



September 26, 2001

Ms. Nancy H. Reyes
Escamilla & Poneck, Inc.
603 Navarro Street, Suite 1200
San Antonio, Texas 78205

OR2001-4325

Dear Ms. Reyes:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152429.

The Edgewood Independent School District (the "district"), which you represent, received a request for copies of various information relating to an "Abatement Agreement" between the district and a specified business entity. You state that you maintain no information that is responsive to request items 3, 12, and 14.¹ You also state that you have released most of the responsive information that you maintain to the requestor. However, you claim that the submitted information, namely Exhibits B1 through B3 and B11 through B14, is excepted from disclosure pursuant to sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information. We have also considered comments submitted by the requestor and additional comments that you submitted to our office for review.² See Gov't Code § 552.304

¹ It is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. See Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. See Attorney General Opinion H-90 (1973); see also Open Records Decision Nos. 87 (1975), 342 at 3 (1982), 416 at 5 (1984), 452 at 2-3 (1986), 555 at 1-2 (1990), 572 at 1 (1990). A governmental body must only make a good faith effort to relate a request to information which it holds. See Open Records Decision No. 561 at 8 (1990).

² We note that the requestor argues that the district failed to comply with section 552.301(d) of the Government Code by not timely notifying him that it wished to withhold the requested information from disclosure. The submitted information indicates that the district faxed a written statement to the requestor dated July 24, 2001 which notified the requestor that it wished to withhold the requested information from disclosure. In the open records ruling process, this office is unable to resolve disputes of fact. We accordingly rely upon the representations presented in the submitted information which show that the district complied with section 552.301(d) of the Government Code.

(providing that interested party may submit comments stating why information should or should not be released).

Initially, you state that the request for “transcripts or meetings of all of the District’s Board of Trustees meetings . . .” can be interpreted as a request for certified agendas of executive sessions. You claim that any responsive certified agendas of closed sessions of meetings of the district’s Board of Trustees are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code.³ We agree. Section 551.104(c) provides that “[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).” Gov’t Code § 551.104(c). Such information cannot be released to a member of the public in response to an open records request. *See* Open Records Decision No. 495 (1988). Therefore, to the extent that the district maintains certified agendas that are responsive to the request, those agendas must be withheld from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.

You also claim that Exhibits B1 through B3 are excepted from disclosure pursuant to section 552.107(1) of the Government Code. Section 552.107(1) excepts information encompassed by the attorney-client privilege from disclosure. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions. *See* Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except purely factual information from disclosure, including factual recountings of events, documentation of calls made, meetings attended, or memos sent. *See id.* After careful review of your arguments, we agree that Exhibits B1 through B3 contain client confidences and an attorney’s legal advice or opinion. Therefore, we conclude that the district may withhold Exhibits B1 through B3 from disclosure pursuant to section 552.107(1) of the Government Code.

You also claim that Exhibits B11 through B14 are excepted from disclosure as attorney work product pursuant to section 552.111 of the Government Code. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney’s mental processes, conclusions and legal theories. *See* Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation

³ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by other statutes.

that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See id.* at 4. The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories.

You state that Exhibits B11 through B14 indicate that each of the respective attorneys who produced such information did so with the good faith belief that litigation would ensue as a result of the protracted dispute between the district and the specified business entity. You also state that this information consists of, or tends to reveal, each attorney's mental processes, conclusions, and legal theories of recovery by the district against the entity. Based on your representations and our review of Exhibits B11 through B14, we conclude that most of the information was created for trial or in anticipation of litigation and reflects an attorney's mental processes, conclusions, and legal theories. Accordingly, the district may withhold from disclosure most of the submitted information in Exhibits B11 through B14 as attorney work product pursuant to section 552.111. However, it is not clear from our review of your arguments or Exhibits B11 through B14 that one of the documents was created for trial or in anticipation of litigation at the time that it was created. Accordingly, you may not withhold from disclosure the document that we have marked in Exhibits B14 pursuant to section 552.111 of the Government Code. Since you claim no other exception to disclosure for this document, you must release it to the requestor.

In summary, you must withhold from disclosure any responsive certified agendas of closed meetings of the district's Board of Trustees pursuant to section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code. You may withhold Exhibits B1 through B3 from disclosure pursuant to section 552.107 of the Government Code. You must release the marked document in Exhibits B14 to the requestor. You may withhold the remaining information in Exhibits B11 through B14 from disclosure pursuant to section 552.111 of the Government Code.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general

have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

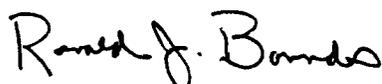
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 152429

Enc. Marked documents

cc: Mr. Patrick O. Keel
Baker Botts, L.L.P.
1600 San Jacinto Center
98 San Jacinto Boulevard
Austin, Texas 78701-4039
(w/o enclosures)