ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 5, 2010

Ms. Lynn Rossi Scott
Brackett & Ellis, P.C.
100 Main Street
Fort Worth, Texas 76102

OR2010-06471

Dear Ms. Scott:

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# 378212.

The Azle Independent School District (the "district"), which you represent, received a request for (1) all e-mail communications from ten named individuals for a specified period of time; (2) all internet activity reports for a specified period of time, including all instant messaging communications from seven named individuals; (3) all Eduphoria work requests submitted to and from the Technology Department for all campuses for a specified period of time; (4) the time clock report for all time clock computer names and their locations; (5) the time clock report pertaining to the requestor for a specified period of time; (6) the report of all computers and computer names in the district; and (7) a copy of a specified profile pertaining to the requestor. You state the district has released some of the requested information with student-identifying information withheld pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g,[1] and other confidential

[1]The 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.

information withheld pursuant to Open Records Decision No. 684 (2009).[2] You claim a portion of the submitted information is not subject to the Act. You claim that the remaining requested information is excepted from disclosure under sections 552.107 and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[3]

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request for information because it relates to information created after the date the request was received. This ruling does not address the public availability of any information that is not responsive to the request, and the district is not required to release that information in response to this request.

Next, you state the district does not have a report of all computers and computer names in the district as requested in item six. The Act does not require a governmental body to make available information that did not exist when the request was received nor does it require a governmental body to compile information or prepare new information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986). Likewise, a governmental body is not required to produce the responsive information in the format requested, a list, or create new information to respond to the request for information. *AT&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex.1995); *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681(Tex. App.—Eastland 2000, pet. denied); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3, 342 at 3 (1982), 87 (1975). However, a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). Thus, to the extent the district maintains records from which the requested information in item six may be obtained, the district must provide such records to the requestor.[4] *See* Gov't Code §§ 552.301(a), .302.

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[2]We note this office recently issued Open Records Decision No. 684, a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision.

[3]We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

[4]As you have not submitted the requested information in item six, we do not address your argument under section 552.139 of the Government Code for this information. *See* Gov't Code § 552.301(e)(1)(D) (governmental body must submit, in connection with request for attorney general decision, the requested information or representative samples thereof).

Next, we address your assertion that Exhibit D is not subject to the Act. The Act is applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists of "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). You inform us that Exhibit D is not subject to the Act because it consists of personal e-mails that were not collected, assembled, or maintained pursuant to any law or ordinance or in connection with the transaction of any official business of the district. After reviewing the information at issue, we agree the information at issue does 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). Therefore, we conclude the responsive information in Exhibit D is not subject to the Act and need not be released in response to this request.

Section 552.107(1) of the Government Code 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 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 a capacity other than that of attorney). Third, the 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.* 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. *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 state the responsive information in Exhibit F constitutes communications between the district's law firm and a district employee that were made for the purpose of providing legal services to the district. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the district may withhold the responsive information in Exhibit F under section 552.107(1) of the Government Code.

In summary, the responsive information in Exhibit D is not subject to the Act and need not be released in response to this request. The district may withhold the responsive information in Exhibit F under section 552.107(1) of the Government Code.

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,

Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/eeg

Ref: ID# 378212

Enc. Submitted documents

c: Requestor
(w/o enclosures)