ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 29, 2012

Ms. Melody Chappell
Counsel for the Beaumont ISD
Wells, Peyton, Greenberg & Hunt, L.L.P.
P.O. Box 3708
Beaumont, Texas 77704-3708

OR2012-19205

Dear Ms. Chappell:

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# 472695.

The Beaumont Independent School District (the "district"), which you represent, received a request for e-mails sent to or from a named principal in the district during two specified time intervals. You state some of the requested information has been released. You contend some of the submitted information is not subject to disclosure under the Act. You seek to withhold the rest of the submitted information under sections 552.026, 552.103, 552.107(1), and 552.114 of the Government Code. We have considered your arguments and reviewed the information you submitted. We also have considered the comments we received from the requestor.[1]

We first note the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our

[1] *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

review in the open records ruling process under the Act.[2] Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). In this instance, the information in Exhibit E consists of redacted education records. Because our office is prohibited from reviewing education records to determine the applicability of FERPA, we will not address FERPA with respect to the redacted education records you have submitted. Such determinations under FERPA must be made by the educational authority in possession of the education records.[3] Thus, we will not address your claims under sections 552.026 and 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into Act), 552.114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (concluding same analysis applies under Gov't Code § 552.114 and FERPA). We will consider your other arguments against disclosure.

You contend the information in Exhibit B is not subject to disclosure under the Act. The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002(a) defines "public information" as consisting 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). Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). You contend the information in Exhibit B was not collected, assembled, or maintained under a law or ordinance or in connection with the transaction of the district's official business. You state the information at issue is related to personal matters. You explain the district allows its employees limited personal use of the district's e-mail system. Based on your

---

[2]A copy of the letter may be found on the attorney general's website, http://www.oag.state.tx.us/open/20060725usdoe.pdf.

[3]If in the future the district obtains parental consent to submit unredacted education records and seeks a ruling from this office on the proper redaction of the records in compliance with FERPA, we will rule accordingly.

representations and our review, we find most of the information in Exhibit B does not constitute public information for purposes of section 552.002 of the Government Code. *See* Open Records Decision No. 635 at 4 (1995) (Gov't Code § 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). We therefore conclude that, except for the information we have marked, the information in Exhibit B is not subject to the Act and need not be released in response to this request for information. We conclude the information we have marked in Exhibit B is related to a personnel matter, so as to pertain to the district's official business. Therefore, the marked information is subject to the Act and must be released unless it falls within the scope of an exception to disclosure.

Next, we address your claims under sections 552.103 and 552.107(1) of the Government Code. Section 552.103 provides in part:

> (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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example,

the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.[4] *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You state the information in Exhibit C "relate[s] to litigation to which the district may be a party. Litigation was reasonably anticipated at the time the [r]equestor made the request for information and the information in Exhibit "C" relates to that litigation." Having considered your representations, we find you have neither provided any concrete evidence of why litigation was reasonably anticipated when the district received the request nor demonstrated how the information at issue is related to anticipated litigation. *See* ORD 452 at 4; *see also* Open Records Decision No. 331 (1982) (mere chance of litigation not sufficient to trigger statutory predecessor to Gov't Code § 552.103). We therefore conclude the district may not withhold any of the information in Exhibit C under section 552.103 of the Government Code.

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. *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

---

[4]This office also concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

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, 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 information in Exhibit D consists of confidential communications between the district and its counsel regarding a personnel matter. You do not indicate the confidentiality of the communications has been waived. Based on your representation and our review, we conclude the district may withhold Exhibit D under section 552.107(1) of the Government Code.

Lastly, we note the district may be required to withhold one item of information in Exhibit B under section 552.117 of the Government Code.[5] Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former official or employee of a governmental body who timely requests confidentiality for the information under section 552.024 of the Government Code. *See* Gov't Code §§ 552.117(a)(1), .024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request confidentiality under section 552.024. The district must withhold the information we have marked in Exhibit B under section 552.117(a)(1) of the Government Code if the employee to whom the information pertains timely requested confidentiality for the information under section 552.024 of the Government Code. If the employee did not timely request confidentiality under section 552.024, the marked information must be released.

---

[5]This office will raise section 552.117 on behalf of a governmental body, as this section is a mandatory exception to disclosure. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

In summary, (1) except for the information we have marked, the information in Exhibit B is not public information subject to the Act and need not be released to the requestor; (2) the district may withhold the information in Exhibit D under section 552.107(1) of the Government Code; and (3) the district must withhold the information we have marked in Exhibit B under section 552.117(a)(1) of the Government Code if the employee to whom the information pertains timely requested confidentiality for the information under section 552.024 of the Government Code. If the employee did not timely request confidentiality, the marked information must be released. In any event, the district must release the rest of the information we have marked in Exhibit B and all the information in Exhibits C and E. This ruling does not address the applicability of FERPA to any of the submitted information. Should the district determine that any of the submitted information consists of "education records" that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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,

James W. Morris III

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/bhf

Ref: ID# 472695

Enc: Submitted documents

c: Requestor
(w/o enclosures)