OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 18, 2003

Mr. Robert S. Johnson
Chappell, Hill & Lowrance, L.L.P.
201 Main Street, Suite 400
Fort Worth, Texas 76102

OR2003-1066

Dear Mr. Johnson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176673.

The Fort Worth Independent School District (the "district"), which you represent, received a request for six categories of information relating to the requestor's client. You inform us that you have released or will release most of the requested information but claim that the documents you have submitted to this office are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Although you also raise Rule 503 of the Texas Rules of Evidence as a potential exception to disclosure, none of the submitted information is subject to section 552.022 of the Government Code. Therefore, rule 503 does not apply in this instance. *See* Open Records Decision No. 676 at 4 (2002) ("However, for information that is not subject to section 552.022, the appropriate exception for a claim of attorney-client privilege is section 552.107(1). This is because such information is not excepted from disclosure except to the extent that one or more exceptions under the [Public Information] Act applies to it."); *see also* Open Records Decision No. 575 (1990) (concluding that predecessor to section 552.101 does not generally encompass discovery privileges).

You assert that some of the submitted information relates to reasonably anticipated litigation and is attorney work product prepared in anticipation of such litigation. Section 552.103 of

the Government Code, which excepts from disclosure information relating to reasonably anticipated litigation, provides as follows:

> (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.
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> . . . .
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> (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.

The district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or is reasonably anticipated on the date the governmental body receives the request for information and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.–Austin 1997, no pet.); *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 district must meet both prongs of this test for information to be excepted under section 552.103(a).

The fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). In order to establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). 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.[1] Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation

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[1]In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

Section 552.111 of the Government Code protects, in part, attorney work product. In order to withhold attorney work product, a governmental body must demonstrate 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. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was 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 that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery 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. Open Records Decision No. 647 at 4 (1996). 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. The work product privilege also encompasses the mental impressions, opinions, conclusions, or legal theories of an attorney's representatives. Tex. R. Civ. P. 192.5(b)(1).

Both section 552.103 and the work product privilege encompassed by section 552.111 require a governmental body to demonstrate that litigation is reasonably anticipated. In this case, you inform us that the request at issue came from an attorney representing a teacher employed by the district. You assert that the requested information is excepted from disclosure because it relates to "the litigation required to terminate [the requestor's client's] employment under the Education Code's statutory plan."

In asserting that litigation was reasonably anticipated at the time the district received this request, you refer us to subchapter F of chapter 21 of the Texas Education Code. *See* Educ. Code §§ 21.251-.260. Section 21.251 provides in pertinent part:

> (a) This subchapter applies if a teacher requests a hearing after receiving notice of the proposed decision to:
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> > (1) terminate the teacher's continuing contract at any time;
> >
> > (2) terminate the teacher's probationary or term contract before the end of the contract period; or
> >
> > (3) suspend the teacher without pay.

In this instance, you do not inform us that, by the time it received this request, the district had provided the teacher in question with "notice of [its] proposed decision to: (1) terminate the teacher's continuing contract at any time; (2) terminate the teacher's probationary or term contract before the end of the contract period; or (3) suspend the teacher without pay." Furthermore, you do not state that, at the time it received this request, the district intended to provide such notice. In addition, you do not inform us that, prior to the district's receipt of this request, the teacher requested a hearing under this subchapter. We therefore conclude that you have failed, for purposes of section 552.103 or the work product privilege encompassed by section 552.111, to provide this office with concrete evidence that litigation was reasonably anticipated under subchapter F when the district received this request. Accordingly, none of the submitted information may be withheld on the basis of those exceptions.

We next address your arguments regarding section 552.107. 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 "for the purpose of facilitating 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 Texas 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 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).

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, no writ). 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).

In this instance, we agree that exhibit 1 and portions of exhibit 3 constitute or reflect privileged communications. We have marked this information, which you may withhold under section 552.107. However, you have not established, and the documents do not reflect, that exhibit 2 or the remainder of exhibit 3 constitutes or reflects privileged communications. Accordingly, this information may not be withheld on the basis of section 552.107.

In summary, exhibit 1 and the marked portions of exhibit 3 may be withheld pursuant to section 552.107 of the Government Code. All other submitted information must be released.[2]

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

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[2]We note that portions of the information being released might be subject to section 552.117 of the Government Code. However, this exception is designed to protect an individual's privacy interest, and the requestor has a special right of access to his client's information. *See* Gov't Code § 552.023(b) (governmental body may not deny access to information to person's representative on grounds that information is considered confidential by privacy principles).

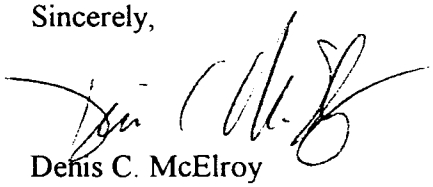
that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



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Ref: ID# 176673

Enc. Submitted documents

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(w/o enclosures)