



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 21, 2010

Mr. W. Montgomery Meitler
Assistant Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2010-15998

Dear Mr. Meitler:

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# 397475 (TEA PIR# 13658).

The Texas Education Agency (the "agency") received a request for specified certificates of occupancy and correspondence regarding the Fruit of Excellence charter school sent and received by two particular agency offices during a specified time period, excluding correspondence sent by or to the Fruit of Excellence charter school.¹ You state the agency will release some of the requested information to the requestor, including the requested certificates. You claim that the submitted information is excepted from disclosure under sections 552.107 and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.²

¹We note the agency sought and received a clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request).

²We assume the "representative samples" of records submitted to this office are 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.

Initially, we note you have marked a portion of the submitted information as not responsive to the present request for information because it was sent by the Fruit of Excellence charter school. Accordingly, this ruling will not address such non-responsive information and the agency need not release it in response to this request.

You claim a portion of the submitted information is excepted under section 552.107(1) of the Government Code, which 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 Texas 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). 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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. *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 information you have marked constitutes communications between agency staff and agency attorneys that were made for the purpose of providing legal advice to the agency. You have identified the parties to the communications. You state these communications

were made in confidence and have maintained their confidentiality. 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 agency may withhold this information under section 552.107 of the Government Code.

You claim section 552.116 of the Government Code for the remaining information, which provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state a portion of the remaining information you have marked consists of working papers prepared or maintained by the agency's Division of Financial Audits in conjunction with a financial audit of the Fruit of Excellence charter school. You further state that such an audit is authorized by section 39.057(a)(4) of title 34 of the

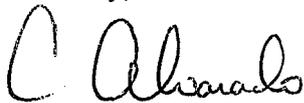
Education Code, which permits special accreditation investigations to be conducted in response to established compliance reviews of a school district's financial accounting practices and state and federal program requirements. You state the other portion of the remaining information you have marked consists of "audit working papers prepared or maintained by [the agency's] Student Assessment Division Security Task Force in conducting investigations of testing irregularities in the administration of statewide assessment instruments." You inform us the investigations "are authorized by section 39.057(a)(8) of the Education Code, which permits the Commissioner of Education to authorize special accreditation investigations to be conducted in response to an allegation regarding or an analysis using a statistical method result indicating a possible violation of an assessment instrument security procedure." *See* Educ. Code § 39.057 (listing circumstances in which the commissioner of education shall authorize investigations). Based on your representations and our review, we agree the information at issue consists of audit working papers as defined in section 552.116(b)(2) of the Government Code. Accordingly, the agency may withhold the information you have marked pursuant to section 552.116 of the Government Code.

In summary, the agency may withhold the information you have marked under section 552.107 of the Government Code. The agency may withhold the remaining information you have marked under section 552.116 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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/tp

Ref: ID# 397475

Enc. Submitted documents

c: Requestor
(w/o enclosures)