



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 23, 2013

Mr. Scott McDonald
Counsel for Ben Bolt-Palito Blanco Independent School District
O'Hanlon, McCollom & Demerath
808 West Avenue
Austin, Texas 78701

OR2013-01277

Dear Mr. McDonald:

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# 476711.

The Ben Bolt-Palito Blanco Independent School District (the "district"), which you represent, received a request for settlement agreements, attorney fee bills, and invoices pertaining to a specified lawsuit. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code.¹ We have considered your arguments and reviewed the submitted information.

Initially, we note section 552.022(a) of the Government Code is applicable to a portion of the submitted information. Section 552.022 provides, in pertinent part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

¹ Although you raise rule 503 of the Texas Rules of Evidence, we note 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. Open Records Decision No. 676 (2002). Further, although you raise section 552.022 of the Government Code, that provision is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under the Act or other law. See Gov't Code § 552.022.

public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(18). Exhibit 4 consists of settlement agreements that are subject to section 552.022(a)(18). Therefore, the district must release this information unless it is confidential under the Act or other law. You state the information at issue is excepted from disclosure under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception and, therefore, does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the district may not withhold Exhibit 4 under section 552.103 of the Government Code. As you raise no other exceptions against disclosure for this information, Exhibit 4 must be released. Next, we will address your arguments against disclosure of the information not subject to section 552.022 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses section 154.073 of the Civil Practice and Remedies Code, which states:

(a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

...

(d) A final written agreement to which a governmental body . . . is a signatory that is reached as a result of a dispute resolution procedure conducted under

this chapter is subject to or excepted from required disclosure in accordance with [the Act].

Civ. Prac. & Rem. Code § 154.073(a)-(b), (d). You state Exhibit 3 consists of initial settlement agreements that were superseded by final written settlement agreements that were provided as part of Exhibit 4. Therefore, you argue Exhibit 3 is confidential because it is comprised of documents created by a mediator in an alternative dispute resolution procedure to which the district was a participating party. Based on your representations and our review of the information, we agree Exhibit 3 consists of records made at an alternative dispute resolution procedure. Further, we find these records are not final written agreements subject to subsection (d). Thus, Exhibit 3 is confidential under section 154.073(b) of the Civil Practice and Remedies Code, and the district must withhold it under section 552.101 of the Government Code.²

Section 552.107(1) of the Government Code protects information that comes 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 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). 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. *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

²As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

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 Exhibit 5 consists of confidential communications between the district's legal counsel and a district employee in her capacity as a client. You state these communications were made in the furtherance of the rendition of legal services to the district and were not intended to be disclosed to third parties. Further, you inform this office these communications have remained confidential. Based on your representations and our review, we agree the submitted information constitutes privileged attorney-client communications. Accordingly, the district may withhold Exhibit 5 under section 552.107(1) of the Government Code.³

In summary, the district must withhold Exhibit 3 under section 552.101 of the Government Code in conjunction with section 154.073(b) of the Civil Practice and Remedies Code. The district may withhold Exhibit 5 under section 552.107(1) of the Government Code. The district 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.

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,



Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/som

³As section 552.107 is dispositive for this information, we need not address your argument under section 552.103 of the Government Code.

Ref: ID# 476711

Enc. Submitted documents

c: Requestor
(w/o enclosures)