



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 22, 2011

Ms. Lisa A. Brown
Thompson & Horton, L.L.P.
For Cypress-Fairbanks Independent School District
3200 Southwest Freeway, Suite 2000
Houston, Texas 77027

OR2011-03901

Dear Ms. Brown:

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# 412417.

The Cypress-Fairbanks Independent School District (the "district"), which you represent, received two requests for information relating to a named student. The first requestor seeks the entire school record for the student and all documents developed as part of an investigation into the student's death. The second requestor, a parent of the student and a client of the first requestor, seeks only the student's educational file. You state the student's academic records have been provided to the second requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.114, 552.135, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Although you raise section 552.101 of the Government Code in conjunction with rule 26 of the Federal Rules of Civil Procedure, rule 192.5 of the Texas Rules of Civil Procedure, and rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002). We note that, in this instance, the proper exceptions to raise when asserting the attorney-client or attorney work-product privileges for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111, respectively. *See* Open Records Decision Nos. 677 (2002), 676.

²We assume 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 those records contain substantially different types of information than those submitted to this office.

Initially, 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 ("FERPA"), 20 U.S.C. § 1232g, 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.³ Consequently, state and local educational authorities that receive a request for education 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 assert FERPA applies to portions of the submitted information, and you have submitted redacted and un-redacted education records identifying both the student named in the request and additional district students 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. Likewise, we will not address sections 552.026 and 552.114 of the Government Code. See Gov't Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining same analysis applies under section 552.114 and FERPA). However, we note a student's parent and a legal representative of the parent have a right of access to a child's education records, and this right of access prevails over inconsistent provisions of state law, such as the district's assertions of sections 552.101, 552.103, 552.108, 552.135, and 552.137 of the Government Code. See *Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995); 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 section 552.103). Determinations under FERPA must be made by the educational authority in possession of the education record. The DOE also has informed this office, however, that a right of access under FERPA to information about a child does not prevail over an educational institution's right to assert the attorney work-product privilege or the attorney-client privilege. Therefore, we will consider the district's assertion of these privileges under sections 552.107 and 552.111 of the Government Code. We will also consider the district's claimed exceptions to the extent the student's parent or the parent's legal representative do not have a right of access to the submitted information under FERPA.

Section 552.103 of the Government Code provides, in relevant part:

- (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

³A 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>.

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). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the district received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁴ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You state, and provide documentation showing, the parents of the named student hired the first requestor and another attorney (the "attorneys") to represent them regarding the

⁴In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

student's death prior to the district's receipt of the requests at issue. You also provide documentation showing the attorneys and parents have filed grievances and sent the district a demand letter threatening to sue the district for any violations of the student's civil rights. Based on these representations and our review of the information, we agree the district reasonably anticipated litigation on the date it received the requests for information. You further state, and we agree, the submitted information relates to the anticipated litigation. Thus, to the extent the district determines the submitted information does not constitute student records to which the student's parent or the parent's legal representative has a right of access under FERPA, the district may withhold this information under section 552.103(a) of the Government Code.⁵

We note once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, any information obtained from or provided to all other parties in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

We will now address your claims under sections 552.107 and 552.111 of the Government Code to the extent the requestors have a right of access to the information pursuant to FERPA. 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning

⁵As our ruling is dispositive in this situation, we do not address your remaining arguments against disclosure.

a matter of common interest therein. 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). 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). We note communications with a third party with which a governmental body shares a privity of interest are protected. Open Records Decision Nos. 464 (1987), 429 (1985).

You assert section 552.107 for portions of the submitted information that consist of communications between the district’s attorneys and authorized representatives of the district. You state these communications were made for the rendition of legal services, they were intended to be confidential, and they have remained confidential. Upon review, we find Exhibits E, F, and G, and the information you have marked under section 552.107 in Exhibit H are subject to the attorney-client privilege. We note that some of these e-mail strings include communications with non-privileged parties. If these communications exist separate and apart from the e-mail strings in which they appear, then the district may not withhold the communications with the non-privileged parties under section 552.107(1) of the Government Code. Therefore, to the extent the district determines these communications are student records that the student’s parent or the parent’s legal representative has a right of access to under FERPA, the district may withhold this information under section 552.107(1) of the Government Code. As to the remaining information, we find the district has failed to demonstrate how this information consists of communications made for the rendition of legal services. Accordingly, no portion of the remaining information may be withheld under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the attorney work-product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4–8. Rule 192.5 defines work product as:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including

the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.* ; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied that:

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7. You state portions of the remaining information consists of communications among the district's attorneys and employees pertaining to the anticipated litigation discussed above. Based on these representations, and our review, we find the handwritten notes and communications you have marked in Exhibits H and I constitute information that is subject to the attorney work-product privilege. Therefore, to the extent the district determines this information consists of student records that the student's parent or the parent's legal representative has a right of access to under FERPA, the district may withhold the handwritten notes and communications you have marked in Exhibits H and I under section 552.111 of the Government Code. As to the remaining information, we find the district has not demonstrated the work-product privilege, and no portion of the remaining information may be withheld under section 552.111 of the Government Code.

In summary, to the extent the district determines the submitted information does not constitute student records to which the student's parents or the parent's legal representative has a right of access under FERPA, the district may withhold this information under section 552.103(a) of the Government Code. To the extent the district determines the submitted information does constitute student records to which the student's parent or the parent's legal representative has a right of access, with the exception of any non-privileged communications that exist separate and apart the district may withhold the communications

in Exhibits E, F, and G, and the information you have marked under section 552.107 in Exhibit H under section 552.107(1) of the Government Code, and the handwritten notes and communications you have marked in Exhibits H and I under section 552.111 of the Government Code. Any remaining student records in that instance 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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/dls

Ref: ID# 412417

Enc. Submitted documents

c: Requestors
(w/o enclosures)