



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 22, 2010

Ms. Lydia L. Perry  
Law Offices of Robert E. Luna, PC  
4411 North Central Expressway  
Dallas, Texas 75205

OR2010-10966

Dear Ms. Perry:

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# 387494.

The Frisco Independent School District (the "district"), which you represent, received a request for information pertaining to the investigation of the requestor's grievance. You state you have released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

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* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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

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<sup>1</sup>Although you also raise section 552.101 of the Government Code in conjunction with rule 1.05 of the Texas Disciplinary Rules of Professional Conduct and the attorney-client privilege found in 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). Accordingly, we will not address your claim the submitted information is confidential under section 552.101 in conjunction with any of these rules.

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 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 information submitted as Exhibit B consists of e-mail correspondence and meeting notes involving the district’s attorney and district administrators. You state these communications were made in furtherance of the rendition of professional legal services to the district. You state these communications were intended to be, and 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 withhold the information in Exhibit B under section 552.107 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses section 21.355 of the Education Code, which provides, “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. This section applies to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. See Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined for purposes of section 21.355, the word “administrator” means a person who is required to and does in fact hold an administrator’s certificate under subchapter B of chapter 21 of the

Education Code and who is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. We note a court has concluded a written reprimand constitutes an evaluation for the purposes of section 21.355 because “it reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You state the information in Exhibit C consists of an investigative report and a memorandum pertaining to the actions of an administrator. You state the administrator held the appropriate administrator’s certificate and was performing the functions of an administrator during the relevant time period. Upon review of the information at issue, we conclude a portion of the information, which we have marked, consists of the evaluation of an administrator for purposes of section 21.355. *See North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). Thus, the district must withhold the marked information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, we find you have failed to show how the remaining information at issue consists of the evaluation of an administrator for purposes of section 21.355. Therefore, the district may not withhold the remaining information in Exhibit C under section 552.101 of the Government Code on that basis.

In summary, the district may withhold the information in Exhibit B under section 552.107 of the Government Code. The district must withhold the information we have marked within Exhibit C under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The remaining information must be released.<sup>2</sup>

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

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<sup>2</sup>We note the requestor has a special right of access to some of the information being released in this instance. *See Gov’t Code* § 552.023(b) (governmental body may not deny access to person to whom information relates or person’s agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Because such information may be confidential with respect to the general public, if the district receives another request for this information from a person other than the requestor or her authorized representative, it should again seek a ruling from this office. *See Gov’t Code* §§ 552.301, .302.

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,

A handwritten signature in cursive script, appearing to read "Claire Morris Sloan", with a long horizontal flourish extending to the right.

Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/jb

Ref: ID# 387494

Enc. Submitted documents

c: Requestor  
(w/o enclosures)