



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 29, 2016

Mr. Stephen Trautmann, Jr.
Counsel for the Zapata Independent School District
J. Cruz & Associates, LLC
216 West Village Boulevard, Suite 202
Laredo, Texas 78041

OR2016-02259

Dear Mr. Trautmann:

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# 598964.

The Zapata County Independent School District (the "district"), which you represent, received a request for specified categories of information pertaining to the requestor, including the requestor's personnel file. The district claims the requested information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Initially, we note the district did not submit the requested personnel file of the requestor and information responsive to other categories of requested documents. We assume, to the extent any additional responsive information existed when the district received the request for information, the district has released it to the requestor. If not, then the district must do so immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses section 551.104 of the Government Code. Section 552.104 provides, "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." *Id.*

§ 551.104(c). Thus, such information cannot be released in response to an open records request. *See* Attorney General Opinion JM-995 at 5-6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act). However, other than certified agendas and tape recordings, records relating to closed meetings are not expressly made confidential by chapter 551 of the Government Code. *See, e.g.*, Open Records Decision No. 485 at 6 (1987) (investigative report not excepted from disclosure under statutory predecessor to section 552.101 simply by virtue of its having been considered in executive session); *see also* Open Records Decision No. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public). The district asserts the submitted information is confidential under section 551.104 because it was presented to the district's Board of Trustees in a closed session and incorporated into a certified agenda. However, the submitted information does not contain a certified agenda or tape. Therefore, the submitted information is not confidential pursuant to section 551.104 of the Government Code and the district may not withhold any of it under section 552.101 of the Government Code on that basis.

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 that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate 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)(A), (B), (C), (D), (E). 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.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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 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).

The district explains Exhibit A, which consists of e-mail strings and attachments, constitutes confidential communications between attorneys for and employees of the district that were made in furtherance of the rendition of professional legal services. The district also asserts the communications were intended to be confidential and their confidentiality has been maintained. Upon review, we find the district has demonstrated the applicability of the attorney-client privilege to Exhibit A. Thus, the district may generally withhold this information under section 552.107(1) of the Government Code. However, we note some of the e-mail strings at issue include e-mails and attachments received from or sent to a non-privileged party. Furthermore, if these documents are removed from the e-mail strings at issue and stand alone, they are responsive to the request for information. Therefore, if the district maintains these non-privileged e-mails and attachments, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then it may not withhold these non-privileged e-mails and attachments 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).¹ *See Gov’t Code* § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c), and the district does not inform us a member of the public has affirmatively consented to its release. Therefore, the district must withhold the e-mail address we have marked under section 552.137 of the Government Code.

To conclude, the district may generally withhold Exhibit A under section 552.107(1) of the Government Code; however, the district must release the non-privileged e-mails and attachments we have marked if it maintains these documents separate and apart from the otherwise privileged e-mail strings in which they appear. The district must withhold the

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).*

information we have marked under section 552.137 of the Government Code. The district must release the remaining information.²

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/bhf

Ref: ID# 598964

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²Because the requestor has a special right of access to some of the information being released, the district must again seek a decision from this office if it receives another request for the same information from another requestor.