



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 12, 2010

Ms. Laura Rodriguez McLean
Walsh, Anderson, Brown, Gallegos & Green, P.C.
P.O. Box 168046
Irving, Texas 75016

OR2010-17155

Dear Ms. McLean:

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# 399893.

The Northside Independent School District (the "district"), which you represent, received a request for (1) information pertaining to searches and response to a previous request made by the requestor, (2) the superintendent's e-mail address and any information that would show the superintendent forwarded the requestor's previous public information requests to a specified department, (3) a specified court order, (4) any sanctions against the district, (5) information pertaining to workers compensation claims, (6) specified risk management reports, (7) a specified report pertaining to a named high school, (8) information revealing costs associated with reviewing the requestor's previous public information requests, (9) specified minutes, (10) information revealing costs associated with a specified renovation project, (11) a specified document showing the amount of bacteria in the water supply of a named district high school, and (12) information pertaining to new duct work done at a named district high school as well as electronic searches used to find information responsive to the requestor's previous request for information related to this item. You state the district will release information responsive to items two through twelve to the requestor upon payment. You claim the submitted information is excepted from disclosure under

section 552.107 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments from the requestor.² *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note you marked portions of the submitted information as not responsive to the present request. This ruling does not address the public availability of non-responsive information, and the district need not release non-responsive information in response to this request.

Next, we understand the requestor to argue the district has failed to comply with section 552.301 of the Government Code because the responsive information was responsive to previous requests for discovery made during her lawsuit against the district; thus, the district may not now claim the submitted information is excepted under section 552.107 of the Government Code. *See id.* §§ 552.301(a), .302. We note the Act differs in purpose from statutes and procedural rules providing for discovery in judicial proceedings. *See id.* §§ 552.005 (the Act does not affect scope of civil discovery), .0055 (subpoena duces tecum or request for discovery issued in compliance with statute or rule of civil or criminal procedure is not considered to be request for information under the Act). We also note a release pursuant to a subpoena is not a voluntary release of information for purposes of section 552.007 of the Government Code. *See id.* § 552.007 (if governmental body voluntarily releases information to member of public, such information may not later be withheld from release to public unless it is confidential under law); *see also* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor of section 552.007). The discovery process is a process through which parties to litigation can obtain information pertaining to the litigation. A public information request under the Act is a process in which any individual may request information from a governmental body. Thus, the discovery process has no bearing on the availability of information requested under Act. Accordingly, the district was not required to request a ruling from this office under section 552.301(a) in response to the requestor's requests for discovery. Thus, we find the district complied with the procedural requirements under section 552.301 with respect to the instant request for information.

¹Although you also 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). Thus, we will not address your claim the submitted information is confidential under section 552.101 in conjunction with rule 503.

²We note the requestor asks this office to make certain presumptions in regards to the district's conduct; however, making such presumptions is beyond the scope of this office's authority in issuing open records rulings. *See id.* § 552.301(a) (open records division's authority is limited to determining, upon a governmental body's request, whether requested information falls within an exception to disclosure).

You inform us some of the responsive information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-16171 (2010). In Open Records Letter No. 2010-16171, we determined the district must release the information at issue in that ruling. You seek to withhold the responsive information, which you state may have been previously addressed by this office. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the district may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential by law. As noted, you seek to withhold the responsive information, including any information which may have been previously released under Open Records Letter No. 2010-16171, under section 552.107. Section 552.107 does not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, to the extent the district released any portion of the responsive information pursuant to Open Records Letter No. 2010-16171, the district may not now withhold such information under section 552.107. Thus, with regard to any portion of the responsive information that was previously requested and ruled on by this office, we conclude the district must release that information in accordance with Open Records Letter No. 2010-16171. To the extent the responsive information was not encompassed by the prior ruling, we will consider your argument against disclosure.

You claim section 552.107 of the Government Code for the responsive information. Section 552.107(1) 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* ORD 676 at 6-7. 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 a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or

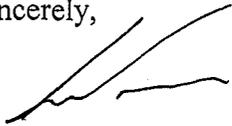
among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege 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 responsive information constitutes attorney-client communications made between district employees, attorneys, and their representatives for purposes of analyzing and rendering legal opinions concerning the requestor’s previous requests for information. You have identified all parties to the communications. Further, you state the communications were intended to be confidential and have retained their confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the responsive information. The requestor argues the district fraudulently misrepresented the date it received the requestor’s workers compensation claim; therefore, it cannot now claim the attorney-client privilege for the responsive information in accordance with Texas Rule of Evidence 503(d) because any such information was used in the furtherance of fraud. Whether or not the requested information was used in the furtherance of fraud is a question of fact. This office cannot resolve factual disputes in the opinion process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See* Open Records Decision No. 552 at 4 (1990). Accordingly, as the district established the attorney-client privilege applies to the responsive information, we find it may withhold the responsive information under section 552.107 of the Government Code, to the extent it was not at issue in Open Records Letter No. 2010-16171.

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 399893

Enc. Submitted documents

c: Requestor
(w/o enclosures)