



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 3, 2010

Ms. Sandra D. Carpenter  
Walsh, Anderson, Brown, Aldridge & Gallegos, P.C.  
P.O. Box 168046  
Irving, Texas 75016

OR2010-06262

Dear Ms. Carpenter:

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# 377825.

The Alvarado Independent School District (the "district"), which you represent, received a request for all records pertaining to the drug testing of a named individual on December 10, 2009. You state the district has released, or will release, some of the requested information to the requestor. You claim the marked e-mails are excepted from disclosure under section 552.107 of the Government Code.<sup>1</sup> We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

Initially, the requestor contends she was not timely notified of the district's request for a ruling from this office because she did not receive the notice by the tenth business day after

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<sup>1</sup>Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded section 552.101 does not encompass discovery privileges. *See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990)*. Further, although you raise Texas Rule of Evidence 503, in this instance, this information is properly addressed under section 552.107 of the Government Code. Additionally, although you raise section 552.022 of the Government Code, that provision is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See Gov't Code § 552.022*.

the date of the district's receipt of the request for information. Pursuant to section 552.301(d) of the Government Code, the governmental body must provide the requestor, within ten business days after the date of its receipt of the request for information, a statement the governmental body has asked for a decision from the attorney general and a copy of the governmental body's written communication to the attorney general asking for a decision. *See id.* § 552.301(d). Pursuant to section 552.308, the requirement for notice is met in a timely fashion if the notice is sent to the recipient by first class United States mail properly addressed with postage or handling charges prepaid and it bears a post office cancellation mark indicating a time within that period. *See id.* § 552.308(a)(1). You state the district received the present request for information on February 8, 2010. The requestor has provided our office with a copy of the envelope in which the district sent the information required under section 552.301(d). The envelope is properly addressed and bears a postmark date of February 22, 2010. Because the envelope was postmarked within ten business days of the district's receipt of the request, we find the district complied with the requirements of section 552.301. *See id.* Accordingly, we will consider your argument under section 552.107 of the Government Code for the submitted e-mails.

Section 552.107(1) of the Government Code 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. *See Open Records Decision No. 676 at 6-7 (2002)*. First, a governmental body must demonstrate 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 pet.). Moreover, because the client may elect to waive the

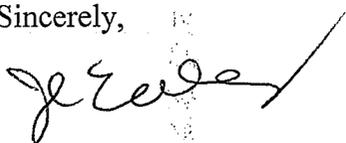
privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information at issue consists of communications between an attorney and her client, the district superintendent. You state the marked e-mails reflect that the attorney gave legal advice to the superintendent or that the attorney and the superintendent shared information regarding the legal issues raised in the e-mails. You state these communications were not intended to be released to other parties. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the marked e-mails. Accordingly, the district may withhold the marked e-mails under section 552.107.

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,



Jessica Eales  
Assistant Attorney General  
Open Records Division

JCE/eeg

Ref: ID# 377825

Enc. Submitted documents

c: Requestor  
(w/o enclosures)