



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 22, 2010

Ms. LeAnne Lundy
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5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2010-17664

Dear Ms. Lundy:

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# 401347.

The Clear Creek Independent School District (the "district"), which you represent, received a request from two requestors for nine categories of information pertaining to named individuals and specified district policies.¹ You state you have redacted portions of the submitted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.² You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.³ We have considered the exceptions you claim and reviewed the

¹You state, and provide documentation showing, the district sought and received clarification from the requestors regarding several of the categories in the request. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

²The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or student consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

³Although you also raise sections 552.101 and 552.111 of the Government Code, you have not provided any arguments to support these exceptions. Therefore, we assume you have withdrawn your claim that these sections apply to the submitted information. See Gov't Code §§ 552.301, .302.

submitted representative sample of information.⁴ We have also received and considered comments from the requestors. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you state that some of the requested information has been previously released to these requestors in response to discovery in pending civil litigation. Further, you state some of the requested information is redundant of other recent requests made to the district by these requestors. Based on these statements, we understand you to assert that you need not release the same information in response to the instant request that was previously released to the requestors through civil discovery or through previous requests made under the Act. Section 552.232 of the Government Code provides as follows:

(a) A governmental body that determines that a requestor has made a request for information for which the governmental body has previously furnished copies to the requestor or made copies available to the requestor on payment of applicable charges under Subchapter F, shall respond to the request, in relation to the information for which copies have been already furnished or made available, in accordance with this section, except that:

(1) this section does not prohibit the governmental body from furnishing the information or making the information available to the requestor again in accordance with the request; and

(2) the governmental body is not required to comply with this section in relation to information that the governmental body simply furnishes or makes available to the requestor again in accordance with the request.

(b) The governmental body shall certify to the requestor that copies of all or part of the requested information, as applicable, were previously furnished to the requestor or made available to the requestor on payment of applicable charges under Subchapter F. The certification must include:

(1) a description of the information for which copies have been previously furnished or made available to the requestor;

(2) the date that the governmental body received the requestor's original request for that information;

⁴We assume 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 those records contain substantially different types of information than that submitted to this office.

(3) the date that the governmental body previously furnished copies of or made available copies of the information to the requestor;

(4) a certification that no subsequent additions, deletions, or corrections have been made to that information; and

(5) the name, title, and signature of the officer for public information or the officer's agent making the certification.

(c) A charge may not be imposed for making and furnishing a certification required under Subsection (b).

(d) This section does not apply to information for which the governmental body has not previously furnished copies to the requestor or made copies available to the requestor on payment of applicable charges under Subchapter F. A request by the requestor for information for which copies have not previously been furnished or made available to the requestor, including information for which copies were not furnished or made available because the information was redacted from other information that was furnished or made available or because the information did not yet exist at the time of an earlier request, shall be treated in the same manner as any other request for information under this chapter.

Id. § 552.232. Thus, section 552.232 allows a governmental body to certify that records have previously been provided to a requestor, rather than make those same records available to the same requestor in response to subsequent requests. However, section 552.232 applies only where a requestor has made a previous request for information under the Act. In this instance, you inform us that portions of the requested information were previously provided to the requestors in the course of civil discovery and portions of the requested information were previously provided to the requestors in response to requests made under the Act. Based on your representations, we conclude that upon provision to the requestors of the certification required by section 552.232 of the Government Code, the requestors need not again be provided with any information the district provided to them in response to the previous requests under the Act. However, we further conclude that section 552.232 does not apply to the information that was previously released in the course of civil discovery. Accordingly, as you have not submitted such responsive information for our review, it must be released to the requestors at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

We now turn to your arguments for the submitted information. Section 552.103 of the Government Code provides as follows:

(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). A governmental body 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 was pending or reasonably anticipated on the date the governmental body 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that prior to the district's receipt of this request, a lawsuit was filed by the requestors against the district in the United States District Court for the Southern District of Texas, Houston Division. Although the requestor states, and the district acknowledges, an Order of Dismissal in this lawsuit was granted by a judge, the district further argues the Order of Dismissal was granted without prejudice, and the requestors reserved the right to re-file at any time. The district also provides documentation showing that the district filed a Motion for Sanctions against the requestors after the Order of Dismissal was granted but before the district received the present request. Accordingly, we find that litigation was pending when the district received the present request for information. We also find the submitted information relates to the pending litigation. Therefore, section 552.103 is generally applicable to the submitted information.

In this instance, however, the opposing parties in the litigation at issue have seen or had access to some of the information at issue. We note that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Therefore, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982),

320 (1982). Accordingly, the portions of the submitted information that the opposing parties in the litigation have seen or had access to may not be withheld under section 552.103. However, the district may withhold the remaining information under section 552.103.⁵ We note that the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You claim that some of the information the opposing parties have seen or had access to is excepted under section 552.107 of the Government Code, which 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 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. *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 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).

⁵As our ruling is dispositive for this information, we need not address your remaining argument against disclosure.

As noted above, the remaining information has been seen or accessed by the opposing parties in the pending litigation, who are not privileged parties. Accordingly, this information is not protected by the attorney-client privilege and generally may not be withheld under section 552.107 of the Government Code. However, we note this information is contained in otherwise privileged e-mail strings. If this non-privileged information, which we have marked, does not exist separate and apart from the otherwise privilege e-mail strings, then this information may be withheld under section 552.107. To the extent the information at issue exists separate and apart from the otherwise privileged e-mail strings, it may not be withheld under section 552.107 and must be released.

In summary, the requestors need not again be provided with any information the district provided to them in response to the previous requests under the Act, but the portions of the requested information previously provided to the requestors in the course of civil discovery must be released. The district may withhold the information for which the opposing parties have not seen or had access under section 552.103 of the Government Code. If the information for which the opposing parties have seen or had access does not exist separate and apart from the otherwise privilege e-mail strings, then this information may be withheld under section 552.107 of the Government Code. To the extent the marked non-privileged information exists separate and apart from the otherwise privileged e-mail strings, the district must release this information to the requestor.

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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/eeg

Ref: ID# 401347

Enc. Submitted documents

c: Requestor
(w/o enclosures)