ROUND ROCK ISD
Hafedh Azaiez, Ed. D.
Superintendent of Schools

Jacob Woolston
Staff Attorney

October 11, 2021

via PIA eFiling System
The Honorable Ken Paxton
Attorney General of Texas
Office of the Attorney General
300 W. 15th St., 11th Floor
Austin, Texas 78701

ATTN: Open Records Division

Re: RRISD / Request for Public Information Determination - TPIA 2022-118 – 15-day Letter

Dear Attorney General Paxton:

Round Rock Independent School District ("RRISD") previously submitted, on October 4, 2021, a request for authorization to withhold certain information that the District believes is not subject to and/or is excepted from disclosure under the Public Information Act.

The District received a request for public information via email on Sunday, September 19, 2021[1] from Robert Montoya for email communications between board members, staff and board counsel. The District is closed on the weekends, so the request was received on Monday, September 20, 2021. The 10th business day from the date of receipt of is October 4, 2021. The 15th business day from the date of receipt is October 11, 2021.

REQUEST FOR DECISION PURSUANT TO GOVERNMENT CODE §552.301

The information that requires a determination from your office is being submitted under this cover. [2] By copy of this letter, RRISD hereby provides notice to the Requestor that we have requested an opinion from your office on whether the requested information is public under the Public Information Act. This request is being submitted pursuant to Texas Government Code Section 552.301 and the identified exemptions herein.

Any information that we determine to be public information will be submitted to the Requestor upon receipt of any required payment.

[1] Exhibit 1: Public Information Request
[2] Exhibit 2: Documentation for review

EXEMPTION FROM DISCLOSURE PURSUANT TO GOVERNMENT CODE §552.103

Section 552.103(a) of the Act, commonly referred to as the "litigation exception," excepts from required public disclosure:

> [I]nformation 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.

Section 552.103(a) was intended to prevent the use of the Public Information Act as a method of avoiding the rules of discovery used in litigation. This exception enables a governmental body to protect its position in litigation "by forcing parties seeking information relating to that litigation to obtain it through discovery" procedures. Section 552.103 is a discretionary exception to disclosure and does not make information confidential under the Act. As such, section 552.103 does not make information confidential for the purposes of section 552.022. Further, a governmental body waives section 552.103 by failing to comply with the procedural requirements of section 552.301.

1. Governmental Body's Burden

For information to be excepted from public disclosure by section 552.103(a), (1) litigation involving the governmental body must be pending or reasonably anticipated and (2) the information must relate to that litigation. Therefore, a governmental body that seeks an attorney general decision has the burden of clearly establishing both prongs of this test.

For purposes of section 552.103(a), a contested case under the Administrative Procedure Act (APA), Government Code chapter 2001, constitutes "litigation." Questions remain regarding whether administrative proceedings not subject to the APA may be considered litigation within the meaning of section 552.103(a). In determining whether an administrative proceeding should be considered litigation for the purpose of section 552.103, the attorney general will consider the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Section 552.103(a) requires concrete evidence that litigation is realistically contemplated; it must be more than conjecture. The mere chance of litigation is not sufficient to trigger section 552.103(a). The fact that a governmental body received a claim letter that it represents to the attorney general to be in compliance with the notice requirements of the Texas Tort Claims Act, Civil Practice and Remedies Code chapter 101, or applicable municipal ordinance, shows that litigation is reasonably anticipated. If a governmental body does not make this representation, the claim letter is a factor the attorney general will consider in determining from the totality of the circumstances presented whether the governmental body has established that litigation is reasonably anticipated.

In previous open records decisions, the attorney general had concluded that a governmental body could claim the litigation exception only if it established that withholding the information was

necessary to protect the governmental body's strategy or position in litigation. However, Open Records Decision No. 551 (1990) significantly revised this test and concluded that the governmental body need only establish the relatedness of the information to the subject matter of the pending or anticipated litigation. Therefore, to meet its burden under section 552.103(a) in requesting an attorney general decision under the Act, the governmental body must identify the issues in the litigation and explain how the information relates to those issues. When the litigation is actually pending, the governmental body should also provide the attorney general a copy of the relevant pleadings.

