



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 24, 2014

Ms. Elizabeth G. Neally  
Walsh, Anderson, Gallegos, Green and Trevino, P.C.  
P.O. Box 460606  
San Antonio, Texas 78246

OR2014-03331

Dear Ms. Neally:

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# 515810.

The Port Aransas Independent School District (the "district"), which you represent, received five requests from different requestors for a specified grievance filed by a named individual. The first two requestors additionally seek specified communications related to the grievance. You state the district is releasing some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code, as well as privileged under rule 503 of the Texas Rules of Evidence.<sup>1</sup> We have considered the submitted arguments and reviewed the submitted information.

Initially, we note three of the requestors seek only the specified grievance submitted by the named individual. You have submitted information beyond the specified grievance as responsive to these requests. The submitted information that does not consist of the specified grievance is not responsive to these three requests for information, and the district is not required to release such information to the requestors who did not request it.

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<sup>1</sup>Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, 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).

Next, we note the submitted information contains a copy of a statute. As laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision Nos. 551 at 2-3 (1990) (laws or ordinances are open records), 221 at 1 (1979) (official records of governmental body's public proceedings are among most open of records). Therefore, the submitted statute, which you have labeled AG - 0019 through AG - 0021, must be released.

Next, we note some of the remaining information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

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

Gov't Code § 552.022(a)(15). The remaining information includes district policies that the district has published on its website. Because the district has published these policies on its website, we find this information is subject to subsection 552.022(a)(15), and the district may withhold it only if it is made confidential under the Act or other law. You raise section 552.103 of the Government Code for the policy you have labeled AG - 0023. You also raise section 552.107 of the Government Code for the policies you have labeled AG - 0026, AG - 0031, and AG - 0036. However, sections 552.103 and 552.107 are discretionary in nature and do 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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the policy you have labeled AG - 0023 may not be withheld under section 552.103, and the policies you have labeled AG - 0026, AG - 0031, and AG - 0036 may not be withheld under section 552.107. You also seek to withhold the policies you have labeled AG - 0026, AG - 0031, and AG - 0036 under rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the policies you have labeled AG - 0026, AG - 0031, and AG - 0036. Further, as section 552.101 of the Government Code applies to confidential information, we will consider your argument under section 552.101 for the policy you have labeled AG - 0023.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert the policies you have labeled AG - 0026, AG - 0031, and AG - 0036 should be withheld under rule 503. You explain the information at issue is part of a privileged attorney-client communication involving attorneys for the district and district officials in their capacities as clients. You state these documents were communicated in furtherance of

the rendition of professional legal services to the district. You state the communication at issue was confidential, and you state the district has not waived the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the district may withhold the policies you have labeled AG - 0026, AG - 0031, and AG - 0036 under Texas Rule of Evidence 503.

You claim section 552.107 of the Government Code for some of the remaining information. Section 552.107(1) protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for rule 503. 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. *See* Open Records Decision No. 676 at 6-7 (2002). 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 remainder of the information you have labeled AG - 0024 through AG - 0049 consists of communications involving attorneys for the district and district officials in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the district. You state these communications were confidential, and you state the district has not waived the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the remaining information you have labeled AG - 0024 through AG - 0049. Accordingly, the district may withhold the remaining information you have labeled AG - 0024 through AG - 0049 under section 552.107(1) of the Government Code.

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). 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, 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). *See* ORD 551 at 4.

This office has long held that for the purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (concerning hearing before Public Utilities Commission). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* ORD 588.

In this instance, the grievance at issue was filed prior to the date the district received the first request for the information. You explain grievances filed with the district are "litigation" because the district follows administrative procedures in handling such disputes. You state the district's grievance process is a multi-level hearing process wherein various administrators initially hear the grievance, and the district's Board of Trustees ultimately hears the grievance. You explain during these hearings the grievant is allowed to be represented by counsel and present evidence to the district. You state the grievant must complete the district's grievance process in order to exhaust his administrative remedies before he can appeal to either the Texas Commissioner of Education or a court of competent jurisdiction. Based on your representations and our review, we find you have demonstrated the district's administrative procedure for disputes is conducted in a quasi-judicial forum and, thus, constitutes litigation for purposes of section 552.103. Thus, we determine the district was involved in pending litigation at the time it received the instant requests for information. Further, the information at issue directly relates to the subject of this pending litigation. Based on your representations and our review, we find the information at issue

is related to litigation that was pending at the time the district received the requests for information. Therefore, section 552.103 is generally applicable to the information you have labeled AG - 0001 through AG - 0018 and the information you have labeled AG - 0022.

We note, however, the information labeled AG - 0001 through AG - 0007 consists of the grievance filed by the opposing party to the anticipated litigation. Thus, the opposing party has seen or had access to this information. The purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party in pending litigation has seen or had access to information that is related to the litigation, 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 withhold under section 552.103 only the information labeled AG - 0008 through AG - 0018 and the information you have labeled AG - 0022, which the opposing party to the litigation has not seen or had access to. 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). However, the district may not withhold the information labeled AG - 0001 through AG - 0007 under section 552.103 of the Government Code. We will address the applicability of other exceptions to disclosure of this information.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. However, this office has concluded the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.*, Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 392 (1982) (reasons for employee's resignation ordinarily not private). Upon review, we find you have not demonstrated how any of the information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

Some of the information at issue may be subject to section 552.117 of the Government Code.<sup>2</sup> Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code, except as provided by section 552.024(a-1). See Gov't Code §§ 552.117(a)(1), .024. Section 552.024(a-1) of the Government Code provides, "A school district may not require an employee or former employee of the district to choose whether to allow public access to the employee's or former employee's social security number." *Id.* § 552.024(a-1). Thus, the district may only withhold under section 552.117 the home address and telephone number, emergency contact information, and family member information of a current or former employee or official of the district who requests this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. See Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, if the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, if the individual at issue did not timely request confidentiality under section 552.024, the district may not withhold the marked information under section 552.117(a)(1).

In summary, the submitted statute, which you have labeled AG - 0019 through AG - 0021, must be released. The district must release the policy you have labeled AG - 0023 pursuant to section 552.022(a)(15) of the Government Code. The district may withhold the policies you have labeled AG - 0026, AG - 0031, and AG - 0036 under Texas Rule of Evidence 503. The district may withhold the remaining information you have labeled AG - 0024 through AG - 0049 under section 552.107(1) of the Government Code. The district may withhold the information you have labeled AG - 0008 through AG - 0018 and the information you have labeled AG - 0022 under section 552.103 of the Government Code. The district must withhold the information we marked under section 552.117(a)(1) of the Government Code if the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code. The district must release the remaining information you have labeled AG - 0001 through AG - 0007.

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<sup>2</sup>The 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).

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](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,

A handwritten signature in black ink, appearing to read "Claire Morris Sloan", with a long horizontal flourish extending to the right.

Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/som

Ref: ID# 515810

Enc. Submitted documents

c: 5 Requestors  
(w/o enclosures)