



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 7, 2010

Ms. Leanne Lundy
Rogers, Morris & Grover, LLP
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2010-10013

Dear Ms. Lundy:

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# 385713.

The Clear Creek Independent School District (the "district"), which you represent, received a request for twenty-four categories of information, including (1) legal invoices, bills, and contracts from outside counsel during a specified time period; (2) documents and e-mails pertaining to three named individuals, including the requestor; (3) information pertaining to section 504 and IDEA due process hearings; (4) information pertaining to the administrative leave of two named individuals; (5) funding for special education, testing, and private school reimbursement during a specified time period; and (6) reports of and policies on bullying, harassment, and abuse of students. You state you have released some of the requested information. You indicate you have no information responsive to a portion of the request.¹ You state you have withheld portions of the submitted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.² You claim the submitted information is excepted from disclosure under

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or student 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 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>.

section 552.107 of the Government Code, as well as privileged under rule 503 of the Texas Rules of Evidence.³ We have considered your arguments and reviewed the submitted representative sample of information.⁴ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the district sought clarification of six categories of requested information. *See id.* § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). You state the district has not received complete clarification of portions of the request. We note you have not submitted information or made arguments pertaining to those portions of the request for which the requestor provided clarification. Therefore, to the extent the district maintains information responsive to the clarified portions of the request, we assume you have released it. However, for the portions of the requested information for which you have not received clarification, we find the district is not required to release information in response to these portions of the request. But if the requestor fully clarifies these portions of the request for information, the district must seek a ruling from this office before withholding any responsive information from the requestor. *See City of Dallas v. Abbott*, 304 S.W. 380, 387 (Tex. 2010).

Next, the district has provided our office with correspondence to the requestor stating the district does not maintain portions of the requested information in the form requested. We note 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 dismissed); Open Records Decision No. 452 at 3 (1986). Likewise, a governmental body is not required to produce the responsive information in the format requested or create new information to respond to the request for information. *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995); *Fish v. Dallas Indep. Sch. Dist.*, 31

³Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, we note although you raise section 552.103 of the Government Code, you have not provided any arguments to support this exception. Therefore, we assume you have withdrawn your claim this section applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

⁴We 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.

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 (1986), 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). Therefore, while the district is not required to create a document in response to a request for information, information from which responsive information may be derived would be responsive to the request. Thus, to the extent the district maintained information from which the information at issue may be derived on the date the request was received, the district must provide such information to the requestor. *See* Gov't Code §§ 552.301(a), .302.

Next, we note a portion of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the date the district received the request. 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 the request.

Next, we address the requestor's claim the district failed to comply with the procedural requirements of the act in requesting a ruling from this office. Section 552.301 of the Government Code prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(b). Pursuant to section 552.301(d), the governmental body must provide the requestor, within ten business days after the date of its receipt of the request for information, a statement the governmental body has asked for a decision from the attorney general and a copy of the governmental body's written communication to attorney general asking for a decision. *See id.* § 552.301(d). You state the district received the request for information on April 21, 2010. Accordingly, you were required to request a decision from this office and provide the requestor the required statement by May 5, 2010. We note the envelope in which the district's request for a ruling was submitted bears a post office cancellation mark dated May 4, 2010. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). The request for ruling indicates the requestor was copied on the correspondence. We further note this office received correspondence from the requestor dated May 5, 2010, which references the request for ruling. Consequently, we find the district timely complied with the procedural requirements mandated by section 552.301(b) of the Government Code.

Next, we address the requestor's argument that the district has previously released a portion of the requested information. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See*

Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). However, section 552.007 does not prohibit an agency from withholding similar types of information, but not the exact information that has been released. We note the requestor contends information was released by a district employee to the public in casual conversations regarding the requestor's son. However, the requestor does not state the exact information at issue was released to a member of the public. Further, we have no indication the requested information has been released in its exact form to any member of the public. Accordingly, we find section 552.007 is inapplicable to the submitted information and we will address the district's arguments against disclosure of the submitted information.

Next, we note portions of the submitted information are subject to section 552.022 of the Government Code. This section provides, in pertinent part:

(a) [T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code. § 552.022(a)(3), (16). In this instance, portions of the submitted information consist of information in a contract relating to the expenditure of public funds by a governmental body and attorney fee bills. Therefore, the information must be released under section 552.022 unless it is confidential under other law. Section 552.107 of the Government Code is a discretionary exceptions to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.107 is not other law that makes information confidential for the purposes of section 552.022(a)(16). Therefore, the district may not withhold any of the information at issue under section 552.107 of the Government Code. You seek to withhold portions of the information at issue under rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held 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 assertions of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022.

