



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 4, 2013

Ms. Emily Grobe
Public Information Officer
Hutto Independent School District
200 College Street
Hutto, Texas 78634

OR2013-09197

Dear Ms. Grobe:

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# 488966.

The Hutto Independent School District (the "district") received a request for (1) information pertaining to two specified lawsuits, including documents reviewed by the district's Board of Trustees (the "board") related to the board's approval of the specified lawsuits, the board's delegation of decision making authority regarding the initiation of the lawsuits, and public notices related to the board's consideration or approval of either lawsuit; (2) communications regarding one of the specified law suits; and (3) all attorney fee bills for a specified time period. You claim the submitted 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.

Initially, we note you have only submitted e-mails for our review. To the extent any additional responsive information existed when the present request was received, we presume the district has released it. If not, the district must do so at this time. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental

¹Although you raise Texas Rule of Evidence 503, 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(1) of the Government Code. *See* Open Records Decision No. 676 at 1-2 (2002).

body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

Section 552.103 of the Government Code 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). The district 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 of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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(a).

You raise section 552.103 for portions of the submitted information, which you have marked. You state, and have provided documentation showing, a lawsuit styled *Hutto Independent School District v. Ronnie Moore*, Case No. 12-CV-00055, was filed in the United States District Court for the Western District of Texas prior to the district's receipt of the request and is currently pending. Based on your representations and our review, we determine litigation was pending on the date the district received the request for information. You state the information at issue relates to this lawsuit. Based on your representations and our review, we find the information at issue is related to the pending litigation for the purposes of section 552.103.

We note, however, that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Therefore, if the opposing party has seen or had access to information relating to pending litigation through

discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the opposing party in the pending litigation has already seen or had access to some of the information at issue. The information that has been seen by the opposing party may not be withheld from the requestor under section 552.103. Thus the district may withhold the information we have marked under section 552.103. We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we will address your claim of the attorney-client privilege for the remaining information you have marked. Section 552.107(1) of the Government Code 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 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). 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, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 contend the remaining information at issue consists of confidential attorney-client privileged communications between district staff and the district’s attorneys. You state the communications were made for the purpose of providing legal counsel to the district. You

further state the communications at issue have been kept confidential. Thus, we find the information at issue is subject to section 552.107. However, we note the information at issue consists of portions of non-privileged e-mails that are included in otherwise privileged e-mail strings. Furthermore, if the e-mails are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold the information at issue under section 552.107(1) of the Government Code. However, if the non-privileged e-mails are not maintained separate and apart from the otherwise privileged e-mail strings, the district may withhold the information at issue under section 552.107(1) of the Government Code.

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).² Gov’t Code § 552.137(a)-(c). We note the requestor has a right of access to his own e-mail address pursuant to section 552.137(b) of the Government Code. *See id.* § 552.137(b). Upon review, we have marked e-mail addresses that are not specifically excluded by section 552.137(c). *See id.* § 552.137(c). As such, the e-mail addresses we have marked in the remaining information must be withheld under section 552.137 of the Government Code, unless their owners affirmatively consent to their release. *See id.* § 552.137(b).

In summary, the district may withhold the information we have marked under section 552.103 of the Government Code. To the extent the non-privileged e-mails are not maintained separate and apart from the otherwise privileged e-mail strings, the district may withhold the remaining information you have marked under section 552.107(1) of the Government Code. However, if the non-privileged e-mails are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold any of the remaining information you have marked under section 552.107(1) of the Government Code. The district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent 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

²The 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).

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 "Kathleen J. Santos". The signature is written in a cursive style with a large, stylized initial "K".

Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/som

Ref: ID# 488966

Enc. Submitted documents

c: Requestor
(w/o enclosures)