



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 9, 2014

Ms. Elizabeth G. Neally  
Counsel for Port Aransas Independent School District  
Walsh, Anderson, Gallegos, Green and Treviño, P.C.  
P.O. Box 460606  
San Antonio, Texas 78246

OR2014-07929

Dear Ms. Neally:

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# 522502.

The Port Aransas Independent School District (the "district"), which you represent, received two requests from different requestors for information regarding a specified investigation. The first requestor seeks the findings of the investigation and communications between a named district official and employees of a named law firm regarding a specified topic. The second requestor seeks all documents produced as a result of the specified investigation regarding his client's grievance.<sup>1</sup> You state the district has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>2</sup> You claim the submitted information

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<sup>1</sup>You state the district sought and received clarification of the second requestor's request. See Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup>The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA 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 review in the open records ruling process under the Act. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.<sup>3</sup> We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive to the present requests because it was created after the district received the requests. This ruling does not address the public availability of non-responsive information, and the district need not release it in response to either request.

Next, we note some of the responsive information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2014-03331 (2014). In Open Records Letter No. 2014-03331, we ruled the district (1) may withhold certain information under Texas Rule of Evidence 503; (2) may withhold certain information under section 552.103 of the Government Code; (3) may withhold certain information under section 552.107 of the Government Code; (4) must withhold the information we marked under section 552.117(a)(1) of the Government Code if the individual whose information is at issue timely requested confidentiality; and (5) must release the remaining information. We have no indication the law, facts, and circumstances on which the prior ruling was based have changed. Therefore, to the extent the responsive information is identical to the information previously submitted and ruled on by this office, the district must continue to rely on Open Records Letter No. 2014-03331 and withhold or release the previously ruled upon information in accordance with the prior ruling. *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 a 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 you seek to withhold all of the responsive information, some of which may have been previously released pursuant to Open Records Letter No. 2014-03331, under sections 552.103, 552.107, and 552.111 of the Government Code and Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. Additionally, we note the responsive information also contains a letter sent to all parents in the district. Section 552.007 of the Government Code, however, 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* 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

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<sup>3</sup>Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 677 (2002), 676 (2002).

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. We note sections 552.103, 552.107, and 552.111, rule 503, and rule 192.5 do 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 section 552.103); Open Records Decision Nos. 677 at 8-10 (attorney work product privilege under section 552.111 and rule 192.5 may be waived), 676 at 10-11 (attorney-client privilege under section 552.107(1) and rule 503 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, to the extent any of the responsive information was previously released pursuant to Open Records Letter No. 2014-03331, the district may not now withhold it under section 552.103, section 552.107, section 552.111, rule 503, or rule 192.5. Additionally, the district may not now withhold the previously released letter on those bases. As you raise no further exceptions to disclosure of the previously released letter, the district must release it. We will consider your arguments for the responsive information other than the previously released letter that was not at issue in the prior ruling.

Next, we note the responsive information contains a partial transcript of an audio recording of an open meeting and draft minutes of an open meeting of the district's Board of Trustees. Section 551.022 of the Open Meetings Act, chapter 551 of the Government Code, expressly provides that the "minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee." Gov't Code § 551.022. We note the minutes of a public meeting of a governmental body are public records when entered, are public in whatever form they exist, and public access may not be delayed until formal approval is obtained. Open Records Decision No. 225 (1979). Accordingly, we find section 551.022 is applicable to the transcript and the draft meeting minutes, which we have marked. Although you raise sections 552.103, 552.107, and 552.111 for this information, we note that as a general rule, the exceptions to disclosure found in the Act are not applicable to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the marked transcript and minutes may not be withheld under section 552.103, section 552.107, or section 552.111 of the Government Code. Accordingly, the district must release the marked transcript and draft minutes.

We next note the remaining information contains information that is subject to section 552.022 of the Government Code. Section 552.022(a) provides in relevant part the following:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(1), (3), (15). The remaining information contains completed evaluations that are subject to section 552.022(a)(1), information in accounts that is related to the receipt or expenditure of district funds that is subject to section 552.022(a)(3), and district policies published on the district's website that are subject to section 552.022(a)(15), which we have marked. We have also marked a job description that is subject to section 552.022(a)(15) if the district considers it to be open to the public under its policies. The district may withhold the information subject to section 552.022 only if it is made confidential under the Act or other law. Although you seek to withhold this information under sections 552.103, 552.107, and 552.111, those exceptions do not prohibit the release of information or make information confidential. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; ORDs 677 at 8-10, 676 at 10-11, 665 at 2 n.5. Accordingly, the district may not withhold the information subject to section 552.022 under section 552.103, section 552.107, or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" that make information expressly confidential for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider the district's assertions of the attorney-client privilege and the attorney work product privilege under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, respectively, for the information subject to section 552.022. We will also address the district's arguments against disclosure of the remaining information.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert the information subject to section 552.022 should be withheld under rule 503. You explain the information at issue was communicated between attorneys for the district and district employees and officials in their capacities as clients. You state these documents were communicated in furtherance of the rendition of professional legal services to the district. You state the communications were confidential, and you state the district has not waived the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the district may withhold the information subject to section 552.022 under rule 503.<sup>4</sup>

