



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 31, 2011

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

OR2011-01593

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# 407513.

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 a named individual for twenty-two named district employees or their administrative assistants from May 24, 2010 until October 8, 2010. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

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.

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.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created outside of the time period specified in the request. This ruling does not address the public availability of non-responsive information, and the district is not required to release non-responsive information in response to this request.

Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses statutes that make information confidential, such as section 1417 of Part B of the Individuals with Disabilities Education Act ("IDEA"), which protects the personally identifiable data of special education students and provides as follows:

The Secretary [of Education] shall take appropriate action, in accordance with [the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code], to ensure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by State educational agencies and local educational agencies pursuant to this subchapter.

20 U.S.C. § 1417(c); *see* 34 C.F.R. § 99.3 (defining "personally identifiable information"). Part B of IDEA further places on school districts certain obligations regarding children in need of special education, regardless of whether the child is a student of the district. *See* 20 U.S.C. § 1412(a)(3) (referred to as "Child Find"). The implementing regulation for Child Find provides, in relevant part:

(1) The State must have in effect policies and procedures to ensure that—

(i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and

(ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.

34 C.F.R. § 300.111(a). You state that the information in Exhibit B was collected pursuant to the district's Child Find obligations under Part B of IDEA. *See* 20 U.S.C. § 1412(a)(3). You explain that the information at issue pertains to the IDEA-required evaluation and

assessment of the individual named in the request, a child who is not, and has never been, a student of the district. You assert that, because only information pertaining to the named individual has been requested, redacting only the individual's personally identifying information would not maintain the confidentiality of the information. Thus, based on your representations and our review of the information at issue, we conclude that the district must withhold the information contained in Exhibit B under section 552.101 of the Government Code in conjunction with section 1417(c) of title 20 of the United States Code.

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 e-mails submitted as Exhibits C through E constitutes privileged attorney-client communications. You have identified the parties to the communications as attorneys for the district and 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 e-mails in Exhibits C through E 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 in these e-mails must be released.

In summary, the district must withhold Exhibit B under section 552.101 of the Government Code in conjunction with section 1417(c) of title 20 of the United States Code. The district may withhold the information you have marked in Exhibits C through E under section 552.107 of the Government Code. The remaining information in Exhibits C through E 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# 407513

Enc. Submitted documents

c: Requestor
(w/o enclosures)