



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 16, 2010

Ms. Leticia D. McGowan
School Attorney
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204-5491

OR2010-12408

Dear Ms. McGowan:

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#390510 (Dallas ISD ORR #9425).

The Dallas Independent School District (the "district") received a request for the requestor's son's educational records, including all e-mails relating to her son, hand-written documents, electronic files, film and video, and all media devices. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note that the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local

¹Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Furthermore, section 552.107 is the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022. *See* ORD 676.

²We assume that 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 that those records contain substantially different types of information than that submitted to this office.

educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purposes of our review in the open records ruling process under the Act. Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). You have submitted for our review redacted education records. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to the information at issue, other than to note that parents have a right of access to their own child’s education records and that their right of access prevails over a claim under section 552.103 of the Government Code. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; Open Records Decision No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to section 552.103). Such determinations under FERPA must be made by the educational authority in possession of the education record. The DOE also has informed this office, however, that a parent’s right of access under FERPA to information about that parent’s child does not prevail over an educational institution’s right to assert the attorney-client privilege.³ Therefore, we will address your assertion of this privilege under section 552.107 of the Government Code.

Section 552.107(1) 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. 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. *See* 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, 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*

³Ordinarily, FERPA prevails over an inconsistent provision of state law. *See Equal Employment Opportunity Comm’n v. City of Orange, Tex.*, 905 F.Supp. 381, 382 (E.D. Tex. 1995); ORD 431 at 3.

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 that the submitted information includes communications between attorneys for the district and district personnel. You state that these communications were made in furtherance of the rendition of legal services to the district, and you inform this office that these communications have remained confidential. Based on your representations and our review, we agree that the e-mails we have marked constitute privileged attorney-client communications. Accordingly, the district may generally withhold these communications under section 552.107 of the Government Code. However, we note that some of the individual e-mails in the submitted e-mail chains consist of communications with a non-privileged party. Thus, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the submitted e-mail chains, the district may not withhold them pursuant to section 552.107 of the Government Code.

We next address your claim under section 552.103 of the Government Code in the event the requestor does not have a right of access under FERPA. Section 552.103 provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd

n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

We understand that as a result of a previous due process complaint, the district and the requestor have a settlement agreement that establishes an Individualized Education Plan ("IEP") for the requestor's son. You state there is currently a dispute over whether the district has met its obligations under the Individuals with Disabilities Education Act and the Texas Education Code regarding the implementation of the IEP. You assert that the requestor's legal counsel has threatened further legal action in federal court, as well as through due process hearing channels with the Texas Education Agency. We understand due process hearings are subject to the APA, chapter 2001 of the Government Code. *See* 19 T.A.C. § 89.1180(f) (discovery methods for these disputes shall be limited to those specified in the APA); *see also* Open Records Decision No. 588 at 7 (1991) (ruling that, for purposes of the Act, litigation includes a contested case under the predecessor to the APA). Accordingly, we find the district has established that it reasonably anticipated additional litigation when it received the instant request for information. *See* Gov't Code § 552.103(c). Further, you contend, and we agree, the information at issue relates to the anticipated litigation. Therefore, we determine that section 552.103 of the Government Code is applicable.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the district may generally withhold the information we have marked under section 552.107 of the Government Code. However, to the extent the non-privileged e-mails we have marked in the submitted e-mail chains exist separate and apart from the otherwise privileged e-mail chains in which they are submitted, they may not be withheld under section 552.107 of the Government Code. To the extent the remaining information does not constitute education records, it may be withheld under section 552.103 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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/jb

Ref: ID#390510

Enc. Submitted documents

c: Requestor
(w/o enclosures)