ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 11, 2012

Mr. Clyde A. Pine, Jr.
Mounce, Green, Myers, Safi, Paxson & Galatzan, P.C.
For the El Paso Independent School District
P.O. Box 1977
El Paso, Texas 79999-1977

OR2012-00572

Dear Mr. Pine:

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# 441992.

The El Paso Independent School District (the "district"), which you represent, received a request for all information pertaining to a named individual and her company from January 2006 through the present, in regard to the company's relationship with the district. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107[1], and 552.108 of the Government Code.[2] We have considered the exceptions you claim and reviewed the submitted information, a portion of which is a representative sample of information.[3] We have also considered comments submitted by the requestor. *See* Gov't

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[1]We note that although you subsequently refer to section 552.105 of the Government Code, section 552.107, which you initially raise, is the proper exception to raise for this type of information. Accordingly, we understand your arguments for section 552.105 to support your assertion of section 552.107. Section 552.105 excepts from disclosure information relating to certain real property transactions.

[2]Although you raise section 552.101 of the Government Code in conjunction with the attorney-client privilege in rule 503 of the Texas Rules of Evidence, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). We also note section 552.101 does not encompass rule 1.05 of the Texas Disciplinary Rules of Professional Conduct.

[3]This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 (1988) at 6, 497 (1988).

Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's complaint that a portion of the submitted information does not consist of a representative sample. On November 1, 2011, the district submitted arguments along with what it described as a "representative sample" for a portion of the requested information. We note that in requesting a ruling, a governmental body may submit to this office a representative sample of information rather than submitting all the requested records. *Id.* § 552.301(e)(1) (D). In doing so, it is the governmental body's burden to assure that the sample of records submitted to this office is truly representative of the requested records as a whole. *See* ORDs 499, 497. Whether the district has additional information that it has not provided is a question of fact. This office cannot resolve factual disputes in the opinion process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 at 4. Accordingly, we must accept the district's representation that the records submitted to this office are truly representative of the requested records as a whole. *See* ORDs 499, 497. This open records letter does not reach, and, therefore, does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

You state the information submitted as Exhibit C, relating to information and communications with a named company, was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-15650 (2011). In that ruling, we determined that the district may withhold the submitted information under section 552.108(a)(1) of the Government Code based on the law enforcement interest in the pending criminal investigation asserted by the United States Department of Justice. We have no indication the law, facts, and circumstances on which Open Records Letter No. 2011-15650 was based have changed. Accordingly, we conclude the district may continue to rely on Open Records Letter No. 2011-15650 as a previous determination and withhold the identical information in accordance with that ruling.[4] *See* Open Records Decision No. 673 (2001) (so long as law, facts, 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 submitted information, which was not ruled upon in Open Records Letter No. 2011-15650, we will consider your arguments against disclosure.

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[4]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

You assert the information in Exhibits A and B is protected by the attorney-client privilege. 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, 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 in Exhibits A and B constitute e-mail communications amongst the attorneys for the district, a district representative, and district employees in their capacity as clients that were made for the purpose of providing legal services to the district. You explain the individual named in the request is a representative of the district, serving as the district's public relations consultant, and is therefore a privileged party. You state the communications were intended to be confidential and have remained confidential. You identify some of the parties to the communications and we are able to discern the identities of some of the remaining parties. As such, we find the district may withhold the information we have marked in Exhibits A and B under section 552.107(1). However, we note an e-mail in Exhibit A includes communications with parties you have not identified and whose identities we are not able to discern as privileged parties. As such, the district may not withhold the e-mail we have marked for release under section 552.107(1).

You also raise section 552.103 of the Government Code for the remaining information in Exhibit A. Section 552.103 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.
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> . . .
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> (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 has the burden of providing relevant facts and documents to show that 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 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing 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.* Concrete evidence to support a claim 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.[5] *See* 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

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[5]In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983). 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 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 generally assert the remaining information at issue is subject to section 552.103 and state the information is "related to litigation of a civil or criminal nature to which [the district], or an officer or employee of [the district] as a consequence of the person's office or employment, is or may be a party, which litigation is pending or reasonably anticipated at the time of [the instant request]." However, you have not informed us, nor do the submitted documents indicate, any party has taken any concrete steps toward the initiation of litigation. *See* Gov't Code § 552.301(e)(1)(A); ORD 331. Further, you have failed to provide any arguments demonstrating that actual litigation is realistically contemplated by the district. Thus, we find you have not established that litigation was pending or reasonably anticipated litigation on the date the district received the request for information. Accordingly, the district has failed to demonstrate the applicability of section 552.103 of the Government Code to the information at issue, and it may not be withheld on that basis.

We note some of the remaining information contains personal e-mail addresses subject to section 552.137 of the Government Code.[6] 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). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure.[7]

In summary, the district may continue to rely on Open Records Letter No. 2011-15650 as a previous determination and withhold Exhibit C in accordance with that ruling. The district may withhold the information we have marked under section 552.107 of the Government

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[6]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

[7]We note Open Records Decision No. 684 (2009) was issued as 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.

Code. The district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners have consented to their 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,

Cynthia G Tynan

Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/em

Ref: ID# 441992

Enc. Submitted documents

c: Requestor
(w/o enclosures)