



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 30, 1993

Mr. Richard M. Abernathy
Law Offices of Abernathy, Roeder,
Robertson & Joplin
P.O. Box 1210
McKinney, Texas 75069-1210

OR93-735

Dear Mr. Abernathy:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former V.T.C.S. article 6252-17a).¹ Your request was assigned ID# 22369.

The McKinney Independent School District (the "district") received an open records request for, *inter alia*, a report of an investigation conducted by an outside attorney into allegations of criminal misconduct² and unauthorized use of district property. You contend the requested report comes under the protection of sections 552.101, 552.103, and 552.111 (former sections 3(a)(1), 3(a)(3), and 3(a)(11), respectively) of the Open Records Act. You further contend, without specific reference to the act, that the district should withhold the report as attorney work product and as information coming within the attorney-client privilege.

Section 552.101 of the act protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You have not explained why you believe this exception is applicable to the information at issue, nor is it apparent to

¹We note that the Seventy-Third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46, at 988. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

²We note that although you state that the investigation "was initiated as a result of a conversation with Ken Walker, Police Chief of the City of McKinney, Texas . . . [t]o date no action has been taken by law enforcement authorities concerning these allegations."

this office that any portion of the report is confidential as a matter of law. Section 552.101 is inapplicable here.

Section 552.103 of the Open Records Act, known as the litigation exception, excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103, a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation. Open Records Decision Nos. 588 (1991); 452 (1986). The mere chance of litigation will not trigger section 552.103. Open Records Decision Nos. 437 (1986); 331, 328 (1982). 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.*

In this instance, you have made no showing that the requested report in any way relates to pending or reasonably anticipated litigation. We further note that in the context of open records requests, the work product doctrine merely represents one aspect of section 552.103 of the Open Records Act: work product may be withheld only if it "relates" to pending or reasonably anticipated litigation to which the governmental entity is or may be a party. *See* Open Records Decision No. 574 (1990). Because you have failed to meet your burden under section 552.103, the district may not withhold the report under this exception as work product or otherwise.

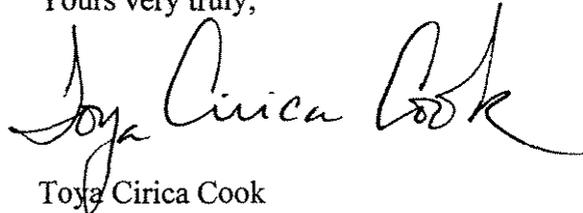
Although you do not raise the attorney-client privilege in the context of any particular section of the act, this privilege is properly deemed to be an aspect of section 552.107(1) (former section 3(a)(7)) of the act, which protects "information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas." *See* Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and confidential attorney-client communications. *Id.* 3. However, where a law firm acts as a fact finder and not in the capacity of legal advisor, section 552.107(1) is not applicable. Open Records Decision No. 462 (1987). The report at issue is a purely factual account of the attorney's findings as to the allegations of criminal misconduct and

unauthorized use of district property and as such does not come under the protection of the attorney-client privilege.

Finally, we address your section 552.111 claims. Section 552.111 (former section 3(a)(11)) of the act excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 538 (1990). The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 450 (1986). As noted above the requested report is purely factual in nature and as such does not come under the protection of section 552.111.³ Because you have raised no applicable exception with regard to the report, the district must release this record in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Toya Cirica Cook
Assistant Attorney General
Open Government Section

TCC/RWP/rho

Ref.: ID# 22369
ID# 22694

Enclosures: Submitted documents

³In Open Records Decision No. 615 (1993), this office held that

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters (Emphasis in original.)

Because the report is purely factual, we need not address here the extent to which it pertains to policy matters, as opposed to "internal administrative and personnel matters," of the district.

cc: Mr. Doug Royer
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McKinney, Texas 75069
(w/o enclosures)