



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 31, 2005

Ms. Kelli H. Karczewski
Schwartz & Eichelbaum, P.C.
P. O. Box 631048
Nacogdoches, Texas 75963

OR2005-09830

Dear Ms. Karczewski:

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# 238810.

The Hudson Independent School District (the "district"), which you represent, received a request for information concerning the requestor's client's daughter, who is a district student. You claim that the requested information is excepted from disclosure based on rule 503 of the Texas Rules of Evidence. We have considered your arguments and reviewed the submitted information.

You contend that the submitted information is protected under the attorney-client privilege based on rule 503 of the Texas Rules of Evidence. In this instance, however, we note that because the submitted information is not subject to section 552.022 of the Government Code, the attorney-client privilege is properly raised under section 552.107 of the Government Code, not rule 503. Open Records Decision No. 676 at 3 (2002); *see also* Gov't Code § 552.022 (listing categories of information that are expressly public under the Act and must be released unless confidential under "other law"). As such, we will address your arguments under section 552.107.

Next, we understand that the requestor's clients are the parents of a student of the district. The Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, governs the availability of student records held by educational agencies or institutions that receive federal funds under programs administered by the federal government. Under

FERPA, a student and the student's parents have an affirmative right of access to the student's own education records, although this right does not extend to information in the student's records that identifies other students. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; *see also* 34 C.F.R. § 99.12(a) ("If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student."). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). An "educational agency or institution" is "any public or private agency or institution" that receives federal funds under an applicable program. *Id.* § 1232g(a)(3). We believe that the information at issue consists of the former student's "education records" for purposes of FERPA. *See* Open Records Decision No. 462 at 15 (1987). Therefore, FERPA requires the district to give the requestor here, as the attorney for the parents of the student to whom the records relate, the right to inspect the requested information, unless an exception under the Act applies. *See* Open Records Decision No. 229 (1979).

We understand you to claim that section 552.107 of the Government Code applies to the submitted information. The Family Policy Compliance Office of the United States Department of Education has informed this office that a student's right of access under FERPA to information about the student does not prevail over an educational institution's right to assert the attorney-client privilege or work product privilege. As such, we will address your arguments that the submitted information is excepted from disclosure based on the attorney-client privilege under section 552.107 of the Government Code.

Section 552.107 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. Open Records Decision No. 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). 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 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, no writ). 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).

In this instance, you inform us that the submitted correspondence consists of e-mails between the district superintendent and an attorney for the district. You represent that these communications were made in furtherance of the rendition of professional legal services and indicate that the confidentiality of these communications has been maintained. Having considered your arguments and reviewed the submitted information, we agree that the submitted information reflects privileged attorney-client communications. As such, the district may withhold the submitted information under section 552.107 of the Government Code.

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 ten 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the

Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,



Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/krl

Ref: ID# 238810

Enc. Submitted documents

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(w/o enclosures)