



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 29, 2008

Ms. Laura C. Rodriguez
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2008-07322

Dear Ms. Rodriguez:

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# 311235.

The Northside Independent School District (the "district"), which you represent, received a request for all of the superintendent's incoming and outgoing e-mails on March 23, 24, 26, 27, 28, 29, 30, and 31, 2007 as well as April 2 and 3, 2007. You state that the district was not able to recover all of the responsive information because it has been deleted and is unrecoverable. You assert that a portion of the submitted information is not subject to the Act. You also claim that the submitted information is excepted from disclosure under sections 552.102, 552.103, 552.107, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

We first address your comments regarding e-mails that have been deleted and are no longer maintained by the district. The Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev.*

¹Although the district raises section 552.101 of the Government Code in conjunction with Rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, we note that as the submitted information is not subject to section 552.022 of the Government Code, rule 503 of the Texas Rules of Evidence does not apply in this instance. See Open Records Decision No. 676 at 4 (2002).

Corp. v. Bustamante, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986). You inform us that all of the district's e-mails stored within the e-mail system are kept in a database format. You explain that the e-mail system keeps track of the location of the e-mails by storing the location of the e-mails in the e-mail system's database that is located on a user's assigned post office which resides on a server out of a cluster of e-mails servers that support the system. The e-mail system displays the e-mail as being in a specific storage location. When an e-mail is "deleted" from the mailbox, it is sent to the trash bin within the mailbox. When the e-mail is "deleted" from the trash bin, the e-mail location is then deleted from the database on the user's post office. You further state that once the location of the e-mail is deleted from the database, the e-mail is unrecoverable by the user as well as the system administrators. We therefore determine that the e-mail messages at issue were no longer being "maintained" by the district at the time of the request and are not public information subject to disclosure under the Act. *See Econ. Opportunities Dev. Corp.*, 562 S.W.2d 266; *see also* Gov't Code §§ 552.002, 552.021 (public information consists of information collected, assembled, or maintained by or for governmental body in connection with transaction of official business).

The district asserts that the e-mails in AG-0001 and AG-0002 are not subject to the Act. The Act is applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists of "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). Thus, virtually all information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The district contends that the e-mails in AG-0001 and AG-0002 are personal in nature and do not constitute public information. After reviewing the information at issue, we agree AG-0001 and a portion of AG-0002 are not subject to the Act and need not be disclosed to the requestor. *See* Open Records Decision No. 635 at 4 (1995) (Gov't Code § 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving de minimis use of state resources). However, we find that the remaining portion of AG-0002, which we have marked, pertains to the official business of the superintendent. We therefore conclude that this information is subject to the Act and must be released, as you raise no exceptions to disclosure.

Section 552.103 of the Government Code provides in part:

- (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.

....

(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.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 must provide relevant facts and documents sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information; and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

You state, and provide documentation showing, that the district received the request for information after a lawsuit styled *Eugenia Bobo-Robertson v. Northside Independent School District*, Civil Action No. SA-07-CA-0699-RF was filed in the United States District Court for the Western District of Texas, San Antonio Division. Based upon your representations and the information presented, we conclude that litigation was pending on the date that the district received this request for information and we find that the information relates to pending litigation for purposes of section 552.103.

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103 interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320(1982). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. We also note that section 552.103 is no longer applicable to this information once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Therefore, because AG-0033 through AG-0040 were either sent or received by the opposing party to the pending litigation, the district may not withhold this information under section 552.103.

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 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 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)-(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).

You state that AG-0013 through AG-0032 consist of confidential communications between district administrators and attorneys for the district. You also state that these communications were made in confidence and in furtherance of the rendition of professional legal services to the district. We understand that the communications have remained confidential. Based on our review of your representations and the submitted communications, we find that you have demonstrated the applicability of the attorney-client privilege to AG-0013 through AG-0032. Accordingly, we conclude that the district may withhold AG-0013 through AG-0032 pursuant to section 552.107(1) of the Government Code.²

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546, 550 (Tex.App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act.

For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and therefore is generally not protected from disclosure under common-law privacy. See Open Records Decision Nos. 470 (public employee's job performance does not generally constitute employee's private affairs), 455 (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, the district may not withhold AG-0041 from public disclosure based on the common-law right to privacy.

You also assert that AG-0003 through AG-0012 contain e-mail addresses that are excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 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). 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. You do not inform us that members of the public have affirmatively consented to the release of these e-mail addresses. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137 (c). Therefore, the district must withhold the e-mail addresses you have marked, as well as the e-mail addresses we have marked, in AG-0003 through AG-0012 under section 552.137 of the Government Code.

In summary, AG-0001 and AG-0002, except as marked for release, are not subject to the Act and need not be released to the requestor. The district may withhold AG-0013 through AG-0032 pursuant to section 552.107 of the Government Code. The district must withhold

the e-mail addresses you have marked, as well as the e-mail addresses we have marked, in AG-0003 through AG-0012 under section 552.137 of the Government Code. The remaining information must be released to the requestor.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. 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 Office of the Attorney General 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,

A handwritten signature in black ink that reads "Olivia A. Maceo". The signature is written in a cursive style with a large initial "O".

Olivia A. Maceo
Assistant Attorney General
Open Records Division

OM/mcf

Ref: ID# 311235

Enc. Submitted documents

c: Mr. Raymond Tamayo
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(w/o enclosures)