



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

November 12, 2009

Ms. Susan K. Bohn
General Counsel
Lake Travis Independent School District
3322 Ranch Road 620 South
Austin, Texas 78738

OR2009-16122

Dear Ms. Bohn:

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# 361229.

The Lake Travis Independent School District (the "district") received nine requests from the same requestor for (1) all communications between the district and a named company regarding support, maintenance, security, or reliability issues during a specified period of time; (2) all communications between the district and the same named company regarding a specified lawsuit; (3) all responses to interrogatories submitted by the district or the plaintiff in the same lawsuit; (4) warrants from the specified company regarding the maintenance or release of certain information; (5) all materials presented during a specified presentation at an administrators' retreat; (6) copies of specified electronic newsletters and the number of recipients of these newsletters; and (7) all versions and revisions of a specified regulation. You state that the district will allow the requestor to inspect some responsive information. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

¹Although your brief also raises section 552.111 of the Government Code, you do not explain how this exception applies to any of the submitted information. Therefore, we understand you to have withdrawn this exception. See Gov't Code § 552.301(e) (governmental body must provide written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld).

Initially, we note that the information at Tab 2 appears to be the same information at issue in a previous request, as a result of which this office issued Open Records Letter No. 2009-13937 (2009). In that ruling, we determined that the district may withhold the submitted information under section 552.103 of the Government Code. As we have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling was based, we conclude that the district may rely on Open Records Letter No. 2009-13937 as a previous determination and continue to treat any previously ruled upon information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (outlining elements of first type of previous determination). To the extent that the submitted information is not the same information ruled upon in Open Records Letter No. 2009-13937, we will consider your arguments against disclosure.

Section 552.103 of the Government Code provides in relevant 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 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 was pending or reasonably anticipated on the date that the request for information was received, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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). Both prongs of this test must be satisfied in order for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

You assert the information at Tab 2 is excepted from disclosure under section 552.103. You state, and provide documentation showing, that the district is named in a lawsuit styled *Meadows v. Lake Travis Independent School District*, Civil Action No. A: 08-CA-819-SS,

which is pending in the United States District Court for the Western District of Texas, Austin Division. You also state that the district was a party to the case when it received the instant requests. You contend that the submitted information is related to the litigation. Based on your representations and our review of the submitted information, we conclude litigation was pending when the district received the requests and that the information at Tab 2 relates to the pending litigation. We therefore conclude that the district may withhold the information at Tab 2 under section 552.103 of the Government Code.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has been obtained from or provided to all other parties in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. We note that some of the information at Tab 2 facially indicates that it has previously been provided to all parties to the litigation. Further, the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

You contend that the information at Tab 7 is excepted from required public disclosure under section 552.107 of the Government Code, which protects information that comes 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 a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1). 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, 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 pet.). 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 the information at Tab 7 consists of a communication between the district's outside counsel and district administrators. You state that this communication was made in furtherance of the rendition of legal services to the district, and you inform this office that this communication was intended to be and has remained confidential. Based on your representations and our review, we agree that the information at Tab 7 constitutes a privileged attorney-client communication. Accordingly, the district may withhold this information under section 552.107 of the Government Code.

In summary: (1) the district may rely on Open Records Letter No. 2009-13937 as a previous determination and continue to treat any previously ruled upon information in accordance with that ruling; (2) to the extent the information at Tab 2 is not subject to the previous determination, the district may withhold this information under section 552.103 of the Government Code, except to the extent all parties to the pending litigation have previously had access to any of this information; and (3) the district may withhold the information at Tab 7 under section 552.107 of the Government Code.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/rl

Ref: ID# 361229

Enc. Submitted documents

cc: Requestor
(w/o enclosures)