2. Only Circumstances Existing at the Time of the Request

Subsection (c) of section 552.103 provides as follows:

> 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.

Consequently, in determining whether a governmental body has met its burden under section 552.103, the attorney general or a court can only consider the circumstances that existed on the date the governmental body received the request for information, not information about occurrences after the date of the request for information.

3. Temporal Nature of Section 552.103

Generally, when parties to litigation have inspected the records pursuant to court order, discovery, or through any other means, section 552.103(a) may no longer be invoked. In addition, once litigation is neither reasonably anticipated nor pending, section 552.103(a) is no longer applicable. Once a governmental body has disclosed information relating to litigation, the governmental body is ordinarily precluded from invoking section 552.103(a) to withhold the same information. This is not the case, however, when a governmental body has disclosed information to a co-defendant in litigation, where the governmental body believes in good faith that it has a constitutional obligation to disclose it.

4. Scope of Section 552.103

Section 552.103 applies to information that relates to pending or reasonably anticipated litigation, which is a very broad category of information. The protection of section 552.103 may overlap with that of other exceptions that encompass discovery privileges. However, the standard for proving that section 552.103 applies to information is the same regardless of whether the information is also subject to a discovery privilege.

For example, information excepted from disclosure under the litigation exception may also be subject to the work product privilege. However, the standard for proving that the litigation exception applies is wholly distinct from the standard for proving that the work product privilege applies. The work product privilege is incorporated into the Act by section 552.111 of the Government Code, not section 552.103. If both section 552.103 and the work product privilege could apply to requested information, the governmental body has the discretion to choose to

assert either or both of the exceptions. However, the governmental body must meet distinct burdens depending on the exception it is asserting. Under section 552.103, the governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation. Under the work product privilege, the governmental body must demonstrate that the requested information was created for trial or in anticipation of civil litigation by or for a party or a party's representative.

The District was notified of the lawsuit on August 16, 2021, when an attempt to serve was unsuccessfully attempted. The lawsuit was formally served on August 31, 2021. Exhibit #3 includes the Case Summary showing the unsuccessful service and the 1st Amended Petition. In addition, the District is involved in similar litigation with the Attorney General. The press release announcing this lawsuit was released on September 10, 2021. The above referenced open records request was submitted well after the District was notified of the litigation. The substance of this request is clearly related to the substance of the lawsuit.

EXEMPTION FROM DISCLOSURE PURSUANT TO GOVERNMENT CODE §552.107

G. Section 552.107: Certain Legal Matters
Section 552.107 of the Government Code states that information is excepted from required public disclosure if:

(1) it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct; or

(2) a court by order has prohibited disclosure of the information.

This section has two distinct aspects: subsection (1) protects information within the attorney-client privilege, and subsection (2) protects information a court has ordered to be kept confidential.

1. Information Within the Attorney-Client Privilege

When seeking to withhold information not subject to section 552.022 of the Government Code based on the attorney-client privilege, a governmental body should assert section 552.107(1). In Open Records Decision No. 676 (2002), the attorney general interpreted section 552.107 to protect the same information as protected under Texas Rule of Evidence 503. Thus, the standard for demonstrating the attorney-client privilege under the Act is the same as the standard used in discovery under rule 503. In meeting this standard, a governmental body bears the burden of providing the necessary facts to demonstrate the elements of the attorney-client privilege.

First, the governmental body must demonstrate that the information constitutes or documents a communication. Second, the communication must have been made "to facilitate the rendition of professional legal services" to the client governmental body. Third, the governmental body must demonstrate that the communication was between or among clients, client representatives, lawyers, and lawyer representatives. Fourth, the governmental body must show that the communication was confidential; that is, the communication was "not intended to be disclosed to third persons other than those: to (A) whom disclosure is made to furtherance the rendition of

professional legal services to the clients; or (B) reasonably necessary to transmit the communication." Finally, because the client can waive the attorney-client privilege at any time, the governmental body must demonstrate that the communication has remained confidential.

