



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 25, 2008

Mr. Robert A. Schulman
Feldman & Rogers, LLP
517 Soledad Street
San Antonio, Texas 78205-1508

OR2008-05597

Dear Mr. Schulman:

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# 309259.

The Alamo Heights Independent School District (the "district"), which you represent, received a request for information related to the district's special education files involving a named student, as well as information related to a named individual. You state that some of the requested information has been provided to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code, as well as privileged under Texas Rule of Evidence 503. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, the district states that the information it has submitted in Exhibit F is subject to a previous ruling from this office. In Open Records Letter No. 2007-02555 (2007), we concluded that most of the information at issue is excepted from disclosure under sections 552.101, 552.107, and 552.117 of the Government Code. The district states that the

pertinent facts and circumstances have not changed since the issuance of that ruling.¹ Accordingly, the district may continue to rely on our prior ruling in Open Records Letter No. 2007-02555 with respect to that information. *See* Gov't Code § 552.301(f); Open Records Decision No. 673 (2001).

Next, 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 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.² 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, among other information, 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.³ Such determinations under FERPA must be made by the educational authority in possession of the education record.

However, 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.⁴ Therefore, to the extent that the requestor has a right of access under FERPA to any of the information for which you claim the attorney-client

¹The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

²A copy of this letter may be found on the attorney general's website, *available at* http://www.oag.state.tx.us/opinopen/og_resources.shtml.

³In 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.

⁴Ordinarily, 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.

privilege, we will address your assertion of the privilege under section 552.107. We also will address your claims under sections 552.101 and 552.111 of the Government Code.

Next, we note that some of the information in Exhibit D1 is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The information at issue consists of an invoice incurred by the district and is subject to section 552.022(a)(3). Therefore, the district may only withhold this document if it is confidential under "other law." You assert that the invoice may be withheld under section 552.107 of the Government Code. Section 552.107 is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) of the Government Code may be waived), 665 at 2 n.5 (discretionary exceptions generally). As such, section 552.107 is not other law that makes information expressly confidential for the purposes of section 552.022. Thus, the invoice in Exhibit D1 may not be withheld under section 552.107.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 336 (Tex. 2001). Accordingly, we will address your assertion of the attorney-client privilege under Texas Rule of Evidence 503.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 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 state that the invoice in Exhibit D1 is part of a communication between the district's attorney and district personnel that was made in connection with the rendition of professional legal services to the district. You also state that the communication was intended to be and has remained confidential. Based on your representations and our review of the information at issue, the district may withhold the invoice on the basis of the attorney-client privilege under Texas Rule of Evidence 503.

The district raises section 552.101 of the Government Code to withhold the information in Exhibits D2 and D3. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is considered to be confidential under other law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy).

The district has failed to direct our attention to any law, and this office is not otherwise aware of any law, under which any of the information at issue is considered to be confidential for purposes of section 552.101.⁵ Therefore, the district may not withhold any of the information in Exhibits D2 and D3 under section 552.101 of the Government Code.

Section 552.107 of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107. 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)-(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).

⁵We note that section 552.301 is not a confidentiality provision for purposes of section 552.101.

You state that the information in Exhibits B1, C, D1, and E consists of communications between the district's attorney and district personnel. Further, you explain that these communications were made for the purpose of facilitating the rendition of professional legal services to the district. You also state that these communications have not been disclosed to third parties and that the confidentiality has not been waived. Based on these representations and our review, we conclude that the district may withhold the information in Exhibits B1, C, and E, as well as the remaining information in Exhibit D1 under section 552.107.⁶

In summary, the district may continue to rely on our prior ruling in Open Records Letter No. 2007-02555 with respect to that information. We note that this ruling does not address the applicability of FERPA to the submitted information. The district may withhold the invoice in Exhibit D1 under Texas Rule of Evidence 503. The district may withhold the information in Exhibits B1, C, and E, as well as the remaining information in Exhibit D1, under section 552.107 of the Government Code. 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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,

⁶As our ruling is also dispositive for the information in Exhibit B2, we need not address your argument under section 552.111 for the information in Exhibit B2.

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 challenge 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,



Loan Hong-Turney
Assistant Attorney General
Open Records Division

LH/eeg

Ref: ID# 309259

Enc. Submitted documents

c: Mr. Arthur J. Rossi
Energy Plaza II, Fifth Floor
8620 North New Braunfels Avenue
San Antonio, Texas 78217
(w/o enclosures)