



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 20, 2004

Ms. Ellen B. Huchital
McGinnis, Lochridge & Kilgore, L.L.P.
1221 McKinney Street, Suite 3200
Houston, Texas 77010

OR2004-6012

Dear Ms. Huchital:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 205629.

The Eanes Independent School District ("EISD"), which you represent, received a request for documents which show legal expenses for March, 2004. You claim that some of the submitted information is excepted from disclosure under section 552.101 of the Government Code and Texas Rule of Evidence 503.¹ We have considered your arguments and reviewed the submitted information.

We begin by noting that the submitted information is subject to the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). "Education records" are those records that contain information directly related to a student and are maintained by an

¹We note that you raised the attorney-client privilege in conjunction with section 552.101 of the Government Code. This office has determined that the attorney-client privilege, as encompassed in Rule 503 of the Texas Rules of Evidence, does not fall within the purview of section 552.101. Open Records Decision No. 676 at 2 (2002).

educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A).

You indicate that portions of the submitted information relate to the requestor and her child. Under FERPA, a student's parents or guardians have an affirmative right of access to their child's education records. 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3 ("parent" includes legal guardian of student). However, the Family Policy Compliance Office of the United States Department of Education has informed this office that a parent's right of access under FERPA to information about the parent's child does not prevail over a school district's right to assert the attorney-client privilege. Therefore, we next consider whether EISD may withhold any of the submitted information under the attorney-client privilege.

The submitted information consists of attorney billing statements, which are subject to section 552.022 of the Government Code. This section provides in pertinent part as follows:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Thus, information contained in attorney billing statements must be released under section 552.022 unless it is expressly confidential under other law. You claim certain entries in the attorney billing statements are excepted from release under Texas Rule of Evidence 503. The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are "other law" within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the information you have marked in the attorney billing statements is protected under Rule 503.

Texas Rule of Evidence 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 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 that 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 that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). You identify the attorneys for EISD and certain client representatives in the EISD administration. Furthermore, we find you have demonstrated that portions of the billing statements constitute communications between the attorneys for EISD and the EISD administration made for the purpose of facilitating the rendition of professional legal services to EISD. You also indicate that EISD intended for the billing statements to remain confidential, and you do not indicate that EISD has waived the attorney-client privilege. Therefore, you may withhold the portions of the attorney billing statements which we have marked pursuant to Texas Rule of Evidence 503. The remaining information in the attorney billing statements must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. David Floyd
Assistant Attorney General
Open Records Division

WDF/sdk

Ref: ID# 205629

Enc. Submitted documents

c: Ms. Dianna Pharr
2204 Westlake Drive
Austin, Texas 78746
(w/o enclosures)