



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 4, 2011

Mr. Robert Russo
Walsh, Anderson, Brown, Gallegos and Green, P.C.
For Lytle Independent School District
P.O. Box 460606
San Antonio, Texas 78246

OR2011-04584

Dear Mr. Russo:

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# 413436.

The Lytle Independent School District (the "district"), which you represent, received a request for multiple categories of information, including all e-mails, discipline records, counseling records, teacher and counselor evaluations, and reports of all behavioral patterns of the requestor's son during his enrollment with the district. You state you have released some of the responsive information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.¹ We have considered the submitted arguments and reviewed the submitted information.

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

¹Although you raise section 552.011 in your brief, we understand you to raise section 552.111 of the Government Code based on the substance to your arguments. Additionally, although you assert the attorney-client privilege under rule 503 of the Texas Rules of Evidence and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure, we note none of the submitted information is subject to section 552.022 of the Government Code. Thus, sections 552.107 and 552.111 are the proper exceptions to raise for your attorney-client privilege and attorney work product privilege claims in this instance. See generally Open Records Decision No. 676 (2002). We further note that although you raise section 552.101 of the Government Code in conjunction with section 552.107, rule 503 of the Texas Rules of Evidence, and rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded section 552.101 does not encompass exceptions in the Act or discovery privileges. See Open Records Decision Nos. 676 at 1-2, 575 at 2 (1990).

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.² 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 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 parents have a right of access to their own child's education records. *See* 20 U.S.C. § 1232g(a)(1)(A). Similarly, section 26.004 of the Education Code provides that "[a] parent is entitled to access to all written records of a school district concerning the parent's child[.]" Educ. Code § 26.004. However, the DOE also has informed this office that a parent's right of access under FERPA to information about a child does not prevail over an educational institution's right to assert the attorney-client and attorney work product privileges. Similarly, we find the right of access in section 26.004 of the Education Code does not extend to privileged attorney-client communications or attorney work product. Therefore, we will consider the district's assertions of attorney-client and attorney work product privileges under sections 552.107 and 552.111 of the Government Code, respectively.

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. 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

²A 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>.

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 that the submitted information consists of communications between the district’s attorneys and district employees, and that these communications were made in furtherance of the rendition of legal services and advice for the district. You further state that the communications were made in confidence and have not been shared with anyone outside the district. Thus, based on the district’s representations and our review, we find the submitted information documents privileged attorney-client communications. Accordingly, the district may withhold the submitted information under section 552.107(1) of the Government Code.³

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

³As our ruling is dispositive, we need not address the district’s remaining argument against disclosure.

Ref: ID# 413436

Enc. Submitted documents

c: Requestor
(w/o enclosures)