



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 26, 2011

Mr. Robert A. Schulman
Rogers, Morris & Grover, L.L.P.
517 Soledad Street
San Antonio, Texas 78205-1508

OR2011-12379

Dear Mr. Schulman:

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# 428096.

The Cosmos Foundation, Inc. d/b/a Harmony Public Schools (the "foundation"), which you represent, received a request for the contract between the foundation and a specified public relations and communications firm; all e-mails for a named administrator of the foundation during a specified period of time; and all e-mails for a named employee of the foundation for the last year the employee was employed with the foundation. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.128 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have not submitted any information pertaining to the requested contract or any of one of the named employee's e-mails that were maintained during his last year as an employee. Thus, to the extent such information existed and was maintained by the foundation on the date the foundation received the request for information, we presume the foundation has released it. If not, the foundation must do so at this time. *See Gov't Code*

¹Although you also raise Texas Rule of Evidence 503, we note that, in this instance, the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107. *See Open Records Decision No. 676 at 1-2 (2002).*

§§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

You raise section 552.103 of the Government Code for the e-mail communications in Exhibits 2 and 3. Section 552.103 provides, in part:

(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). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation is pending or reasonably anticipated on the date the governmental body receives 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, 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 governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See* ORD 551 at 4.

In order to demonstrate that litigation is reasonably anticipated, the governmental body must provide this office "concrete evidence showing that the claim that litigation might ensue is more than a mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open

Records Decision No. 331 (1982). We also note that the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983). This office has concluded that litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission (the "EEOC"). *See* Open Records Decision No. 336 (1982).

You state two individuals filed complaints against the foundation with the EEOC and one individual filed a complaint with the United States Department of Education Office for Civil Rights before the date the foundation received the present request for information. You state the e-mails in Exhibits 2 and 3 involve discussions regarding these complaints. Based on your representation and our review, we agree the foundation reasonably anticipated litigation on the date the foundation received the present request for information. We also agree the information at issue in Exhibits 2 and 3 is related to the anticipated litigation. As such, we conclude that the foundation may withhold the e-mails in Exhibits 2 and 3 under section 552.103 of the Government Code.

We note that once the information has been obtained by all parties to the anticipated litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation is concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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. ORD 676 at 6-7. 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 Tex. 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 to only 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 to only 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, orig. proceeding). 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 in Exhibit 4 constitutes communications between the foundation’s administrators and two named attorneys for the foundation, or was “prepared at the request” of the two attorneys “in the process of rendering professional legal services and advice to [the foundation] regarding the [foundation’s] responses” to specified legal issues. We understand the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the foundation may generally withhold Exhibit 4 under section 552.107(1). However, upon review, we find two e-mails and portions of some of the submitted e-mail strings have been shared with individuals you have not demonstrated are privileged parties. As to the two e-mails we have marked for release, we find you have failed to establish how this information constitutes communications between or among privileged parties for the purposes of section 552.107. Thus, the foundation may not withhold these e-mails under section 552.107(1). Additionally, if the non-privileged communications in the e-mail strings we have marked exist separate and apart from the e-mail strings in which they appear, then the foundation may not withhold these non-privileged communications under section 552.107(1).

You claim the information in Exhibit 5 is subject to section 552.128 of the Government Code. Section 552.128 is applicable to “[i]nformation submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program[.]” Gov’t Code § 552.128(a). However, you do not indicate that any of the vendors in Exhibit 5 submitted their information in connection with an application for certification under such a program. Moreover, section 552.128(c) states:

Information submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, including information that may also have been submitted in connection with an application for certification as a historically underutilized

or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Id. § 552.128(c). In this instance, the vendors submitted information in connection with a specific proposed contractual relationship. We therefore conclude the foundation may not withhold any of the information in Exhibit 5 under section 552.128.

We note Exhibits 4 and 5 contain private e-mail addresses that may be subject to section 552.137 of the Government Code.² Section 552.137 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). *Id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail addresses we have marked are not of the types specifically excluded by section 552.137(c). Accordingly, the foundation must withhold the e-mail addresses we have marked in Exhibits 4 and 5 under section 552.137 of the Government Code unless the owners of the addresses have affirmatively consented to their release.³

In summary, the foundation may withhold the information in Exhibits 2 and 3 under section 552.103 of the Government Code. With the exception of the e-mails we have marked for release, the foundation may generally withhold the information in Exhibit 4 under section 552.107(1) of the Government Code; however, if the communications in the non-privileged e-mail strings we have marked exist separate and apart from the e-mail strings in which they appear, then the foundation may not withhold these non-privileged communications under section 552.107(1). The foundation must withhold the e-mail addresses we have marked in Exhibits 4 and 5 under section 552.137 of the Government Code unless the owners of the addresses have consented to their release. The foundation must release the remaining information.

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.

²The Office of the Attorney General will raise a 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).

³We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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 black ink that reads "Lindsay E. Hale". The signature is written in a cursive, flowing style.

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/bs

Ref: ID# 428096

Enc. Submitted documents

c: Requestor
(w/o enclosures)