



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 18, 2006

Ms. Christine Badillo
Walsh, Anderson, Brown, Schulze, & Aldridge, P.C.
P. O. Box 2156
Austin, Texas 78768

OR2006-03869

Dear Ms. Badillo:

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# 246644.

The Lake Travis Independent School District (the "district"), which you represent, received nine requests for expense information related to two district employees, copies of public information requests received by the district during a specified period of time, charges imposed by the district pertaining to public information requests received by the district during a specified period of time, copies of communications between the district and the Department of Education, Office of Civil Rights during a specified period of time, and any records of payments made by the district to specified individuals and organizations during specified periods of time. You claim that portions of the responsive information are excepted from disclosure under sections 552.101, 552.107, 552.111, 552.114, 552.117, 552.136 and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

We first address your claim that a portion of the submitted information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client

¹Although you raise section 552.024 of the Government Code, section 552.024 is not an exception to disclosure under the Act. Section 552.024 provides the manner in which an individual may choose to keep information confidential for purposes of section 552.117 of the Government Code. Accordingly, we will consider the relevant information under section 552.117.

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 Texas 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 a capacity other than that of attorney). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, 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)-(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. Finally, 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 the definition of a confidential communication 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). Upon review, we find that the information you have marked in Tab 4 documents communications to an individual who you have not identified as a client, client representative, lawyer, or lawyer representative. Thus, you have failed to demonstrate that the information at issue documents privileged attorney-client communications. Accordingly, the district may not withhold the information you have marked in Tab 4 under section 552.107.

The district also asserts that the information contained in Tab 5 is protected from disclosure by the attorney work product privilege. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency” and encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas*

Morning News, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). 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 governmental body seeking to withhold information under this exception bears the burden of demonstrating that 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. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and

b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

After reviewing the information contained in Tab 5, we find that the information at issue was created by the district in response to a federal entity's request for information. Thus, you have failed to demonstrate that the information in Tab 5 is a communication between privileged parties made in anticipation of litigation or for trial. Further, you have not demonstrated that this information constitutes materials prepared or mental impressions developed in anticipation of litigation or for trial by the district or its representatives. We therefore conclude that the information contained in Tab 5 does not constitute attorney work product under section 552.111 of the Government Code, and none of it may not be withheld on this basis. *See* Tex. R. Civ. P. 192.5(2); ORD 677 at 7-8 (if information claimed to be work product consists of a communication, communication must be between a party and the party's representatives).

You also contend that a portion of the submitted information is identifying of district students and protected by the Family Educational Rights and Privacy Act of 1974 ("FERPA"). Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information made confidential by other statutes. Gov't Code § 552.101. 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). "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). This office generally applies the same analysis under FERPA and section 552.114 of the Government Code. *See* Open Records Decision No. 539 (1990).

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. *See* Open Records Decision No. 634 at 6-8 (1995). In this instance, you have submitted information that you contend is confidential under FERPA. Accordingly, we will address your claim.

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). Such information includes both information that directly identifies a student, as well as information that, if released, would allow the student's identity to be easily traced. You inform us that portions of the submitted information in Tabs 3 and 4 identify students of the district. We generally agree that the information you have marked in Tabs 3 and 4 must be withheld pursuant to FERPA. Additionally, we have marked a small amount of student identifying information in Tabs 3, 4, and 5 to be withheld pursuant to FERPA. Some of the information you have marked, however, does not identify a student. This information must be released.

We now address your claim under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). Whether a particular piece of

information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district must withhold the home address, home telephone number, social security number, and family member information of any employee who chose to withhold that information under section 552.024. We agree that the information you have marked in Tabs 1, 2, and 3 must be withheld pursuant to section 552.117.

Next, you claim that portions of the submitted information contained in Tabs 1, 6, 8, and 9 are excepted from disclosure under section 552.136 of the Government Code. Section 552.136 states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. We generally agree with the markings you have made in Tabs 1, 6, 8, and 9 pursuant to section 552.136. However, we note that a check number is not an access device number for purposes of section 552.136 and we have marked such numbers for release. The district must withhold the remaining account numbers you have marked in Tabs 1, 6, 8, and 9 pursuant to section 552.136.

Finally, you assert that the submitted documents contain e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail addresses you have marked do not appear to be of a type specifically excluded by section 552.137(c). In addition, you inform us that the district has not received consent for the release of the e-mail addresses at issue. Therefore, the district must withhold the e-mail addresses you have marked in Tab 3 pursuant to section 552.137. We have also marked an additional e-mail address in Tab 3 to be withheld pursuant to section 552.137.

In summary, the district must withhold 1) the student identifying information marked in Tabs 3, 4, and 5 pursuant to FERPA; 2) the information you have marked in Tabs 1, 2, and 3 pursuant to section 552.117 of the Government Code; 3) the account numbers marked in Tabs 1, 6, 8, and 9 pursuant to section 552.136 of the Government Code; and 4) the e-mail addresses marked in Tab 3 pursuant to section 552.137 of the Government Code. The remaining submitted information must be released to the requestor.

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, 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*, 342 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 Schless 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 10 calendar days of the date of this ruling.

Sincerely,



Candice M. De La Garza
Assistant Attorney General
Open Records Division

CMD/krl

Ref: ID# 246644

Enc. Submitted documents

c: Mr. David Lovelace
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(w/o enclosures)