



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 9, 2010

Ms. Andrea Sheehan
Law Offices of Robert E. Luna, P.C.
4411 North Central Expressway
Dallas, Texas 75205

OR2010-08410

Dear Ms. Sheehan:

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# 381954.

The Carrollton-Farmers Branch Independent School District (the "district"), which you represent, received a request for (1) the testimony of certain named individuals; (2) a portion of the business calendar of a former district employee; (3) files or documents prepared for a specified board meeting; (4) documents prepared and shared at specified board meetings; (5) notes, documents, or presentations regarding settlement conferences; (6) documents delivered by the office of Robert Luna to a former district employee's legal counsel on a specified date; and (7) documentation of specified expenses of a named former district employee. You state you have no information responsive to categories one, three, and seven of the request.¹ You further state some responsive information related to categories two and five of the request has been released to the requestor. You assert that a portion of the submitted information is not subject to the Act. You also claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.117 of the Government Code, and privileged under Texas Rule of Evidence 503. We have considered the exceptions you claim and reviewed the submitted information.

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); *Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983)*.

Initially, we note that a portion of the submitted information may have been subject to a previous request for information, in response to which this office issued Open Records Letter No. 2009-02257 (2009). In that decision, we ruled the district must withhold portions of the submitted information under sections 552.101, 552.117, 552.130, and 552.136 of the Government Code. As we have no indication that the law, facts, or circumstances on which the prior ruling was based have changed, the district may continue to rely on that ruling as a previous determination and withhold or release any previously ruled upon information in accordance with that prior ruling.² See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information was not previously ruled upon, we will consider your arguments against disclosure.

Next, we note you have marked a portion of the submitted information as not responsive to the request. This ruling does not address the public availability of non-responsive information, and the district is not required to release non-responsive information in response to this request.

Next, we address your assertion that the information in Exhibit E is not subject to the Act. The Act is applicable to "public information." See Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists of "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). The requestor seeks, in part, documents delivered by the district's attorney, Robert Luna, to a former district employee's legal counsel on a specified date. You inform us that the requested documents were delivered and returned to the sender; thus, the district does not maintain the requested documents. The information in Exhibit E consists of a photocopy of a delivery slip and window envelope. You assert that the requested documents were not collected, assembled, or maintained by the district and that the information in Exhibit E is merely a record of delivery. Upon review, we conclude the information in Exhibit E was collected or assembled or is maintained in connection with the transaction of official district business and, thus, constitutes "public information" as defined by section 552.002(a). Because this information is subject to the Act, it must be released unless it falls within the scope of an exception to disclosure. See Gov't Code §§ 552.301, .302. We note a governmental body must make a good faith effort to relate a request to information which it holds. See Open Records Decision No. 561 at 8 (1990) (construing statutory predecessor). As you have submitted information for our review and raised an exception to disclosure for

²As our ruling is dispositive of this information, we need not address your arguments against its disclosure.

this information, we consider the district to have made a good faith effort to identify the information that is responsive to category six of the request. Thus, we will address the applicability of the claimed exception to the information at issue.

You assert that the information in Exhibits C-1, C-2, and D are protected by the attorney-client privilege. Section 552.107(1) of the Government Code protects information coming 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. 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.* 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. *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 documents in Exhibits C-1 and C-2 were transmitted between district attorneys and district employees during a closed session of the district’s Board of Trustees, were not intended to be disclosed to third parties, and were prepared and transmitted by a district attorney in the furtherance of the rendition of professional legal services. You state the information in Exhibit D consists of handwritten meeting notes taken by a district employee and district attorneys during a meeting, and that the notes were communicated to a district attorney for the furtherance of the rendition of legal services to the district. You state that, although a non-privileged party was present during the meeting, the notes were not

communicated with any non-privileged party and have maintained their confidentiality. You have identified the parties to the communications in Exhibits C-1, C-2, and D. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information in Exhibits C-1, C-2, and D. Therefore, the district may generally withhold Exhibits C-1, C-2, and D under section 552.107 of the Government Code.³ However, we note a portion of the information in Exhibit C-2 has been seen by non-privileged parties. Thus, to the extent this information, which we have marked, exists separate and apart from the communication at issue, we conclude this information may not be withheld under section 552.107 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information that other statutes make confidential, such as the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). You contend the information in Exhibit E constitutes medical records subject to the MPA. However, upon review, we find that no portion of the information at issue consists of medical records for purposes of the MPA. Therefore, the district may not withhold any of the information in Exhibit E under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts,

³As our ruling is dispositive of this information, we need not address your remaining arguments against its disclosure.

the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. See Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). You seek to withhold information in Exhibits B and E. Upon review, we agree a portion of the remaining information is intimate or embarrassing and of no legitimate public interest. Accordingly, the information we have marked in Exhibits B and E is confidential and must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. However, no portion of the remaining information you seek to withhold is highly intimate or embarrassing and of no legitimate concern to the public. Therefore, the remaining information is not confidential under common-law privacy and it may not be withheld under section 552.101 on this basis.

You claim portions of the remaining information are excepted from disclosure pursuant to section 552.117(a)(1) of the Government Code. Section 552.117 excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1); see *id.* § 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). The district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. We have marked portions of the remaining information that may be subject to section 552.117(a)(1). To the extent the individuals whose information is at issue timely elected to keep their personal information confidential prior to the date the district received the current request for information, the district must withhold the information we have marked under section 552.117(a)(1). However, the remaining information you have marked does not fall within the scope of section 552.117(a)(1) and may not be withheld on that basis.

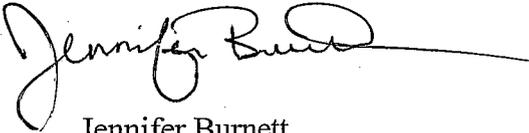
In summary: (1) the district may continue to rely on Open Records Letter No. 2009-02257 as a previous determination and withhold or release the information in accordance with that ruling; (2) the district may generally withhold Exhibits C-1, C-2, and D under section 552.107 of the Government Code, but the marked information that has been seen by a non-privileged party must be released to the extent it exists separate and apart from the privileged communication; (3) the information we have marked in Exhibits B and E is confidential and must be withheld under section 552.101 of the Government Code in

conjunction with common-law privacy; and (4) the district must withhold the information we have marked under section 552.117(a)(1), to the extent the individuals whose information is at issue timely elected to keep their personal information confidential prior to the date the district received the current request for information. The remaining responsive information must be released.

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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 381954

Enc. Submitted documents

c: Requestor
(w/o enclosures)