



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 30, 2010

Ms. Heather R. Rutland
Henslee Schwartz, LLP
6688 North Central Expressway, Suite 850
Dallas, Texas 75206

OR2010-04467

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# 374111.

The Carrollton-Farmers Branch Independent School District (the "district"), which you represent, received two requests from the same requestor that, taken together, seek all district legal bills from a specific law firm. You represent the district does not have responsive attorney's fee bills from May or October of 2009.¹ You state the district has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.² You also state the district has provided the requestor redacted copies of the submitted attorney's fee bills. You claim some of the fee bills

¹The Act does not require a governmental body to release information that did not exist when a request for information was received, create responsive information, or obtain information that is not held by or on behalf of the governmental body. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

²The 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>.

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 submitted information. We have also received and considered comments submitted by the requestor.³ See Gov't Code § 552.304 (providing that an interested third party may submit comments stating why information should or should not be released).

Initially, you represent some of the responsive attorney's fee bills were the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-03699 (2010). In that ruling, we held the district may withhold the information we marked under Texas Rule of Evidence 503, and that the remaining information must be released. As we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the district must continue to rely on the ruling as a previous determination and withhold or release the information in the fee bills responsive to the request for information at issue in Open Records Letter No. 2010-03699 in accordance with that ruling. See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, you acknowledge that the submitted attorney's fee bills are subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege," unless the information is expressly confidential under "other law." Gov't Code § 552.022(a)(16). Although you seek to withhold some of the information at issue under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a 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); Open Records Decision No. 665 at 2 n. 5 (2000) (discretionary exceptions in general). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022(a)(16), and the district may not withhold any of the information at issue under that exception. The Texas Supreme Court has held 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). We will therefore consider your argument under Rule 503 of the Texas Rules of Evidence.

³The requestor 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.

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).

We have marked the information within the submitted attorney fee bills that reveals communications between privileged parties. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the district. You also represent these communications were intended to be confidential and that their confidentiality has been maintained. Although you have not identified the parties to the communications, we are able to discern that some individuals are privileged from the

documents. Based on your representations and our review, we conclude the information we marked may be withheld under Texas Rule of Evidence 503. However, the remaining information you highlighted in the submitted fee bills either reveals a communication with a party who is not identified as privileged, or does not reveal a communication. We note some information reveals a document was prepared but does not indicate the document was actually communicated with any privileged party. Because you failed to provide this office with the necessary facts to demonstrate the elements of the attorney-client privilege with respect to the remaining highlighted information, this information is not privileged under rule 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_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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 374111

Enc. Submitted documents

cc: Requestor
(w/o enclosures)