



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 14, 1996

Ms. Sara Hardner Leon
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P.
1700 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701-2443

OR96-1453

Dear Ms. Leon:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 100141.

The Austin Independent School District ("AISD"), which you represent, received a request for all legal bills that AISD has received from your law firm. You have submitted a representative sample of the bills to this office for review.¹ You contend that certain entries on the bills are excepted from disclosure under sections 552.026, 552.102, 552.103, 552.104, 552.105, 552.107, 552.111, and 552.114 of the Government Code.

Although you claim that some information in the legal bills is excepted from disclosure under sections 552.102 and 552.111 of the Government Code, you failed to submit to this office written comments explaining the reasons why these exceptions apply to the legal bills. As you have not met your burden of establishing how and why sections 552.102 and 552.111 apply to the legal bills, we have no basis upon which to pronounce the legal bills protected under these sections. Open Records Decision Nos. 542 (1990), 532 (1989), 363 (1983).

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You assert that some information contained in the billing statements relates to anticipated litigation to which AISD is a party, and that, therefore, this information is excepted from disclosure under section 552.103. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *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 (1990) at 4. To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 (1986) at 4. 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).

The requestor, an attorney, has "filed three administrative actions" against AISD on behalf of AISD students, and you claim that AISD reasonably anticipates litigation in connection with these actions. The requestor has also threatened legal action against AISD in connection with two of the administrative actions. We agree that AISD reasonably anticipates litigation in connection with these two administrative actions. Thus, pursuant to section 552.103(a), AISD may withhold the information in the legal bills that is related to the reasonably anticipated litigation.² We have marked the information accordingly.

The third administrative action has been "settled." Section 552.103(a) does not apply to information related to litigation that has been settled. Open Records Decision No. 350 (1982). As information related to the "settled" administrative action is not protected by section 552.103(a), AISD must release this information unless it is protected by one of the other exceptions to disclosure discussed below or is confidential by law.

You contend that some of the entries on the billing statements are excepted from disclosure under section 552.107, because disclosure of these entries would violate the attorney-client privilege. Section 552.107 excepts information from disclosure if:

²We note that once all parties to litigation have gained access to the information at issue, through discovery or otherwise, section 552.103(a) is no longer applicable. Open Records Decisions Nos. 551 (1990), 454 (1986). Further, once the litigation has concluded, section 552.103(a) is no longer applicable. Open Records Decision No. 350 (1982). Additionally, AISD generally has discretion to release information. Gov't Code § 552.007. However, some of the information excepted from disclosure under section 552.103(a) may be confidential by law, specifically the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g. Therefore, even though AISD generally has discretion to release information, AISD should ensure that any information that it may choose to release is not confidential by law. See Gov't Code § 552.007.

it is 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 Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Although section 552.107(1) appears to except information within rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct, the rule cannot be applied as broadly as written to information that is requested under the Open Records Act. Open Records Decision No. 574 (1990) at 5. To prevent governmental bodies from circumventing the Open Records Act by transferring information to their attorneys, section 552.107(1) is limited to material within the attorney-client privilege for confidential communications; "unprivileged information" as defined by rule 1.05 is not excepted under section 552.107(1). Open Records Decision Nos. 574 (1990) at 5; 462 (1987) at 13-14.

Thus, this exception protects only the essence of the confidential relationship between attorney and client from the disclosure requirements of the Open Records Act. Open Records Decision No. 574 (1990) at 5. Consequently, a governmental body may not withhold fee bills in their entirety under this exception, but may only withhold information about the details of the substance of communications between the attorney and the client.

That section 552.107(1) protects only the details of the substance of attorney-client communications means that the exception applies only to information that reveals attorney advice and opinion or client confidences. *See* Open Records Decision No. 574 (1990). Consequently, if a governmental body seeks to withhold attorney fee bills under section 552.107(1), the governmental body must identify the portions of the bills that reveal client confidences or attorney advice. *See* Open Records Decision No. 589 (1991). In general, documentation of calls made, meetings attended, or memos sent is not protected under this exception. *See id.* We have marked the portions of the requested legal bills that appear to reveal client confidences or attorney advice. AISD may withhold only these portions of the bills from required public disclosure pursuant to section 552.107(1) of the Government Code.

You claim that some information in the legal bills is excepted from disclosure under section 552.104 because it relates to "possible sale, purchase or lease of real property, and "release of this information could provide an unfair advantage to competitors." Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). You have not specifically alleged that AISD is currently involved in a competitive bidding situation relating to these parcels of property. Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair

advantage will not suffice. Open Records Decision No. 541 (1990) at 4. The information you have provided to us is not sufficient to meet this requirement. Consequently, we conclude that you may not withhold any information in the legal bills under section 552.104.

You state that AISD is currently involved in negotiations relating to the sale, purchase, or lease of certain properties. You believe, therefore, that the locations of the properties are excepted from disclosure under section 552.105. We agree. Section 552.105 excepts from disclosure information relating to:

(1) the location of real or personal property for a public purpose prior to public announcement of the project; or

(2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Section 552.105 does not, however, except from disclosure the identities of parties who are involved in negotiations with AISD. We have marked the information that is excepted from disclosure under section 552.105.

Finally, the legal bills contain references to several AISD students. You claim that the students' identities are excepted from disclosure under sections 552.026 and 552.114 of the Government Code. In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. In this instance, however, you have submitted to this office legal bills containing AISD student names. "Education records" under FERPA are records that

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A). *See also* Open Records Decision Nos. 462 (1987), 447 (1986).

The legal bills at issue are education records under FERPA. Prior to releasing the legal bills to the requestor, FERPA requires AISD to delete information from the bills to

the extent "reasonably and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978). We have marked the information in the legal bills that appears to identify AISD students and is not protected from disclosure under the previously discussed exceptions to the Open Records Act. This identifying information is deemed confidential under FERPA and must be withheld from disclosure under section 552.101 as information made confidential by law.³

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref.: ID# 100141

Enclosures: Marked documents

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(w/o enclosures)

³Section 552.101 exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."