



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 30, 2009

Mr. John-Peter Lund
O'Hanlon, McCollom & Demerate
Attorney for Lancaster Independent School District
808 West Avenue
Austin, Texas 78701

OR2009-16833

Dear Mr. Lund:

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# 362515.

The Lancaster Independent School District (the "district"), which you represent, received a request for information related to a settlement agreement between the district and a specified former district employee. You state that the district will release some responsive information. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of the requested information.¹ We have also considered comments submitted by the requestor. *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. You raise section 552.101 in conjunction with Texas Rule of Evidence 503. However, 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).* In this

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988).* This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

instance, section 552.107 of the Government Code is the proper exception to raise for your attorney-client privilege claim.

Section 552.107 protects information that comes within the attorney-client privilege; accordingly, we will consider your attorney-client privilege argument under that exception. 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. ORD 676 at 6-7. 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 issue consists of communications among district representatives, the district’s outside legal counsel, and counsel for the opposing party in a contested hearing. You have identified the parties to these communications. You state that these communications were made in furtherance of the rendition of legal services to the district, and you inform this office that these communications were intended to be and have remained confidential. Based on your representations and our review, we agree that the information we have marked constitutes privileged attorney-client communications. Accordingly, the district may withhold the information we have marked under section 552.107 of the Government Code.

However, the remainder of the submitted information consists of communications between the district’s counsel and opposing counsel. Communications with opposing counsel are not

confidential communications with privileged parties. *See* TEX. R. EVID. 503(b)(1)(A)-(E). Therefore, we conclude that the district may not withhold any of the remaining information at issue under section 552.107(1) of the Government Code.

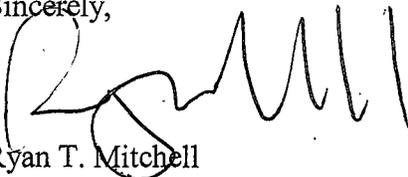
We note that section 552.137 of the Government Code states that “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure.² Gov’t Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). We have marked an e-mail address belonging to a member of the public. You do not indicate that the owner of this address has consented to its release. Accordingly, the district must withhold the information we have marked under section 552.137.

In summary, the district may withhold the information we have marked under section 552.107 of the Government Code and must withhold the information we have marked under section 552.137 of the Government Code. As you raise no further exceptions against disclosure, the district must release the remainder of the submitted information.

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

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Ref: ID# 362515

Enc. Submitted documents

cc: Requestor
(w/o enclosures)