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<sup>4</sup>As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

Section 552.103 of the Government Code 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 that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation is pending or reasonably anticipated on the date the governmental body receives 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, 481 (Tex. App.—Austin 1997, orig. proceeding); *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). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See* ORD 551 at 4.

This office has long held that for the purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (concerning hearing before Public Utilities Commission). 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* ORD 588.

In this instance, you state the remaining responsive information is related to a grievance filed with the district prior to the date the district received the requests for information. You explain grievances filed with the district are "litigation" because the district follows

administrative procedures in handling such disputes. You state the district's grievance process is a multi-level hearing process wherein various administrators initially hear the grievance, and the district's Board of Trustees ultimately hears the grievance. You explain during these hearings the grievant is allowed to be represented by counsel and present evidence to the district. You state the grievant must complete the district's grievance process in order to exhaust his administrative remedies before he can appeal to either the Texas Commissioner of Education or a court of competent jurisdiction. Based on your representations and our review, we find you have demonstrated the district's administrative procedure for grievances is conducted in a quasi-judicial forum and, thus, constitutes litigation for purposes of section 552.103. Thus, we determine the district was involved in pending litigation at the time it received the instant requests for information. Further, the information at issue directly relates to the subject of this pending litigation. Based on your representations and our review, we find the remaining responsive information is related to litigation that was pending at the time the district received the requests for information. Therefore, section 552.103 is generally applicable to the remaining responsive information.

We note, however, some of the information at issue was sent to or received by the opposing party to the pending litigation. Thus, the opposing party has seen or had access to this information, which we have marked. The purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party in pending litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the district may not withhold the marked information the opposing party has seen or had access to. The district may withhold the remaining responsive information under section 552.103.<sup>5</sup> We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). We will address the applicability of other exceptions to disclosure of the information the opposing party has seen or to which it has had access.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for rule 503. 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* ORD 676 at 6-7. 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). Upon review, we find you have failed

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<sup>5</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

to demonstrate how the remaining responsive information, which was shared with the opposing party, consists of privileged attorney-client communications. Accordingly, the district may not withhold any of the remaining responsive information under section 552.107 of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. ORD 677 at 4-8; *see City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 377 (Tex. 2000). Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a)(1)-(2). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*; ORD 677 at 6-8. Upon review, we find you have failed to demonstrate how the remaining responsive information, which was shared with the opposing party, consists of privileged work product. Accordingly, the district may not withhold any of the remaining responsive information under section 552.111 of the Government Code.

In summary, to the extent the responsive information is identical to the information previously submitted to and ruled on by this office, the district must continue to rely on Open Records Letter No. 2014-03331 and withhold or release the previously ruled upon information in accordance with the prior ruling. The district must release the previously released letter, which we have marked, pursuant to section 552.007 of the Government Code to the second requestor. The district must also release the transcript of an audio recording of an open meeting and the draft meeting minutes of an open meeting, which we have marked, pursuant to section 551.022 of the Open Meetings Act to the second requestor. The district may withhold the information subject to section 552.022 of the Government Code under Texas Rule of Evidence 503. With the exception of the information seen by the opposing party, which we have marked, the district may withhold the remaining responsive

information under section 552.103 of the Government Code. The district must release the marked information seen by the opposing party to the second requestor.<sup>6</sup>

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](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,



Kristi L. Wilkins  
Assistant Attorney General  
Open Records Division

KLW/tch

Ref: ID# 522502

Enc. Submitted documents

c: Two Requestors  
(w/o enclosures)

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<sup>6</sup>We note the information being released to the second requestor is not responsive to first requestor's request for information, and the district need not release this information to the first requestor. Additionally, we note the information being released to the second requestor contains that requestor's e-mail address, as well as personal information pertaining to that requestor's client, to which the second requestor has a right of access. See Gov't Code §§ 552.023(a), .137(b); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself).