefore, since the opposing parties have 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). Accordingly, Exhibits B and C, which the opposing parties in the litigation have seen or had access to, may not be withheld under section 552.103.

You claim portions of the remaining information, which you have marked in Exhibit A, are excepted from disclosure under section 552.107(1) of the Government Code. Section 552.107(1) 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). 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.*, 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 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 that the information you have marked under section 552.107 reveals communications between an attorney for the district and district administrators and staff. You represent that these communications were made for the purpose of facilitating the

rendition of professional legal services to the district. You also represent the confidentiality of these communications has been maintained. *See* Open Records Decision No. 516 (1989) (release of information by one state agency to another state agency is not a release to the public for the purposes of section 552.007 of the Government Code); *see also* Gov't Code §§ 552.301(e-1), .3035. Upon review, we find the district may withhold the information we have marked under section 552.107 of the Government Code. However, you have not shown the remaining information at issue constitutes communications between privileged parties that were made for facilitating the rendition of professional legal services. Accordingly, the district may not withhold this information under section 552.107 of the Government Code.

In summary, district may continue to rely on Open Records Letter Nos. 2010-18323 and 2011-01014 as previous determinations and withhold or release the previously ruled upon information in accordance with these rulings. The district may withhold the information we have marked under section 552.107 of the Government Code. 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,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/vb

Ref: ID# 409048

Enc. Submitted documents

c: Requestor
(w/o enclosures)