



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 20, 2007

Ms. Heather R. Rutland
Henslee Fowler Hepworth & Schwartz LLP
816 Congress Avenue, Suite 800
Austin, Texas 78701

OR2007-04521

Dear Ms. Rutland:

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# 276265.

The Wimberley Independent School District (the "district"), which you represent, received a request for: (1) documents related to a survey conducted by a district board member, including information provided to trustees for their January school board meetings; (2) e-mails to and from the superintendent pertaining to the survey; and (3) minutes from the January school board meetings where the survey was discussed. You state some responsive information has been provided to the requestor, but claim that portions of the submitted information are excepted from disclosure under sections 552.107, 552.114, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address your contention that some of the information you highlighted in Exhibits A, C, and D constitutes student records and is therefore excepted from public disclosure under section 552.114 of the Government Code. The United States Department of Education Family Policy Compliance Office (the "DOE") informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. §1232g, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). You have submitted, among other

things, unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of the education records.¹ Accordingly, we also do not address your arguments under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act); .114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). We will, however, address the applicability of the remaining claimed exceptions to the submitted information.

You contend that some of the information you highlighted in Exhibits A and B is excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) protects information that comes 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 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. *See* 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. *See 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 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. *See* 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. *See 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

¹In the future, if the district does obtain parental consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

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).

You state that information you highlighted in Exhibits A and B consists of communications between a district board member and the district's attorney regarding a legal matter. You assert that these communications were not intended to be disclosed to a third party. Based on your representations and our review of the submitted information, we conclude that the information we have marked in Exhibits A and B constitutes confidential attorney-client communications made in connection with the rendition of professional legal services to the district. We therefore conclude that the district may withhold this marked information under section 552.107(1) of the Government Code. However, as to the remaining information in Exhibit A that you assert is excepted pursuant to section 552.107(1), we find that the district has failed to demonstrate how it constitutes a confidential attorney-client communication made in connection with the rendition of professional legal services to the district. Therefore, the district may not withhold this information under section 552.107(1) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024. 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)*. The district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The submitted documents contain the family member information of three district employees. Although you have submitted election forms for all three individuals, only one of the individuals has elected to keep information regarding her family confidential. The remaining two individuals have only elected to keep their home addresses and telephone numbers confidential. Accordingly, pursuant to section 552.117(a)(1), the district must only withhold the personal information we have marked in Exhibits A, D, and E.

We note that the submitted information contains private e-mail addresses.² 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

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). We note that section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. Section 552.137 also does not protect from public disclosure "an e-mail address... provided to a governmental body by a person who has a contractual relationship with the governmental body." Gov't Code § 552.137(c)(1). The district must withhold the personal e-mail addresses we have marked under section 552.137, unless the owner of a particular e-mail address has affirmatively consented to its public disclosure.

In summary, this ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information constitute "education records" subject to FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act. The district may withhold the information we marked in Exhibits A and B under section 552.107(1) of the Government Code. The district must withhold the information we marked in Exhibits A, D, and E under section 552.117 of the Government Code, and the private e-mail addresses we marked under section 552.137 unless the district received consent for their release. The remaining information 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, 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 10 calendar days of the date of this ruling.

Sincerely,



Aries Solis
Assistant Attorney General
Open Records Division

AS/eb

Ref: ID# 276265

Enc. Submitted documents

c: Ms. Molly Bloom
Austin American-Statesman
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(w/o enclosures)