



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 27, 2014

Ms. Ellen H. Spalding
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OR2014-01530

Dear Ms. Spalding:

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# 512071 (EISD Request No. 6848).

The Eanes Independent School District (the "district"), which you represent, received a request for (1) information relating to the hiring process of a named individual and (2) a Westlake High School organization chart with a list of administrators along with their current salary and job responsibilities. It appears the district is redacting student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, account numbers pursuant to section 552.136 of the Government Code, and personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ The district claims the submitted information is excepted from disclosure

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>. Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain 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 seeking a decision from this office.

under sections 552.101, 552.102, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the district has submitted information pertaining to the hiring process of the requestor's client, but not the requested organization chart. Although you state the district submitted a representative sample of the requested information, we find the submitted information is not representative of the other types of information to which the requestor seeks access. Please be advised, this open records letter ruling applies only to the type of information you have submitted for our review. This ruling does not authorize the district to withhold any information that is substantially different from the type of information you submitted to this office. *See* Gov't Code § 552.302. Accordingly, to the extent any information responsive to the remainder of the request for information existed in the possession of the district when it received the request, we assume the district has released this information to the requestor. *See* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible). If the district has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

We next note some of the submitted information is subject to section 552.022 of the Government Code, which provides in relevant part the following:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(3), (15). Some of the submitted information relates to the expenditure of public funds by the district and, thus, is subject to section 552.022(a)(3) of the Government Code. The submitted information also includes a job description that is subject to section 552.022(a)(15) of the Government Code if the district considers this item to be open to the public under its policies. *See id.* § 552.022(a)(15). You assert the information subject to section 552.022, which we have marked, is excepted from release under section 552.103 of the Government Code. However, section 552.103 is discretionary

and 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); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district may not withhold the submitted information subject to section 552.022 of the Government Code under section 552.103 of the Government Code. Accordingly, the district must release the information marked under section 552.022(a)(3) of the Government Code to the requestor. The district must also release the job description marked under section 552.022(a)(15) of the Government Code if the district considers it to be open to the public under the district's policies. However, we will address your assertion of section 552.103 for the marked job description if the district does not consider it to be open to the public under the district's policies. We will also consider your arguments against disclosure of the remaining information.

Section 552.103 of the Government Code provides, in part, the following:

(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 governmental body 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 is 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, orig. proceeding); *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).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that

litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* 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* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined 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).

You inform us, and provide documentation showing, that before the district received the request for information, the district received a demand letter from an attorney representing the individual at issue claiming damages related to breach of contract and promissory estoppel by the district, with a threat to pursue legal action against the district if it did not respond to the demand. You state the information at issue is related to the anticipated litigation as the requestor seeks documents and information directly related to the hiring process that is the subject matter of the demand letter. Based on your representations and our review, we determine the district reasonably anticipated litigation when the district received the request. Furthermore, we find the remaining information relates to the anticipated litigation. Accordingly, we conclude section 552.103 of the Government Code is generally applicable to the information at issue.

However, we note the opposing party to the anticipated litigation has seen or had access to some of 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 seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party has seen or had access to information relating to the anticipated 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). Accordingly, the district may not withhold under section 552.103 the information that the opposing party to the anticipated litigation has seen or had access to, which we have marked. Nevertheless, we agree the district may withhold the remaining information under section 552.103 of the Government Code.² We note the applicability of section 552.103 ends once the related litigation concludes or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You assert some of the information that the opposing party to the anticipated litigation has seen or had access to is excepted from disclosure under section 552.107(1) of the Government Code. Section 552.107(1) of the Government Code protects information

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

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). 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, 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).

Upon review, we find you have failed to demonstrate the applicability of the attorney-client privilege to any of the information that the opposing party to the anticipated litigation has seen or had access to. Therefore, the district may not withhold this information under section 552.107(1) of the Government Code.

We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the

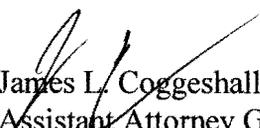
governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

To conclude, the district must release the following: (1) the information we have marked under section 552.022(a)(3) of the Government Code; (2) the job description we have marked under section 552.022(a)(15) of the Government Code if the district considers it to be open to the public under the district's policies; and (3) the information we have marked that the opposing party to the anticipated litigation has seen or had access to. However, the district may only release any copyrighted information in accordance with copyright law. The district may withhold the remaining information under section 552.103 of the Government Code.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,


James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 512071

Enc. Submitted documents

c: Requestor
(w/o enclosures)