



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 5, 2011

Ms. DeAndrea C. Washington
Thompson & Horton LLP
For the Humble Independent School District
711 Louisiana Street, Ste 2100
Houston, Texas 77002-2746

OR2011-00278

Dear Ms. Washington:

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# 404975.

The Humble Independent School District (the "district"), which you represent, received a request for all electronic mail messages or written notes or messages from any conferences, meetings, or telephone calls regarding the requestor's daughter for twenty-two named district employees or their administrative assistants from May 24, 2010 until October 8, 2010. The district received a second request from the same requestor for all deleted and omitted electronic mail messages or written notes or messages from any conferences, meetings, or telephone calls regarding the requestor's daughter for the same twenty-two district employees or their administrative assistants from May 24, 2010 until November 30, 2010. You state the district has released some information to the requestor. You claim portions of the submitted information are excepted from disclosure under section 552.107 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted representative

¹We note that you also raise section 552.101 in conjunction with section 552.107. However, section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision No. 676 at 1-3 (2002). Additionally, although you also raise Rule 503 of the Texas Rules of Evidence, section 552.107 is the appropriate exception to raise for the information you have submitted, which is not subject to section 552.022 of the Government Code. *See* ORD 676.

sample of information.² We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, you inform us that the district asked the requestor for clarification of her second request. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010). You inform us that the requestor has not responded to this request for clarification. 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 (1990). In this case, as you have submitted responsive information for our review and raised an exception to disclosure for this information, we consider the district to have made a good-faith effort to identify the information that is responsive to the request, and we will address the applicability of the claimed exception to the submitted information. We further determine the district has no obligation at this time to release any additional information that may be responsive to the second request for which it has not received clarification. However, if the requestor responds to the request for clarification, the district must again seek a ruling from this office before withholding any additional responsive information from the requestor. *See City of Dallas*, 304 S.W.3d at 387.

You state that the submitted e-mails are not "education records" subject to the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code, because the information pertains to an individual who has never been enrolled as a student in the district. "Education records" mean those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 U.S.C. § 1232g(a)(4)(A). A "student" is defined to include "any person with respect to whom an educational agency or institution maintains education records or personally identifiable information," but does not include a person who has not been in attendance at such agency or institution. *Id.* § 1232g(a)(6); *see also* 34 C.F.R. § 99.3. Because the submitted information does not relate to a student of the district, we find this information is not subject to FERPA.

Next, we address the requestor's contention that as a parent of the child to whom the requested information relates, she has a right of access to the requested information under the Individuals with Disabilities Education Act ("IDEA"), section 1400 of title 20 of the United States Code. We will assume, without deciding, the information at issue is subject to IDEA. Under both FERPA and IDEA, a student and the student's parents have an

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.

affirmative right of access to the student's own education records. 20 U.S.C. § 1232g(a)(1)(A), 34 C.F.R. § 300.613. We note the Family Policy Compliance Office of the United States Department of Education has informed this office that a parent's right of access under FERPA does not prevail over an educational institution's right to assert the attorney-client privilege. Although the requestor acknowledges this, she contends that her right of access under IDEA prevails over the district's claims under the attorney-client privilege. However, we note that the access provision under IDEA is substantially similar to the access provision in FERPA. *See* 20 U.S.C. § 1232g(a)(1)(A) (funds shall not be made available to any institution which denies parents of students the right to inspect and review the education records of their children), 34 C.F.R. § 300.613 ("Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part.") Accordingly, we conclude a parent's right of access under IDEA also does not prevail over an educational institution's right to assert the attorney-client privilege. Therefore, we will address your assertions of the attorney-client privilege under section 552.107 of the Government Code for the requested information.

Section 552.107(1) of the Government Code 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 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. 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, *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

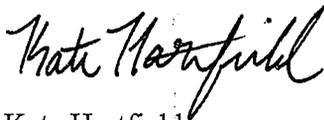
communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You assert that the information you have marked in the submitted e-mails constitutes privileged attorney-client communications. You have identified the parties to the communications as attorneys for the district, attorney representatives, and district administrators and employees. You state these communications were made in furtherance of the rendition of legal services to the district. You also state these communications were not intended to be disclosed to third parties and that the communications' confidentiality has been maintained. Upon review, we agree the information you have marked in the submitted e-mails constitutes privileged attorney client communications. Accordingly, the district may withhold this information under section 552.107 of the Government Code. As you have claimed no other exceptions to disclosure, 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,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 404975

Enc. Submitted documents

c: Requestor
(w/o enclosures)