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;
- (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 it is 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 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and 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 assert the attorney fee bills must be withheld in their entirety under rule 503. However, section 552.022(a)(16) of the Government Code provides information “that is *in* a bill for attorney’s fees” is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. *See* Gov’t Code § 552.022(a)(16) (emphasis added). This provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld. *See also* Open Records Decisions No. 676 (2002) (attorney fee bill cannot be withheld in entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)); 589 (1991) (information in attorney fee bill excepted only to extent information reveals client confidences or attorney’s legal advice).

In the alternative, you assert the portions of the submitted fee bills you have marked should be withheld under rule 503. You assert most of the submitted fee bills include privileged attorney-client communications between the district’s attorneys and their clients, district employees. You also assert a portion of the submitted information includes communications with coparties of the district concerning a matter of common interest. *See generally* TEX. R. EVID. 503(b)(1)(c) (discussing privilege among parties “concerning a matter of common interest”); *see also In re Monsanto*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1998, no pet.) (discussing the “joint-defense” privilege incorporated by Rule 503(b)(1)(C)), *In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (citing *Hodges, Grant & Kaufmann v. United States Government*, 768 F.2d 719, 721 (5th Cir. 1985)) (attorney-client privilege not waived if privileged communication is shared with third person who has common legal interest with respect to subject matter of communication). You state the communications at issue were made for the purpose of the rendition of legal services to the district. You indicate the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on your representations and our review of the information at issue, we find the district has established portions of the information at issue, which we have marked, constitute attorney-client communications under rule 503.

The requestor argues the submitted fee bills should be released in their entirety because the information at issue is not subject to the attorney-client privilege. The requestor asserts the privilege is not meant for every employee of the district, but only for high-level administrators. Whether the attorney at issue represents an employee of the district for purposes of the attorney-client privilege is a question of fact. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990). The district asserts the communications at issue are between the district’s attorneys and district employees. Thus, we find the employees at issue are clients for purposes of rule 503.

The requestor also asserts Texas Rule of Evidence 503(d)(1) supercedes the district’s claim of the attorney-client privilege because the district sought to use its attorneys “to further a

continuing or future crime or fraud.” TEX. R. EVID. 503(d)(1) (no privilege under rule 503 if the services of a lawyer are sought to commit crime or fraud). As previously noted, this office is unable to resolve disputes of fact in the open records ruling process. Further, we note whether the district used its attorney to further a crime or fraud is outside the scope of this office’s ruling process under the Act. Thus, the district may withhold the information we have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. However, we find the remaining information at issue documents communications with individuals you have not identified or demonstrated are privileged parties, or do not document privileged communications. Accordingly, none of the remaining information at issue may be withheld under Texas Rule of Evidence 503.

You claim section 552.107 of the Government Code for the information not subject to section 552.022. Section 552.107(1) protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for rule 503. 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). 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 claim the e-mails submitted in Exhibit E are protected by section 552.107 of the Government Code. You state the e-mails at issue consist of communications involving the district’s attorneys and their clients, district employees for the purpose of the rendition of legal services to the district. You indicate these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the district may generally withhold the information at issue under section 552.107 of the Government Code. We note one of the individual e-mails contained in the e-mail strings is a communication from the requestor, a non-privileged party. Thus, to the extent this non-privileged e-mail, which we have marked, exists separate and apart from the submitted e-mail strings, it may not be withheld under section 552.107.⁵

The submitted documents also include information that is subject to section 552.136 of the Government Code.⁶ Section 552.136 provides, “[n]otwithstanding any other provision of

⁵We note the requestor has a right to her own e-mail address under section 552.137(b). *See* Gov’t Code § 552.137(b).

⁶The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

[the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). Accordingly, the district must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code.

In summary, the district may withhold the information we have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. The district may withhold the information we have marked under section 552.107 of the Government Code; however, to the extent the marked non-privileged e-mail exists separate and apart from the submitted e-mail strings, the non-privileged e-mail may not be withheld under section 552.107. The district must withhold the bank account and routing numbers we have marked under section 552.136 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, toll free at (888) 672-6787.

Sincerely,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/jb

Ref: ID# 385713

Enc. Submitted documents

c: Requestor
(w/o enclosures)