



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 2, 2008

Ms. Debra G. Rosenberg
Atlas & Hall, L.L.P.
P.O. Box 3725
McAllen, Texas 78502-3725

OR2008-16368

Dear Ms. Rosenberg:

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# 328941.

The McAllen Independent School District (the "district"), which you represent, received a request for information relating to a specified lawsuit to which the district was a party, including information relating to the settlement of the case. You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.117, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.

You also ask whether the district must withhold any of the submitted information on the basis of a confidentiality provision in a settlement agreement that concluded the lawsuit. We note that a governmental body cannot overrule or repeal the provisions of the Act by agreement or contract. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990). Therefore, the district may not withhold any of the submitted information on the basis of the confidentiality provision in the settlement agreement.

We note that the submitted information includes copies of the minutes of a meeting of the district's board of education. The minutes of a governmental body's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code.

See Gov't Code § 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee). As a general rule, the exceptions to disclosure found in the Act are not applicable to information that other statutes make public. See Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the meeting minutes that we have marked must be released pursuant to section 551.022.

Next, we address your arguments against disclosure of the remaining information. Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege.¹ 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. See 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. See 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. See *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. See 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. See *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).

¹We note that you also claim the attorney-client privilege under section 552.101, which does not encompass discovery privileges. See Open Records Decision No. 676 at 1-3 (2002).

You seek to withhold the submitted letters, e-mails, and memorandum under section 552.107(1). You state that the information in question either consists of or documents communications between attorneys for and representatives of the district that were made in connection with the rendition of professional legal services to the district. You also state that the communications were intended to be and remain confidential. Based on your representations and our review of the information at issue, we conclude that the district may withhold the information that we have marked under section 552.107(1).² We conclude that you have not demonstrated that any of the remaining information either consists of or documents a communication between or among privileged parties, and therefore the district may not withhold any of the remaining information under section 552.107(1).

You believe that some of the remaining information may be protected by common-law privacy under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. See *id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. See generally Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

You believe that the remaining documents may contain private medical information. We note that some of the remaining information is contained in documents that have been filed with a court. Information contained in public court records may not be withheld under section 552.101 in conjunction with common-law privacy. See Gov't Code § 552.022(a)(17) (providing for required disclosure of information also contained in court records); *Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (sexual assault victim's privacy right not violated by release of information in public court document). We find that none of the remaining information not contained in the court records is either intimate or embarrassing or not a matter of legitimate public interest. We therefore conclude that the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

You also raise section 552.117 of the Government Code, which excepts from disclosure the home address and telephone number, social security number, and family member information

²As we are able to make this determination, we need not address your claim for the submitted memorandum under section 552.111 of the Government Code.

of a current or former official or employee of a governmental body who timely requests that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code §§ 552.117(a)(1), .024; Open Records Decision No. 530 at 5 (1989). You have not demonstrated that any of the remaining information consists of the home address, home telephone number, social security number, or family member information of a current or former official or employee of the district. We therefore conclude that the district may not withhold any of the remaining information under section 552.117 of the Government Code.

Lastly, we address your claim under section 552.136 of the Government Code, which states that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). We have marked bank account and routing numbers that the district must withhold under section 552.136.

In summary: (1) the district must release the marked meeting minutes pursuant to section 551.022 of the Government Code; (2) the district may withhold the information that we have marked under section 552.107(1) of the Government Code; and (3) the district must withhold the marked bank account and routing numbers under section 552.136 of the Government Code. The rest of the submitted information must be released.

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). If the governmental body does not file suit over 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,

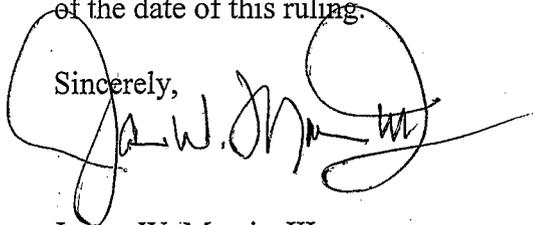
toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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, appearing to read "J.W. Morris, III", written over a large, circular scribble.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ma

Ref: ID# 328941

Enc: Submitted documents

cc: Requestor
(w/o enclosures)