The privilege will not apply if the attorney or the attorney's representative was acting in a capacity "other than that of providing or facilitating professional legal services to the client." In *Harlandale Indep. Sch. District v. Cornyn*, the Third Court of Appeals addressed whether an attorney was working in her capacity as an attorney when she conducted a factual investigation, thus rendering factual information from the attorney's report excepted from public disclosure under section 552.107(1) of the Government Code. There, the Harlandale Independent School District hired an attorney to conduct an investigation into an alleged assault and render a legal analysis of the situation upon completion of the investigation. The attorney produced a report that included a summary of the factual investigation as well as legal opinions. While the court of appeals held the attorney-client privilege does not apply to communications between an attorney and a client "when the attorney is employed in a non-legal capacity, for instance as an accountant, escrow agency, negotiator, or notary public," the court also held the attorney in that case was acting in a legal capacity in gathering the facts because the ultimate purpose of her investigation was the rendition of legal advice. Thus, when an attorney is hired to conduct an investigation in his or her capacity as an attorney, a report produced by an attorney containing both factual information and legal advice is excepted from disclosure in its entirety under section 552.107(1).

If a governmental body demonstrates that any portion of a communication is protected under the attorney-client privilege, then the entire communication will be generally excepted from disclosure under section 552.107. However, section 552.107 does not apply to a non-privileged communication within a privileged communication, if the non-privileged communication is maintained by the governmental body separate and apart from the otherwise privileged communication. For example, if an e-mail string includes an e-mail or attachment that was received from or sent to a non-privileged party, and the e-mail or attachment that was received from or sent to the non-privileged party is separately responsive to the request for information when it is removed from the e-mail string and stands alone, the governmental body may not withhold the non-privileged e-mail or attachment under section 552.107.

The scope of the attorney-client privilege and the work product privilege, which is encompassed by section 552.111 of the Government Code, are often confused. The attorney-client privilege covers certain communications made in furtherance of the rendition of professional legal services, while the work product privilege covers work prepared for the client's lawsuit. For materials to be covered by the attorney-client privilege, they need not be prepared for litigation.

The request specifically seeks communications to RRISD's Interim General Counsel, Jenny Wells, and Doug Poneck, outside Board Counsel, from high level district officials and Trustees. These communications were to facilitate the rendition of professional legal services to the client, RRISD, as indicated by a statement in the exchange. The communication was intended to be confidential and was not disclosed to third parties. RRISD has not waived the privilege with respect to these communications. 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).

EXEMPTION FROM DISCLOSURE PURSUANT TO GOVERNMENT CODE §552.108

H. Section 552.108: Certain Law Enforcement, Corrections, and Prosecutorial Information

Section 552.108 of the Government Code, sometimes referred to as the "law enforcement" exception, provides as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

(3) it is information relating to a threat against a peace officer or detention officer collected or disseminated under Section 411.048; or

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

The information marked is an internal record that relates to a current investigation and prosecution that may compromise the case pursuant to §552.108(a). *See* Exhibit #4.

EXEMPTION FROM DISCLOSURE PURSUANT TO GOVERNMENT CODE §552.111

Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency . . .

To be protected under section 552.111, information must consist of interagency or intra-agency communications. Although information protected by section 552.111 is most commonly generated by agency personnel, information created for an agency by outside consultants acting on behalf of the agency in an official capacity may be within section 552.111. An agency's communications with other agencies and third parties, however, are not protected unless the agency demonstrates that the parties to the communications share a privity of interest. For example, correspondence between a licensing agency and a licensee is not excepted under section 552.111. Also, to be protected under section 552.111, an interagency or intra-agency communication must be privileged from discovery in civil litigation involving the agency. The attorney general has interpreted section 552.111 to incorporate both the deliberative process privilege and the work product privilege.

