



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 28, 2013

Ms. Ellen H. Spalding
Counsel for the Eanes Independent School District
Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2013-11086

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# 491733 (EISD request 3536).

The Eanes Independent School District (the "district"), which you represent, received a request for a named individual's appointment book from a specified period of time. You claim the requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, you state the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2013-05960 (2013). In that ruling, we determined the district may withhold the information at issue under section 552.103 of the Government Code because the district was involved in pending litigation, in the form of a pending public grievance, at the time it received the previous request for information. However, you inform us the grievance at issue

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

in the prior ruling was no longer pending on the date the district received the instant request for information. Therefore, we find the facts and circumstances on which the previous ruling is based have changed. Thus, you may not rely on Open Records Letter No. 2013-05960 as a previous determination with regard to the information at issue. *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). Accordingly, we will address the submitted arguments against release of the 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.

...

(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).

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, the requestor filed internal grievances with the district, including a grievance against an attorney for 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 parent 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 parent grievances are conducted in a quasi-judicial forum, and thus, constitute litigation for purposes of section 552.103.

You inform us the district's board heard some of the requestor's complaints on March 5, 2013, prior to the district's receipt of the information request. Thus, this proceeding has concluded. You also inform us the district's board heard the requestor's complaint against the attorney for the district on December 4, 2012. Thus, this proceeding has also concluded. Accordingly, as these proceedings are no longer pending we find you have failed to demonstrate the district is involved in litigation relating to these internal grievances when the district received the request for information.

You also explain an individual has filed complaints with the State Bar of Texas against three attorneys associated with the district. However, you have not explained how the district is a party to any litigation involving the State Bar of Texas complaints. You have further provided an e-mail dated March 7, 2013, in which the individual accuses the district of libel and slander. You state the district interprets this e-mail to be a threat of litigation. However, 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 request for information. *See* Gov't Code § 552.301(e); 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 in relation to these matters on the date the district received the request for information.

Additionally, you state that prior to the district's receipt of the instant request, the requestor filed grievances complaining the district (1) posted STAAR results on the district's website in violation of the Family Educational Rights and Privacy Act, (2) destroyed surveillance video, and (3) violated competitive bidding requirements in relation to the purchase of computer tablets. You further state these grievances remain pending. Thus, we determine

the district was a party to pending litigation relating to these internal grievances at the time it received the instant request for information. However, you have failed to demonstrate how the information at issue relates to these pending grievances. Accordingly, the district may not withhold the submitted information under section 552.103 of the Government Code.

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. *See Open Records Decision Nos. 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 capacity other than that of attorney). Third, the privilege applies only to 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 only to 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 assert the submitted appointment book entries consist of or document confidential communications between district representatives and attorneys for the district. You contend these communications were made in furtherance of the rendition of legal services to the district, and you indicate these communications have remained confidential. However, upon review, we find you have failed to demonstrate how any of the information at issue consists of or documents communications between privileged parties made for the purpose of facilitating the rendition of professional legal services to the district. Therefore, none of this

information may be withheld under section 552.107(1) of the Government Code. As you raise no other exceptions to disclosure, the submitted information 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script that reads "Paige Lay". The signature is written in black ink and is positioned above the typed name.

Paige Lay
Assistant Attorney General
Open Records Division

PL/bhf

Ref: ID# 491733

Enc. Submitted documents

cc: Requestor
(w/o enclosures)