



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 17, 2007

Ms. J. LeAnne Bram Lundy
Feldman & Rogers, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2007-13608

Dear Ms. Lundy:

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# 292072.

The Alief Independent School District (the "district"), which you represent, received a request for education records pertaining to the requestors' child. You state you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.²

Initially, we note that the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Education Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state

¹Although you raise section 552.101 of the Government Code in conjunction with rule 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Furthermore, as the submitted information is not subject to section 552.022 of the Government Code, rule 503 does not apply in this instance. *See* Open Records Decision No. 676 at 4 (2002).

²Although you also argued section 552.111 of the Government Code, you have not identified any information you seek to withhold under this exception. Therefore, we assume you do not assert this exception to disclosure. *See* Gov't Code §§ 552.301, .302.

and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purposes of our review in the open records ruling process under the Act.³ 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 for our review redacted and unredacted education records. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to the information at issue, other than to note that parents have a right of access to their own child’s education records and that their right of access prevails over a claim under section 552.103 of the Government Code.⁴ *See* 20 U.S.C § 1232g(a)(1)(A); 34 C.F.R. § 99.3; Open Records Decision No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to Gov’t Code § 552.103). Such determinations under FERPA must be made by the educational authority in possession of the education record.

With regard to your claim under section 552.107 of the Government Code, the DOE also has informed this office that a parent’s right of access under FERPA to information about the parent’s child does not prevail over an educational institution’s right to assert the attorney-client privilege.⁵ Therefore, to the extent that the requestors have a right of access under FERPA to any of the information for which you claim the attorney-client privilege, we will address your assertion of the privilege under section 552.107. We also will address your claim under section 552.103 of the Government Code.

You claim that most of the submitted information is excepted from disclosure under section 552.107 of the Government Code. When asserting the attorney-client privilege under section 552.107, 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

³A copy of this letter may be found on the Office of the Attorney General’s website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

⁴In 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.

⁵Ordinarily, FERPA prevails over an inconsistent provision of state law. *See Equal Employment Opportunity Comm’n v. City of Orange, Tex.*, 905 F.Supp. 381, 382 (E.D. Tex. 1995); Open Records Decision No. 431 at 3.

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 a 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).

You explain that the information at issue consists of communications between the district’s outside legal counsel and district representatives, made for the purpose of facilitating the rendition of professional legal services. You also inform us that the confidentiality of these communications has been maintained. Based on your arguments and our review of this information, we conclude that the information we have marked consists of privileged attorney-client communications that the district may withhold under section 552.107.⁶ You have failed, however, to demonstrate how the remaining information at issue constitutes confidential communications between privileged parties. Therefore, the remaining information may not be withheld under section 552.107.

Next, section 552.103 of the Government Code provides as follows:

- (a) Information is excepted from [required public disclosure] if it is information 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

⁶As our ruling is dispositive, we need not address your remaining claim for this information.

employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

(c) 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.

Gov't Code § 552.103. The district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the request was received, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us that the requestor filed a request with the Texas Education Agency ("TEA") for a special education due process hearing on May 25, 2007. We understand that discovery in a due process hearing is governed by the Administrative Procedure Act, Texas Government Code, Chapter 2001, and the hearing itself is governed by the Texas Rules of Civil Procedure and the Texas Rules of Evidence. You also explain that the submitted information directly relates to the hearing. Accordingly, we find that the due process hearing constitutes litigation for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concluding that contested case under Administrative Procedure Act, Gov't Code ch. 2001, qualifies as litigation under statutory predecessor), 301 (1982) (concluding that litigation includes a contested case before an administrative agency). Furthermore, upon review of your arguments and the information at issue, we find that litigation was pending on the date that the district received the request for information and that the information at issue relates to the litigation. Therefore, the district may withhold the remaining information under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the district may withhold the information we have marked under section 552.107 of the Government Code. The district may withhold the remaining submitted information under section 552.103 of the Government Code. 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 consists of "education records" subject to FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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).

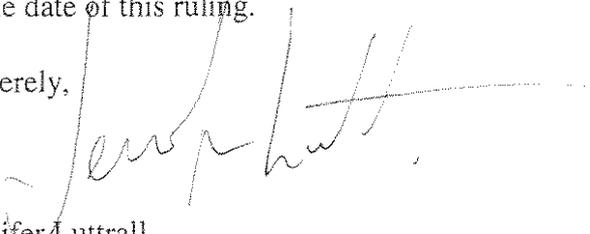
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/jb

Ref: ID# 292072

Enc. Submitted documents