ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 3, 2012

Mr. Miles J. LeBlanc
Assistant General Counsel
Houston Independent School District
4400 West 18th Street
Houston, Texas 77092-8501

OR2012-00041

Dear Mr. LeBlanc:

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# 440965.

The Houston Independent School District (the "district") received a request for certain sign-in sheets, time cards, leave forms, rosters, the requestor's personnel file, and documents and correspondence prepared by certain named individuals or entities. You claim the submitted information is excepted from disclosure pursuant to section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we note you have only submitted notes taken by an attorney. To the extent additional responsive information existed and was maintained by the district on the date the district received the request, we assume you have released such information. If you have not released any such information to the requestor, you must do so at this time. *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 note the district sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). The requestor asserts the district failed to comply with sections 552.221(d), 552.222(a) and 552.222(e) of the Government Code. *See id.* § 552.221(d) (providing that if officer of public information cannot produce information for inspection or duplication within 10 business days after date information is requested, the officer shall certify that fact in writing to requestor and set date and hour within reasonable time when information will be available for inspection or duplication), .222(a) (stating governmental body may not inquire into purpose for which information will be used), .222(e) (stating request for clarification must include statement as to consequences of failure by requestor to timely respond to request for clarification). We note that while section 552.302 provides failure to comply with section 552.301 results in the presumption that the requested information is subject to required public disclosure and must be released, the Act contains no comparable provision for a violation of section 552.221(d) or section 552.222. *See id.* § 552.302. Thus, even if the district failed to comply with section 552.221(d) or section 552.222, as the requestor alleges, the district has not waived its discretionary exception. Accordingly, we will consider the district's assertion of section 552.107.

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. 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. *See* 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, 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 contend the submitted notes were taken by an attorney for the district to convey his legal opinion to the district and other district attorneys. You state the submitted communication was between privileged parties and was made in furtherance of the rendition of professional legal services to the district. You also state the communication was made in confidence, and that confidentiality has been maintained. We note the requestor contends the attorney was not acting as legal counsel for the district when the notes were taken. The question of whether the attorney who authored the notes was acting in his capacity as an attorney is a question of fact. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *See* Open Record Decision No. 522 at 4 (1990). As previously noted, the district represents the submitted notes were created by an attorney in order to provide legal services to the district. Therefore, based on the district's representations and our review of the submitted information, we find the district has demonstrated the applicability of the attorney-client privilege to the submitted information. We note the requestor asserts he has a special right of access to the information at issue under section 552.023 of the Government Code. Section 552.023 provides that a person or a person's authorized representative has a special right of access to information that is excepted from public disclosure under laws intended to protect that person's privacy interest. Gov't Code § 552.023. However, section 552.107 is not intended to protect the privacy of any individual. *See id.* §§ 552.107 (section 552.107 intended to protect information encompassed by the attorney-client privilege); *see also id.* § 552.023(b) (governmental body may assert provisions of Act or other law that are not intended to protect person's privacy interests to withhold information to which requestor may otherwise have a special right of access). As such, the requestor does not have a special right of access to the information at issue under section 552.023. Accordingly, the district may withhold the submitted information under section 552.107(1) of the Government Code.

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# 440965

Enc. Submitted documents

c: Requestor
(w/o enclosures)