



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 28, 2011

Mr. Christopher B. Gilbert
Thompson & Horton LLP
Phoenix Tower, Suite 2000
3200 Southwest Freeway
Houston, Texas 77027

OR2011-17404

Dear Mr. Gilbert:

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# 437100.

The Houston Independent School District (the “district”), which you represent, received a request for all correspondence pertaining to the “2011 District IV school board election” and “the filing of” a named individual, and all correspondence involving any of five named individuals during a specified time period. You claim that the submitted information is exempted from disclosure under section 552.107 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information.

Initially, we note you state you reviewed 130 e-mails responsive to the present request for information. However, you do not submit 130 e-mails for our review, state the district has released any responsive information, or state the submitted information constitutes a representative sample of the responsive information. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body may submit representative samples of the requested information if a

¹Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Furthermore, the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107. *See* ORD 676 at 1-2.

voluminous amount of information was requested). Thus, we presume the district has released the remaining responsive e-mails. If not, the district must do so at this time. *See id.* §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

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 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). 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 to only 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 to only 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, orig. proceeding). 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).

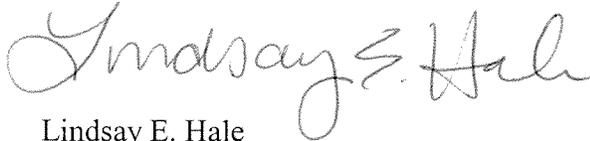
You state the submitted e-mails constitute communications among district employees and outside attorneys hired to advise the district. You identify most of the parties to the communications and state the communications were made for the purpose of providing legal services to the district. You state the communications were intended to be confidential and

have remained confidential. Based on your representations and our review, we find the district may generally withhold the submitted information under section 552.107(1) of the Government Code. However, we find one of the e-mail strings and portions of some of the e-mail strings you seek to withhold have been shared with individuals you have not demonstrated are privileged parties. As to the e-mail string we have marked for release, we find you have failed to establish how this information constitutes communications between or among district employees and attorneys for the purposes of section 552.107(1). Thus, the district may not withhold this e-mail string under section 552.107(1) of the Government Code. Additionally, if the non-privileged communications in the portions of the remaining e-mail strings we have marked exist separate and apart from the e-mail strings in which they appear, then the district may not withhold these non-privileged communications under section 552.107(1). As you raise no further exceptions against disclosure of this information, it 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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/em

Ref: ID# 437100

Enc. Submitted documents

c: Requestor
(w/o enclosures)