



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 14, 2009

Mr. Bill Aleshire
Riggs, Aleshire, & Ray
Attorney for Arlington Independent School District
700 Lavaca, Suite 920
Austin, Texas 78701

OR2009-04907

Dear Mr. Aleshire:

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# 339804.

The Arlington Independent School District (the "district"), which you represent, received a request for specified e-mails and hand-written or typed memorandums sent or received during a particular period of time. You state you have released some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.107 and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.² We have 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).

¹Although you also raise Texas Rule of Evidence 503, the Texas Supreme Court has held that the Texas Rules of Evidence is other law that make information confidential for the purposes of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The information for which you claim the attorney-client privilege is not encompassed by section 552.022, and thus, we do not address rule 503.

²We note you have submitted information you have marked as not responsive to the request. Our ruling does not address this non-responsive information, and the district need not release it in response to the request.

Initially, we note that the submitted information appears to include education records. The United States Department of Education Family Policy Compliance Office has informed this office that the Family Educational 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 purpose 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, among other things, what appears to be unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine the applicability of FERPA, we will not address FERPA with respect to these records. See 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. Such determinations under FERPA must be made by the educational authority in possession of the education records.⁴ However, we will consider the exceptions to disclosure under the Act that you have raised for the information at issue.

Section 552.107(1) of the Government Code 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 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. See TEX. R. EVID. 503(b)(1)(A), (B),

³A copy of this letter may be found on the attorney general's website, <http://www.oag.state.tx.us/open/2006725usdoe.pdf>.

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.

(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 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 assert that the responsive information consists of or reveals e-mail communications amongst a district attorney and district personnel that were made in connection with the rendition of legal services to the district. You state that these communications were made in confidence and that their confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to most of the responsive e-mails. We note, however, that you have failed to demonstrate that a portion of the remaining e-mails, which we have marked for release, constitutes confidential communications between privileged parties made for the purpose of facilitating the rendition of professional legal services. Accordingly, with the exception of the e-mails we have marked for release, the district may withhold the responsive e-mails you have marked under section 552.107 of the Government Code. We also note, however, that an individual e-mail contained within a submitted e-mail string consists of a communication with a non-privileged party. To the extent this non-privileged e-mail, which we have marked, exists separate and apart from the submitted e-mail string, it may not be withheld under section 552.107.

You also raise section 552.137 of the Government Code for portions of the remaining responsive e-mails. 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). You do not indicate that a member of the public has affirmatively consented to the release of any e-mail address. Further, none of the e-mail addresses you have marked fall within any section 552.137 exceptions. Thus, the district must withhold the e-mail addresses you have marked under section 552.137 of the Government Code.

In summary, with the exception of the e-mails we have marked for release, the district may withhold the responsive e-mails you have marked under section 552.107 of the Government

Code. However, to the extent the non-privileged e-mail we have marked exists separate and apart from the submitted e-mail string, the separate e-mail must be released. The district must withhold the e-mail addresses you have marked under section 552.137 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rl

Ref: ID# 339804

Enc. Submitted documents

cc: Requestor
(w/o enclosures)