



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 27, 2008

Ms. Laura C. Rodriguez
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2008-11816

Dear Ms. Rodriguez:

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# 320294.

The Northside Independent School District (the "district"), which you represent, received a request for all of the superintendent's incoming and outgoing e-mails from June 6, 2008. You claim that a portion of the requested information is not subject to the Act. The district has redacted social security numbers pursuant to section 552.147 of the Government Code.¹ You also state that the district has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a).² You also claim that portions of the submitted e-mails are excepted from disclosure under sections 552.107, 552.116, and 552.137 of the Government Code and privileged under Texas

¹We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

²We note that the United States Department of Education Family Policy Compliance Office (the "DOE") has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

Rules of Civil Procedure Rule 192.5.³ We have considered your arguments and reviewed the submitted information.

You claim that pages AG-0089 through AG-0114 are not subject to the Act. The Act is only applicable to “public information.” *See* Gov’t Code § 552.021. Section 552.002(a) defines public information as “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it.” *Id.* § 552.002(a). Thus, virtually all information that is in a governmental body’s physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). After reviewing pages AG-0089 through AG-0114, we agree that the e-mails do not constitute “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for the district. *See* Gov’t Code § 552.021; *see also* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving de minimis use of state resources). Thus, we conclude that pages AG-0089 through AG-0114 are not subject to the Act, and need not be released in response to this request.⁴

Next, you assert that pages AG-0001 through AG-0077 are excepted from disclosure under section 552.107(1) of the Government Code, which 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 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). 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

³Although you raise section 552.101 in conjunction with the attorney-client privilege, 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).

⁴As pages AG-0090 through AG-0111 are not subject to the Act, we need not address your argument against the disclosure of the personal e-mail addresses in this information.

privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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.*, 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). We note that communications with third party consultants with which a governmental body shares a privity of interest are protected. Open Records Decision Nos. 464 (1987), 429 (1985).

You state that the e-mails and attachments at pages AG-0001 through AG-0077 reveal communications between the district’s outside counsel and district administrators. You also state one of the e-mails reveals a communication between the district’s outside counsel and an insurance claim adjuster for the district. You explain that the insurance claim adjuster is responsible for defense cost coverage on pending lawsuits with the district. You have specifically identified each of the individuals who were party to the e-mails at AG-0001 through AG-0077. You represent that these communications were made for the purpose of facilitating the rendition of professional legal services. You also represent that the confidentiality of these communications has been maintained. Based upon your representations and our review, we agree that the district and the insurance adjuster share a privity of interest. We therefore conclude that section 552.107 is applicable to all of the e-mails and attachments at pages AG-0001 through AG-0077. Thus, the district may withhold pages AG-0001 through AG-0077 under section 552.107 of the Government Code.⁵

You assert that pages AG-0078 through AG-0088 are excepted from disclosure under section 552.116 of the Government Code. Section 552.116 provides as follows:

- (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by

⁵As our ruling is dispositive as to this information, we need not address your remaining arguments against the disclosure of portions of this information.

Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state that pages AG-0078 through AG-0088 are "e-mails between district employees that address particular issues and concerns regarding the district's audit on criminal background checks" of its employees. You contend that pages AG-0078 through AG-0088 are "audit working papers" of an audit by the district relating to the criminal history background check of public school employees. Gov't Code § 552.116(b)(1). However, upon review of pages AG-0078 through AG-0088, we find that they consist of e-mails pertaining to the general administration of the fingerprinting program and do not consist of audit working papers with regard to any particular criminal history background check of a public school employee. Accordingly, we find that you have failed to demonstrate the applicability of section 552.116 to pages AG-0078 through AG-0088. Therefore, the district may not withhold pages AG-0078 through AG-0088 under section 552.116 of the Government Code. As you raise no further exceptions against the disclosure of these pages they must be released.

In summary, pages AG-0089 through AG-0114 are not subject to the Act. The district may withhold pages AG-0001 through AG-0077 under section 552.107 of the Government Code. Pages AG-0078 through AG-0088 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 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). If the governmental body does not file suit over 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 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,

A handwritten signature in cursive script that reads "Laura E. Ream".

Laura E. Ream
Assistant Attorney General
Open Records Division

LER/jb

Ref: ID# 320294

Enc. Submitted documents

c: Mr. Raymond Tamayo
10734 Vollmer Lane
San Antonio, Texas 78254-1757
(w/o enclosures)