



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

December 19, 2016

Mr. Harry F. Wright, Jr.  
School Attorney  
Bryan Independent School District  
101 North Texas Avenue  
Bryan, Texas 77803

OR2016-27954

Dear Mr. Wright:

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# 639083.

The Bryan Independent School District (the "district") received a request for information pertaining to a named district employee's request for leave during a specified time period and all documents related to the named employee's resignation. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code, and privileged under rule 408 of the Texas Rules of Evidence.<sup>1</sup> We have received comments from an attorney on behalf of the named employee (the "employee's

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<sup>1</sup>Although you raise section 552.101 of the Government Code in conjunction with rules 408 and 503 of the Texas Rules of Evidence 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. 676 at 1-2 (2002), 575 at 2 (1990). Further, while you also raise section 552.101 of the Government Code in conjunction with section 552.103 of the Government Code, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* ORDs 676 at 1-2, 575 at 2. Accordingly, we do not address your arguments under section 552.101 of the Government Code in conjunction with these provisions. In addition, we note the proper exceptions to raise when asserting the attorney-client and attorney work product privileges for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 677 (2002), 676 at 6.

attorney”). *See* Gov’t Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, we address the employee’s attorney’s argument that the information in Exhibit 4 is not subject to the Act. The Act applies to “public information,” which is defined in section 552.002(a) of the Government Code as

information that is written, produced, 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:
  - (A) owns the information;
  - (B) has a right of access to the information; or
  - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

Gov’t Code § 552.002(a). Information is “in connection with the transaction of official business” if it is “created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer’s or employee’s official capacity, or a person or entity performing official business or a government function on behalf of a governmental body, and pertains to official business of the governmental body.” *Id.* § 552.002(a-1). Thus, virtually all of the information in a governmental body’s physical possession constitutes public information and thus 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 employee’s attorney asserts Exhibit 4 consists of a recording that was not made in connection with official business of the district or maintained by a district officer or employee in their capacity as an officer or employee of the district. The employee’s attorney argues the recording does not constitute public information as it was “not gathered or maintained in connection with the transaction of official business.” We note, however, the information at issue is maintained by the district and pertains to a personnel matter concerning the district.

Thus, we find the information at issue is maintained by the district in connection with the transaction of official business. Consequently, the information at issue is public information under section 552.002 that must be released unless it falls within an exception to public disclosure. *See* Gov't Code §§ 552.002, .021. Accordingly, we will consider the submitted arguments against disclosure of this information.

The employee's attorney also claims Exhibit 4 is confidential under chapter 551 of the Government Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses section 551.104 of the Government Code. Section 552.104 provides, "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." *Id.* § 551.104(c). Thus, such information cannot be released in response to an open records request. *See* Attorney General Opinion JM-995 at 5-6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act). However, other than certified agendas and tape recordings, records relating to closed meetings are not expressly made confidential by chapter 551 of the Government Code. *See, e.g.,* Open Records Decision No. 485 at 6 (1987) (investigative report not excepted from disclosure under statutory predecessor to section 552.101 simply by virtue of its having been considered in executive session); *see also* Open Records Decision No. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public). The employee's attorney asserts Exhibit 4 is confidential under section 551.104 because, due to the substantive content of the recording, the discussion should have occurred in a closed session unless the employee elected for it to occur in open session. However, the district does not inform us, and the information does not otherwise indicate, the meeting at issue was a closed meeting for purposes of the Open Meetings Act. Upon review, we find Exhibit 4 does not contain a certified agenda or tape of a closed meeting. *See* Gov't Code § 551.104. Therefore, Exhibit 4 is not confidential pursuant to section 551.104 of the Government Code and the district may not withhold it under section 552.101 of the Government Code on that basis.

The district claims Exhibit 4 is excepted from public disclosure under section 552.101 of the Government Code. Section 552.101 encompasses other statutes, such as section 21.355 of the Education Code, which provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355(a). This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). Additionally, a court has concluded that a written reprimand constitutes an evaluation for purposes of section 21.355, as it "reflects the principal's judgment regarding

[a teacher's] actions, gives corrective direction, and provides for further review." *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). In Open Records Decision No. 643, we determined an "administrator" for purposes of section 21.355 means a person who is required to, and does in fact, hold an administrator's certificate under subchapter B of chapter 21 of the Education Code, and is performing the functions as an administrator, as that term is commonly defined, at the time of the evaluation. *See* ORD 643.

You assert Exhibit 4 consists of an evaluation of a former administrator of the district that is confidential under section 21.355. You inform us, and have submitted documentation reflecting, the administrator at issue held the appropriate certification at the time of the evaluation. However, we find you have failed to demonstrate Exhibit 4 consists of "[a] document evaluating the performance of a teacher or administrator" as contemplated by section 21.355 of the Education Code. *See* ORD 643 at 3. Therefore, the district may not withhold Exhibit 4 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.107(1) of the Government Code protects information coming 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 "to facilitate 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). 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. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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 state the information you have marked in Exhibit 6 consists of communications between the district's attorneys, including outside counsel employed by the district, and district employees that were made for the purpose of providing legal services to the district. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the information you have marked consists of privileged attorney-client communications. Therefore, the district may withhold the information you have marked in Exhibit 6 under section 552.107(1) of the Government Code.

The district seeks to withhold the information you have marked in Exhibit 7 under section 552.103 of the Government Code.<sup>2</sup> 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.

*Id.* § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and

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<sup>2</sup>Although the employee's attorney raises section 552.103 for the information in Exhibit 7, we note section 552.103 protects the interests of governmental bodies, as distinguished from exceptions which are intended to protect the interests of third parties. *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 No. 522 (1989) (discretionary exceptions in general). Thus, we do not address the employee's attorney's argument under section 552.103.

(2) the information at issue is related to that litigation. *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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

We note, however, the information at issue has been communicated to or obtained from the attorney representing the opposing party in this instance. 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 has seen or had access to information relating to the anticipated litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the district may not withhold the information you have marked under section 552.103 of the Government Code. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Finally, the district also claims the information in Exhibit 7 is privileged under Texas Rule of Evidence 408. Rule 408 governs the admissibility of information developed through compromise negotiations. *See* TEX. R. EVID. 408. However, rule 408 does not expressly make information confidential. *See generally* Open Records Decision Nos. 658 at 4 (1998) (stating that statutory confidentiality provision must be express and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (stating that, as general rule, statutory confidentiality requires express language making information confidential), 465 at 4-5 (1987). Accordingly, the district may not withhold any of the submitted information in Exhibit 7 under rule 408 of the Texas Rules of Evidence.

In summary, the district may withhold the information you have marked in Exhibit 6 under section 552.107(1) of the Government Code. The district must release the remaining information to the requestor.

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,



Kieran Hillis  
Assistant Attorney General  
Open Records Division

KH/akg

Ref: ID# 639083

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)