



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 26, 2010

Ms. Karla A. Schultz  
Walsh, Anderson, Brown, Aldridge & Gallegos, P.C.  
P.O. Box 2156  
Austin, Texas 78768

OR2010-02901

Dear Ms. Schultz:

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# 371353.

The Austin Independent School District (the "district"), which you represent, received a request for "any and all files" relating to the requestor, an employee of the district. You state that some of the requested information has been released. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the representative samples of information you submitted.<sup>1</sup>

We first note that the submitted information includes education records. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the federal 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

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<sup>1</sup>This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D); .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

ruling process under the Act.<sup>2</sup> 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 the submitted education records to determine the applicability of FERPA, we will not address FERPA with respect to those 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 record.<sup>3</sup>

We also note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]” unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). In this instance, the submitted information includes completed reports and investigations made for or by the district. The district must release that information under section 552.022(a)(1), unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. The district does not claim an exception to disclosure under section 552.108. Although you do claim exceptions under sections 552.103 and 552.107(1) of the Government Code, those sections are discretionary exceptions that protect a governmental body’s interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov’t Code § 552.103); Open Records Decision Nos. Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov’t Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.107(1) are not other law that makes information confidential for the purposes of section 552.022(a)(1). Therefore, the district may not withhold any of the information that is subject to section 552.022(a)(1) under section 552.103 or section 552.107(1). We will determine, however, whether any of the remaining information may be withheld under these exceptions.

You also claim the attorney-client privilege under Texas Rule of Evidence 503 for some of the information that is subject to section 552.022(a)(1). The Texas Rules of Evidence have been held to be “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 also will address your claim under rule 503. Rule 503 enacts the attorney-client privilege and provides in part:

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<sup>2</sup>A copy of this letter may be found on the attorney general’s website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

<sup>3</sup>In the future, if the district does obtain consent to submit unredacted education records and seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

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 contend that the information submitted as Exhibit 7 consists of privileged communications between attorneys for and representatives of the district. You state that these communications were made in connection with the rendition of professional legal services to the district. You also state that the communications were intended to be and remain confidential. You have identified the attorneys who are parties to the communications. Based on your representations and our review of the information at issue, we conclude that the information in Exhibit 7 that is subject to section 552.022(a)(1) may be withheld under Texas Rule of Evidence 503. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25

S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney's entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice).

We note that section 552.101 of the Government Code is applicable to some of the remaining information that is subject to section 552.022(a)(1).<sup>4</sup> 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 common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of common-law privacy to information relating to an investigation of alleged sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *See id.* at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* The *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Thus, if there is an adequate summary of an investigation of sexual harassment, the summary must be released along with the statement of the person accused of sexual harassment, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. If no adequate summary of the investigation exists, then detailed statements regarding the allegations must be released, but the identities of victims and witnesses must be redacted from the statements. In either event, the identity of the individual accused of sexual harassment is not protected from public disclosure. We note that supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

The information submitted as Exhibit 3 includes a completed investigation of alleged sexual harassment. In this instance, the records in question include an adequate summary of the investigation, which we have marked. In accordance with *Ellen*, the marked investigation summary must be released, except for the information that identifies the victim of the alleged sexual harassment. The district must withhold that information, along with the rest of the

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<sup>4</sup>Unlike other exceptions to disclosure, this office will raise section 552.101 on behalf of a governmental body, because the Act prescribes criminal penalties for the release of confidential information. *See Gov't Code §§ 552.007, .352; Open Records Decision No. 325 at 2 (1982).*

information pertaining to the investigation, under section 552.101 of the Government Code in conjunction with common-law privacy and *Ellen*. We have marked the information that must be withheld on this basis.

Section 552.101 also encompasses information that other statutes make confidential. Medical records are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

*Id.* § 159.002(b)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). Medical records must be released on the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked medical records pertaining to the requestor in Exhibit 3 that must be withheld under section 159.002 of the MPA, unless the district receives the required written consent for release under sections 159.004 and 159.005.

Next, we address your claims for the information that is not encompassed by section 552.022(a)(1). Section 552.103 of the Government Code provides in part:

(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 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(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

You contend that the remaining information in Exhibit 3 is related to anticipated litigation. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* You inform us, and have provided documentation demonstrating, that the requestor filed a charge of discrimination with the Civil Rights Division of the Texas Workforce Commission (the “CRD”) prior to the district’s receipt of her request for information. You contend that the remaining information in Exhibit 3 is related to the requestor’s claims of discrimination. This office has determined that a charge of employment discrimination filed with the federal Equal Employment Opportunity Commission or the CRD indicates that litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1(1982). Therefore, based on your representations and documentation and our review of the information at issue, we conclude that section 552.103 of the Government Code is applicable in this instance.

We note that the purpose of this exception is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, when the opposing party has seen or had access to information relating to anticipated litigation, through discovery or otherwise, there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the requestor has already seen or had access to much of the remaining information in Exhibit 3. However, the requestor only saw or had access to this information in the usual scope of her employment by the district. Such information is not considered to have been obtained by the opposing party to anticipated litigation. Therefore, the remaining information in Exhibit 3 that is not encompassed by section 552.022(a)(1) may be withheld under section 552.103. We note that the applicability of this exception ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Lastly, 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* ORD 676 at 6-7. 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)-(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 pet.). 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 contend that the remaining information in Exhibit 7 consists of attorney-client communications that were made in connection with the rendition of professional legal services to the district. You state that the communications were intended to be and remain confidential. You have identified the attorneys who are parties to the communications. Based on your representations and our review of the information at issue, we conclude that the district may withhold the remaining information in Exhibit 7 under section 552.107(1).

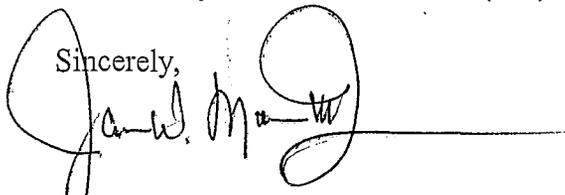
In summary: (1) the marked information in Exhibit 7 that is subject to section 552.022(a)(1) of the Government Code may be withheld under Texas Rule of Evidence 503; (2) the district must withhold the information we have marked in Exhibit 3 under section 552.101 of the Government Code in conjunction with common-law privacy and *Morales v. Ellen*; (3) the requestor’s marked medical records in Exhibit 3 must be withheld under section 159.002 of the MPA, unless the district receives the required consent for release under sections 159.004

and 159.005; (4) the information in Exhibit 3 that is not subject to section 552.022(a)(1) may be withheld under section 552.103 of the Government Code; and (5) the remaining information in Exhibit 7 may be withheld under section 552.107(1) of the Government Code. The rest of the submitted information must be released.<sup>5</sup> 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 consist of "education records" that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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](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, toll free, at (888) 672-6787.

Sincerely,



James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/cc

Ref: ID# 371353

Enc: Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>5</sup>We note that some of the information that must be released implicates the requestor's privacy interests. The requestor has a right of access to her own private information under section 552.023 of the Government Code. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Should the district receive another request for these same records from a person who would not have a right to this requestor's private information, the district should resubmit these records and request another ruling. *See* Gov't Code §§ 552.301(a), .302.