ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 14, 2013

Ms. Ellen H. Spalding
Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2013-10108

Dear Ms. Spalding:

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# 490192 (EISD Request No. 3513).

The Eanes Independent School District (the "district"), which you represent, received a request for all documents and e-mails that name or refer to a named individual, all documents regarding the named individual being banned by the district, and a list of people who were notified about the named individual being banned by the district. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted representative sample of information.[2]

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[1]Although 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. 677 (2002), 676 at 1-2 (2002). Further, we note 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 of the Government Code. *See* ORDs 677, 676.

[2]We 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.

Initially, we 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 or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.[3] 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"). You have provided redacted education records for our review. We note the requestor is a parent of the students to whom the submitted information pertains. Because our office is prohibited from reviewing these education records to determine the applicability of FERPA, we will not address the applicability of FERPA to any of the submitted records, other than to note that parents have a right of access under FERPA to their own child's education records and their right of access prevails over a claim under section 552.103 of the Government Code. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; Open Records Decision No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to Gov't Code § 552.103); *see also Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (holding FERPA prevails over inconsistent provision of state law). Such determinations under FERPA must be made by the educational authority in possession of the education records.[4] The DOE also has informed our office, however, a parent's right of access under FERPA to information about the parent's child does not prevail over an educational institution's right to assert the attorney-client privilege. Therefore, we will address your assertion of the attorney-client privilege under section 552.107 of the Government Code to the submitted information. We will also consider the district's claimed exceptions to the extent the students' parent does not have a right of access to the requested information under FERPA.

You state the responsive information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2013-02342 (2013). In that ruling, we determined, with the exception of the information we marked for release, the district may withhold the submitted information under section 552.103 of the Government Code. However, you inform us the public grievances that were pending in the prior ruling were no longer pending on the date the district received the instant request for information. Thus, we find the circumstances have changed, and the district may not rely on Open

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[3]A copy of this letter may be found on the Office of the Attorney General's website at http://www.oag.state.tx.us/open/20060725usdoe.pdf.

[4]In the future, if the district does obtain parental or an adult student's consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

Records Letter No. 2013-02342 as a previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We note 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 under 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 under law. Although you raise section 552.103 of the Government Code, this section does not prohibit the release of information or make information confidential. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, to the extent any portion of the submitted information was previously released in accordance with Open Records Letter No. 2013-02342, the district may not now withhold such information under section 552.103. However, we will address your argument under section 552.103 for the remaining information.

Section 552.103 of the Government Code provides in relevant part 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.
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> . . .
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> (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 section 552.103(a) 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. *See 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). *See* ORD 551.

This office has long held "litigation," for purposes of section 552.103, includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* Open Records Decision No. 588 (1991).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish 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." *Id.* Concrete evidence to support a claim 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. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). On the other hand, this office has determined 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 that 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 first assert litigation against the district is currently pending or is reasonably anticipated because prior to the district's receipt of the instant request for information, both the requestor and another individual filed internal grievances with the district. You state complaints filed with the district are "litigation" in that the district follows administrative procedures in handling such disputes. You explain under the district's grievance policy, the grievant proceeds through a three-level process wherein hearing officers hear the complaint at level one and level two, and the district's board of trustees (the "board") hears the grievance if the

grievant appeals to level three. You state the grievant is allowed to be represented by counsel, present favorable evidence to the district, and present witnesses to testify on the grievant's behalf. Based on your representations, we find you have demonstrated the district's administrative procedures for grievances are conducted in a quasi-judicial forum, and thus, constitute litigation for purposes of section 552.103. You inform us the board heard both complaints on March 5, 2013, prior to the district's receipt of the instant request for information. We understand you to argue, however, litigation is pending or reasonably anticipated in these matters because the statute of limitations for either individual to file an appeal to the Commissioner of Education has not yet run. However, because an appeal has not been filed, we find you have not demonstrated the district is a party to pending or anticipated litigation based on the district's grievance hearings.

You also explain the individual who filed the other grievances has also filed complaints with the State Bar of Texas against three attorneys associated with the district. You have not explained how complaints filed with the State Bar of Texas are litigation for the purposes of section 552.103. You also have not explained how the district is a party to any litigation involving the State Bar of Texas complaints. Finally, you have provided an email dated March 7, 2013, in which the same individual accuses the district of libel and slander. You state the district interprets this e-mail to be a threat of litigation. However, upon review of your arguments, you have not provided this office with evidence this individual had taken any objective steps toward filing a lawsuit prior to the date the district received the instant request for information. *See* Gov't Code § 552.301(e)(1)(A); Open Records Decision No. 331 (1982). Thus, based on your representations and our review, we find you have failed to demonstrate litigation was pending or reasonably anticipated on the date the district received the request for information. Therefore, the district may not withhold any portion of the requested information 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 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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, orig. proceeding). 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 claim the information you have marked is protected by section 552.107(1) of the Government Code. You state the information you have marked consists of communications between a district attorney and district representatives. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the district and these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Thus, the district may withhold the information you have marked under section 552.107(1) of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).[5] Gov't Code § 552.137(a)-(c). Upon review, we have marked an e-mail address that is not a type specifically excluded by section 552.137(c). However, we note the requestor may be the authorized representative of the individual whose e-mail address we have marked and have a right of access pursuant to section 552.137(b). *See id.* § 552.137(b). Accordingly, the district must withhold the email address we marked under section 552.137 of the Government Code, unless the individual to whom the e-mail address belongs affirmatively consents to its release or the requestor is the authorized representative of the individual whose e-mail address is at issue.

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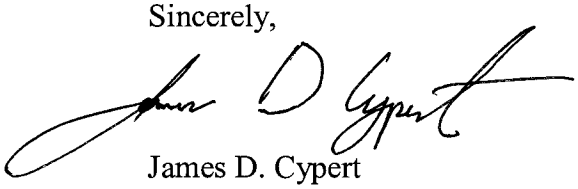
[5]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the district may withhold the information it has marked under section 552.107 of the Government Code. The district must withhold the email address we marked under section 552.137 of the Government Code, unless the individual to whom the e-mail address belongs affirmatively consents to its release or the requestor is the authorized representative of the individual whose e-mail address is at issue. The district must release the remaining information.

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 D. Cypert
Assistant Attorney General
Open Records Division

JDC/ac

Ref: ID# 490192

Enc. Submitted documents

c: Requestor
(w/o enclosures)