1. Deliberative Process Privilege

Section 552.111 has been read to incorporate the deliberative process privilege into the Public Information Act for intra-agency and interagency communications. 588 The deliberative process privilege, as incorporated into the Public Information Act, protects from disclosure intra-agency and interagency communications consisting of advice, opinion or recommendations on policymaking matters of the governmental body at issue. The purpose of withholding advice, opinion or recommendations under section 552.111 is "to encourage frank and open discussion within the agency in connection with its decision-making processes" pertaining to policy matters. "An agency's policymaking functions do not encompass routine internal administrative and personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues." An agency's policymaking functions do include, however, administrative and personnel matters of broad scope that affect the governmental body's policy mission. For example, because the information at issue in Open Records Decision No. 615 (1993) concerned the evaluation of a university professor's job performance, the statutory predecessor to section 552.111 did not except this information from required public disclosure. On the other hand, the information at issue in Open Records Decision No. 631 (1995) was a report addressing allegations of systematic discrimination against African-American and Hispanic faculty members in the retention, tenure, and promotion process at a university. Rather than pertaining solely to the internal administration of the university, the scope of the report was much broader and involved the university's educational mission. Accordingly,

section 552.111 excepted from required public disclosure the portions of the report that constituted advice, recommendations or opinions.

Even when an internal memorandum relates to a governmental body's policy functions, the deliberative process privilege excepts from disclosure only the advice, recommendations, and opinions found in that memorandum. The deliberative process privilege does not except from disclosure purely factual information that is severable from the opinion portions of the memorandum.

Before June 29, 1993, the attorney general did not confine the application of the statutory predecessor to section 552.111 solely to communications relating to agencies' policymaking functions. Given the change in the interpretation of the scope of section 552.111, a governmental body that receives a request for information should exercise caution in relying on attorney general decisions regarding the applicability of this exception written before June 29, 1993. For example, in Open Records Decision No. 559 (1990), the attorney general held that the predecessor statute to section 552.111 also protects drafts of a document that has been or will be released in final form to the public and any comments or other notations on the drafts because they necessarily represent advice, opinion, and recommendations of the drafter as to the form and content of the final document. However, the rationale and scope of this open records decision have been modified implicitly to apply only to those records involving an agency's policy matters.

While factual information is not normally excepted, if it is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982). The factual information sought to be excepted here is inextricably intertwined with material involving advice, opinion, or recommendation, making severance of the factual data impractical.

Your office has concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. See *id*. at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. See *id*. at 2.

The request seeks to access information in emails of RRISD Board of Trustees and the District's Chief of Public Affairs and Communications, Jenny Caputo. Under the Texas Education Code 11.151(b), (d), school boards are responsible for adopting a vision statement and comprehensive goals for school districts; adopting a tax rate; adopting a budget; and policies on various topics, among other duties. Therefore, it is unsurprising many of the email communications in question contain advice, recommendations, and opinions regarding proposed policy changes and resolutions affecting the district. This includes draft communications discussing those proposals. In addition, the email communication discuss policy, administrative and personnel matters of broad scope that affect the School Board's policy mission. The factual information

included in these emails is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical.

Any information that we determine to be public information will be submitted to the Requestor upon receipt of any required payment.

Conclusion

We respectfully request that this request for information be reviewed for a determination by your office to protect any and all information that is deemed excepted from disclosure under the Public Information Act.

If you have any questions or need additional information, please feel free to contact me at 512.464.5451.

Sincerely,

Jacob Woolston

Jacob Woolston
Staff Attorney
Round Rock ISD

Enclosure(s)

cc: *Mr. Robert Montoya*
Via email: rmontoya@texasscorecard.com
w/o Enclosures

EXHIBIT 1

Request for Information dated September 19, 2021

EXHIBIT 2

Responsive Information to be Reviewed For a Determination

EXHIBIT 3

EXHIBIT 4