



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 23, 2010

Ms. Karla A. Schultz  
Walsh, Anderson, Brown, Aldridge & Gallegos, P.C.  
P.O. Box 2156  
Austin, Texas 78768

OR2010-02667

Dear Ms. Schultz:

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# 371037.

The Austin Independent School District (the "district"), which you represent, received a request for all e-mails sent to or received by two named individuals from September 1, 2009 to the present which reference the requestor's client, excluding any e-mails sent to the requestor's client. You claim the submitted e-mails are excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note you submitted e-mails that reflect they were sent to the requestor's client. Because the requestor specifically excludes such e-mails from the request for information, any e-mails sent to the requestor's client are not responsive to the request for information. This decision does not address the public availability of the non-responsive information, and the e-mails we marked need not be released.

We also note the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act ("FERPA"), 20

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<sup>1</sup>We 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.

U.S.C. § 1232g, does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.<sup>2</sup> See 20 U.S.C. § 1232g(b); see also *id.* § 1232g(a)(4)(A) (defining "education records"); Open Records Decision No. 462 at 15 (1987). Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. See 34 C.F.R. § 99.3 (defining "personally identifiable information"). The submitted information contains unredacted personally identifiable student information. Because our office is prohibited from reviewing an education record to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of the education records.

You claim the responsive e-mails submitted in Tab 2 are excepted under section 552.103 of the Government Code. Section 552.103 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). 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 reasonably anticipated on the date the district received the request for information, 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). The district must meet both prongs of this test for information to be excepted under section 552.103(a).

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<sup>2</sup>A copy of this letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

You state, and provide documentation showing, that prior to the district's receipt of the request for information, the requestor's client filed a complaint with the Equal Employment Opportunity Commission ("EEOC") against the district, alleging discrimination based on race, gender, disability, and retaliation. This office has stated that a pending EEOC complaint indicates that litigation is reasonably anticipated. See Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). Based on your representations and our review of the submitted EEOC complaint, we agree the district reasonably anticipated litigation on the date it received the present request for information. We also agree the responsive information in Tab 2 is related to the EEOC complaint for purposes of section 552.103. However, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. See ORD 551 at 4-5. Thus, once information is obtained from or provided to all the opposing parties in the anticipated litigation, there is no interest in withholding that information under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Some of the responsive e-mails in Tab 2 reflect they were obtained from the requestor's client, who is the district's sole opposing party in the pending EEOC claim. These e-mails may not be withheld under section 552.103. We have, however, marked the responsive information the district may withhold under section 552.103 of the Government Code. We note that the applicability of section 552.103 ends once the related litigation concludes. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You next claim the e-mails in Tab 6 are excepted under section 552.107 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(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. 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). 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.*, 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 the responsive e-mails in Tab 6 were communicated between and among attorneys representing the district and district employees. You also state the communications were made for the purpose of providing legal services to the district, and that the communications were intended to be and have remained confidential. Based on your representations and our review, we agree most of the e-mails in Tab 6 are privileged and thus may be withheld under section 552.107 of the Government Code. However, the requestor’s client, who is not privileged, was party to some individual e-mails contained in otherwise privileged e-mail strings. Because these e-mails were communicated with a non-privileged party, they are not privileged. Consequently, to the extent the marked non-privileged e-mails exist separate and apart from the e-mail strings, they may not be withheld under section 552.107. If any marked e-mails do not exist separate and apart from the strings in which they were submitted, they may be withheld along with the e-mail strings as privileged attorney-client communications.

Some of the remaining responsive information in Tabs 2 and 6 may be subject to section 552.137, which 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).<sup>3</sup> *See Gov’t Code* § 552.137(a)-(c). The e-mail addresses we marked do not appear to be excepted under subsection (c). Accordingly, unless the owners of the e-mail addresses we marked in Tabs 2 and 6 have consented to their release, the district must withhold these e-mail addresses under section 552.137.<sup>4</sup>

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>4</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the district may withhold the e-mails we marked in Tab 2 under section 552.103 of the Government Code. The district may generally withhold the e-mails in Tab 6 under section 552.107 of the Government Code. However, to the extent the e-mails we marked as non-privileged exist separate and apart from the submitted e-mail strings, they must be released. The district must withhold the private e-mail addresses we marked in Tabs 2 and 6 under section 552.137 of the Government Code, unless the owners of the e-mail addresses have consented to their release. The remaining responsive information must be released.<sup>5</sup>

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](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,



Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/cc

Ref: ID# 371037

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)

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<sup>5</sup>Some of the information subject to release would ordinarily be protected by exceptions and laws enacted to protect a person's right to privacy. However, because the requestor in this instance has a right of access to information pertaining to his client that otherwise would be protected by privacy principles, if the district receives another request for this particular information from a different requestor, the district should again seek a decision from this office. *See generally* Gov't Code § 552.023(b) (person or person's authorized representative has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests).