



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 31, 2011

Ms. Elisabeth A. Donley
Law Offices of Robert E. Luna, P.C.
For Garland Independent School District
4411 North Central Expressway
Dallas, Texas 75205

OR2011-01553

Dear Ms. Donley:

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# 407490.

The Garland Independent School District (the "district"), which you represent, received a request for any records, including documents provided to the Texas Education Agency or the Texas State Board of Educator Certification, pertaining to the requestor's named client. You state the district has provided some of the requested information to the requestor with social security numbers, other than the requestor's client's number, redacted under section 552.147 of the Government Code.¹ You also state the district has redacted student-identifying information from the information submitted to this office pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).² You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the

¹Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

²The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office 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. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

Government Code.³ We have considered the exceptions you claim and reviewed the submitted information.

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. This section encompasses information protected by other statutes, such as section 261.201(a) of the Family Code, which provides:

(a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You acknowledge the district is not an agency authorized to conduct a chapter 261 investigation. *See id.* §§ 261.103 (listing agencies that may conduct child abuse investigations), .406. You claim, however, the information you have marked in Exhibit B is confidential under section 261.201(a) because it relates to a report of alleged child abuse made to the Texas Department of Family and Protective Services' Child Protective Services Division ("CPS") and the identity of the individual who made the report. *See id.* § 261.001(1) (defining "abuse" for purposes of Fam. Code ch. 261); *see also id.* § 101.003(a) (defining "child" for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). Upon review, we agree some of the information, which we have marked, consists of a report of alleged child abuse and the identity of the person who made the report. Furthermore, we note a portion of the information, which we have also marked, reflects the information was used by CPS in its investigation of the alleged child abuse. We find the information we have marked is within the scope of section 261.201(a) of the Family Code. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. You have failed to demonstrate, however, how the remaining information you seek to withhold in Exhibit B consists of a report of alleged or suspected child abuse or the

³Although you also raise the attorney-client privilege under rule 503 of the Texas Rules of Evidence, we note section 552.107 is the proper exception to raise for your attorney-client privilege claim in this instance. *See Open Records Decision No. 676 (1988).*

identity of an individual who made such a report. Consequently, none of the remaining information you seek to withhold in Exhibit B may be withheld under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.

You claim the e-mail and letter with multiple attachments submitted as Exhibit C are protected by the attorney-client privilege. 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 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 assert the documents in Exhibit C consist of communications between an attorney for the district and district officials made in furtherance of the rendition of professional legal services to the district. You state the communications were made in confidence, and that confidentiality has been maintained. Based on your representations and our review, we find you have generally demonstrated the applicability of the attorney-client privilege to the letter

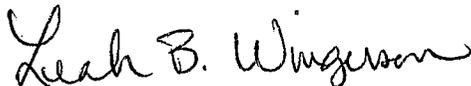
and its attachments. We note, however, the letter's attachments consist of district investigation records, communications between the district and the requestor's client, and communications between the district and the requestor's associates regarding the client. You state that to the extent the attachments exist separate and apart from the privileged letter to which they are attached, the district has provided those documents to the requestor. Therefore, if any of the attachments do not exist separate and apart from the privileged letter, the district may withhold them under section 552.107(1) of the Government Code. Regardless, the district may withhold the submitted letter in Exhibit C under section 552.107(1) of the Government Code. You have failed to demonstrate, however, how the submitted e-mail in Exhibit C was communicated in furtherance of the rendition of professional legal services. Consequently, we find you have failed to establish the applicability of the attorney-client privilege to the e-mail in Exhibit C, and the district may not withhold this information under section 552.107(1) of the Government Code.

In summary, the district must withhold the information we have marked in Exhibit B under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. The district may withhold the letter in Exhibit C under section 552.107(1) of the Government Code. If any of the letter's attachments in Exhibit C do not exist separate and apart from the privileged letter, the district may also withhold them under section 552.107(1) of the Government Code. 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 407490

Enc. Submitted documents

c: Requestor
(w/o enclosures)