



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 16, 2010

Ms. Heather R. Rutland
Henslee Schwartz
Attorneys at Law
816 Congress Avenue, Suite 800
Austin, Texas 78701-2443

OR2010-03699

Dear Ms. Rutland:

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# 372854.

The Carrollton-Farmers Branch Independent School District (the "district"), which you represent, received a request for district bills from a specific law firm between May 2009 and December 2009. You state the district has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.¹ You also state the district has provided the requestor with redacted copies of the submitted attorney's fee bills. We understand you to claim that the highlighted portions of the submitted fee bills are excepted from disclosure under section 552.103 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA 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. 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>.

submitted information. We have also received comments from a third party.² *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, as you acknowledge, the submitted information is subject to section 552.022(a)(16) of the Government Code, which provides that information in a bill for attorney's fees must be released unless it is privileged under the attorney-client privilege or is expressly confidential under other law. *See id.* § 552.022(a)(16). Although we understand you to claim that portions of the submitted information are excepted from disclosure under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See 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 section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, this section does not make information confidential. Therefore, the district may not withhold any portion of the submitted information under section 552.103. However, the Texas Supreme Court has held that the Texas Rules of Evidence is "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 consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information at issue.

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;

²The third party asks this office, among other things, to open a criminal investigation. Conducting such an investigation is beyond the scope of this office's authority in issuing open records rulings. *See* Gov't Code § 552.301(a) (open records division's authority is limited to determining, upon a governmental body's request, whether requested information falls within an exception to disclosure). Thus, this ruling does not address the issues raised by the requestor that are beyond the scope of our authority.

(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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that portions of the submitted attorney fee bills document communications between the district's attorneys and agents of the district that 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 have remained confidential. Upon review of the submitted attorney fee bills, we agree that some of the information at issue is protected by the attorney-client privilege. We note, however, that you have not specifically identified, by name, any of the privileged parties. We are unable to discern who the privileged parties are with the exception of the attorneys and law firm employees listed as providing legal services in the submitted fee bills and certain district employees and representatives we are able to identify from the submitted information. Additionally, some of the information you have marked documents communications with non-privileged parties. Furthermore, while other marked entries indicate that certain documents were prepared, there is no indication that the information was actually communicated to a privileged party. Therefore, we find that the district has failed to demonstrate how the remaining information at issue documents confidential communications that were made between privileged parties. Accordingly, the district may only withhold the information we have marked in the submitted attorney fee bills pursuant to Texas Rule of Evidence 503. As you raise no further exceptions against the disclosure of the remaining information, it 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_ori.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,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/jb

Ref: ID# 372854

Enc: Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)