



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 1, 2010

Ms. Denise Hays
Walsh, Anderson, Brown, Gallegos, and Green, P.C.
For Eanes Independent School District
P.O. Box 2156
Austin, Texas 78768

OR2010-17993

Dear Ms. Hays:

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# 401496.

The Eanes Independent School District (the "district"), which you represent, received a request for all records pertaining to a named student for the past two years, any items that contain personally identifiable information about the student or the student's parents, all documents relating to the inservice training conducted and attended by district employees involved in the student's education, and any and all peer-reviewed, scientifically based studies showing the efficacy of the school's own programming and or the efficacy of the methodologies used by the school in regard to the student or other similarly situated students. You state the district is releasing some information pertaining to the named student to this requestor pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. You claim the request is not a request for information under the Act. Alternatively, you claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

¹We 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.

Initially, we note a portion of the submitted information you have labeled Tab 3 is not responsive to the present request because it was created after the date the request was received by the district. This ruling does not address the public availability of this non-responsive information, which we have marked, and the district is not required to release non-responsive information in response to this request.

We begin by addressing your claim that the present request is not a request for information under the Act. You inform us the requested information relates to a pending due process hearing involving the requestor's clients. You state that discovery in a due process hearing is "limited to those specified in the Administrative Procedure Act ("APA"), Texas Government Code, Chapter 2001...[and] discovery between parties engaged in a contested case such as the one at issue here is conducted under the Texas Rules of Civil Procedure." You further state that because legal authority already exists which governs the production of documents, the request is not subject to the Act. Section 552.0055 of the Government Code provides that "[a] subpoena duces tecum or a request for discovery that is issued in compliance with a statute or a rule of civil or criminal procedure is not considered to be a request for information under this chapter." *Id.* § 552.0055. This section does not apply in all instances in which a governmental body could have received such a subpoena or discovery request. *See Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865-66 (Tex. 1999) (in interpreting statutes, goal of discerning legislature's intent is served by beginning with statute's plain language because it is assumed that legislature tried to say what it meant and its words are therefore surest guide to its intent); *see also City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 324 (Tex. App.—Austin 2002, no pet.) (citing *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex. 1994)) ("In applying the plain and common meaning of a statute, [one] may not by implication enlarge the meaning of any word in the statute beyond its ordinary meaning, especially when [one] can discern the legislative intent from a reasonable interpretation of the statute as it is written.").

You do not assert that the request the district received is in fact a request for discovery that is issued in compliance with a statute or a rule of civil or criminal procedure." *See Gov't Code* § 552.0055. Furthermore, you have not demonstrated, and the request does not indicate, that the information was otherwise requested pursuant to the authority of a statute or a rule of civil or criminal procedure. The requestor states she is requesting the information under the "Texas Open Records Act." Although discovery in a contested case is conducted under the Texas Rules of Civil Procedure, there is nothing that prevents the requestor from also submitting a request for information under the Act. Therefore, we find the district received a request for information under the Act, and we will address whether the district is required to release the submitted information pursuant to chapter 552 of the Government Code.

Next, we note 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.² 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 unredacted education records for our review. Because our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA should be made, we will not address the applicability of FERPA to any of the submitted records, other than to note parents have a right of access to their own child’s education records. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations must be made by the educational authority in possession of the education record. We note the DOE has informed this office a parent’s right of access under FERPA does not prevail over an educational institution’s right to assert the attorney-client privilege.³ Therefore, to the extent the requestor has a right of access to the submitted information, we will address your assertions of the attorney-client privilege under section 552.107 of the Government Code for this information.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that other statutes make confidential. Section 551.104 of the Open Meetings Act, chapter 511 of the Government Code, provides, in part, that “[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3).” *Id.* § 551.104(c). Thus, such information cannot be released to a member of the public in response to an open records request. *See* Attorney General Opinion JM-995 at 5-6 (1998) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act). Section 551.146 of the Open Meetings Act makes it a criminal offense to disclose a certified agenda or tape recording of a lawfully closed meeting to a member of the public. *See* Gov’t Code § 551.146(a)(b); *see also* Open Records Decision No. 495 at 4 (1998) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether a governmental body may withhold such information under statutory predecessor to section 552.101). In this instance, none of the submitted information consists of agendas or tape recordings of a closed executive meeting of the district. Accordingly, section 551.104 of the Open Meetings Act is not applicable to any portion of the submitted information, and the district may not withhold any of the submitted information under section 552.101 on that basis.

You seek to withhold a portion of the submitted information, which you have labeled Tab 2, under section 552.103 of the Government Code, which provides as follows:

²A copy of this letter may be found on the Office of the Attorney General’s website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

³Ordinarily, FERPA prevails over inconsistent provisions of state law. *See Equal Employment Opportunity Comm’n v. City of Orange, Tex.*, 905 F.Supp. 381, 382 (E.D. Tex. 1995); Open Records Decision No. 431 at 3 (1985).

(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). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us, and the request reflects, that simultaneously with the submission of the request for information, the requestor requested a due process hearing before the Texas Education Agency on behalf of her clients. You explain the due process hearing is a contested case hearing, which is governed by the APA, chapter 2001 of the Government Code. This office has concluded a contested case under the APA constitutes litigation for purposes of the statutory predecessor to section 552.103. Open Records Decision No. 588 (1991). Based on your representations and our review, we conclude litigation was pending on the date the district received the request for information. You state the information in Tab 2 is related to the pending litigation because it pertains to the issues that form the basis of the litigation. Based on your representations and our review, we find the information in Tab 2 is related to the pending litigation for the purposes of section 552.103. Accordingly, the district may withhold the information in Tab 2 under section 552.103 of the Government Code.

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 pending 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. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We next address your argument under section 552.107 of the Government Code for the responsive information in Tab 3. Section 552.107 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 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. *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 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 information in Tab 3 consists of 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 responsive e-mails in Tab 3 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.

In summary, the district may withhold the information in Tab 2 under section 552.103 of the Government Code. The district may generally withhold the responsive information in Tab 3 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, these e-mails may not be withheld under section 552.107 of the Government Code.⁴

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,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 401496

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note the non-privileged e-mails contain the requestor's client's e-mail address, to which the requestor has a special right of access. Gov't Code § 552.137(b). Because such information is confidential with respect to the general public, if the district receives another request for this information from a different requestor, the district must again seek a ruling from this office.