



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 21, 2011

Ms. Pam Young Kaminsky
Fort Bend Independent School District
16431 Lexington Boulevard
Sugar Land, Texas 77479

OR2011-03832

Dear Ms. Kaminsky:

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# 411747.

The Fort Bend Independent School District (the "district") received a request for education records pertaining to the requestors' child. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information, which we have marked, 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 and the district is not required to release non-responsive information in response to this request.

Next, we note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act 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.¹ Consequently, state and local educational authorities that receive a request for education

¹A 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>.

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, we will not address the applicability of FERPA to the information at issue, other than to note that parents have a right of access to their own child's education records and that their right of access prevails over a claim under section 552.103 of the Government Code. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; Open Records Decision No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to Gov't Code § 552.103). 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.² Therefore, to the extent the requestors have 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.

We first address your claim under section 552.103 of the Government Code to the extent the requestors do not have a right of access. Section 552.103 provides, in relevant part, as follows:

(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*

²Ordinarily, 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); ORD 431 at 3.

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 provide documentation showing, that the requestors' attorney requested a due process hearing before the Texas Education Agency. You further explain, and provide documentation showing, the due process hearing is a contested case hearing, which is governed by the Administrative Procedure Act (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 submitted responsive information 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 submitted responsive information is related to the pending litigation for the purposes of section 552.103. Accordingly, the district may generally withhold the submitted responsive information under section 552.103 of the Government Code.³

We note, however, that the opposing party in the anticipated litigation has seen or had access to some of the submitted responsive information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent that the opposing party in the anticipated litigation has seen or had access to any portion of the submitted information, such information is not protected by section 552.103 and may not be withheld on that basis. We also note that the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Accordingly, if the requestors do not have a right of access pursuant to FERPA, then, with the exception of the information the opposing party to the anticipated litigation has seen or accessed, the district may withhold the submitted responsive information pursuant to section 552.103 of the Government Code.

We will now address your claims under section 552.107 of the Government Code to the extent the requestors have a right of access to that information pursuant to FERPA. Section 552.107(1) 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

³As our ruling is dispositive, we need not address your remaining argument against disclosure.

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. *See* 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, 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 submitted responsive information consists of communications between an attorney for the district and district personnel. You also state that these communications were made in furtherance of the rendition of legal services to the district. You inform this office that these communications were intended to be and remain confidential. Based on your representations and our review, we agree that the submitted responsive information constitutes privileged attorney-client communications. Therefore, to the extent the requestor has a right of access under FERPA, the district may generally withhold the submitted responsive information under section 552.107(1) of the Government Code. We note some of the individual e-mail strings, which we have marked, include communications with non-privileged parties. If the communications with these non-privileged parties exist separate and apart from the e-mail strings in which they appear, then the district may not withhold the communications we have marked under section 552.107(1) of the Government Code.

In summary, to the extent the submitted responsive information does not consist of education records to which the requestors have a right of access under FERPA, and to the extent the opposing party to the pending litigation has not seen or had access to the submitted responsive information, the district may withhold the submitted responsive information

under section 552.103 of the Government Code. To the extent the submitted responsive information consists of education records to which the requestors have a right of access under FERPA, the district may withhold the submitted responsive information under section 552.107(1) of the Government Code. However, to the extent the non-privileged e-mails we have marked exist separate and apart, they may not be withheld under section 552.107(1) 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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 411747

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴In this instance, we note the information being released contains the requestors' e-mail addresses, to which the requestors have a right of access under section 552.137(b) of the Government Code. If the district receives another request for this information from a requestor without such a right of access, it is authorized to withhold this e-mail address under section 552.137, without the necessity of requesting an attorney general decision pursuant to Open Records Decision No. 684 (2009).