



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 31, 2011

Ms. J. LeAnne Bram Lundy
Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2011-01608

Dear Ms. Lundy:

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# 407668.

New Caney Independent School District (the "district"), which you represent, received a request for statements and other paperwork related to a specified incident that occurred on September 1, 2010. You state the district has made some information available to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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, 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.*, 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 marked under section 552.107 is an e-mail communication between a district employee and an attorney with the district’s outside legal counsel. You explain the communication was made for the purpose of facilitating the rendition of legal advice to the district, and that it was intended to be and has remained confidential. Therefore, based on your representations and our review, we agree the district may withhold the information you marked under section 552.107 of the Government Code.

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 statutes. Section 261.201 of the Family Code provides in part as follows:

(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 claim the remaining information consists of reports of alleged or suspected child abuse made to the Child Protective Services Division of the Texas Department of Family and Protective Services ("CPS") under chapter 261 of the Family Code. *See id.* § 261.201(a)(1). Although the remaining two documents at issue reflect the incident at issue was reported to CPS, these documents consist of communications between the district's superintendent and the Texas Education Agency and between the district's superintendent and its board. Thus, we conclude you failed to demonstrate that the information at issue consists of a report made to CPS under chapter 261. Additionally, we have no representation from CPS, nor does it appear from our review, that these documents were used or developed by CPS in a chapter 261 investigation. *See id.* § 261.201(a)(2). Thus, we find you failed to demonstrate the applicability of section 261.201 to the remaining information, and it may not be withheld under section 552.101 on that basis.

You also assert the remaining information contains the identifying information of an individual who reported alleged violations of chapter 261 of the Family Code to CPS. You claim such information is confidential under section 261.101, which provides as follows:

(a) A person having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report as provided by this subchapter.

...

(d) Unless waived in writing by the person making the report, the identity of an individual making a report under this chapter is confidential and may be disclosed only:

(1) as provided by Section 261.201; or

(2) to a law enforcement officer for the purposes of conducting a criminal investigation of the report.

Id. § 261.101(a), (d). As noted above, the submitted documents reflect the incident at issue was reported to CPS. We note that CPS is an agency that is authorized to conduct an investigation under chapter 261. *See id.* §§ 261.103 (listing agencies that may conduct child abuse investigations), .401. Accordingly, the identity of an individual who makes a report to CPS is confidential under section 261.101(d) of the Family Code. However, the submitted information does not reveal the identity of the person who made the report at issue.

Accordingly, we find you failed to show how any portion of the information at issue is confidential pursuant to section 261.101 of the Family Code, and no information may be withheld on that basis.

In summary, the district may withhold the information you marked under section 552.107 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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/tf

Ref: ID# 407668

Enc. Submitted documents

c: Requestor
(w/o enclosures)