



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 3, 2011

Mr. Paul Roser
Public Information Office
Humble Independent School District
P.O. Box 2000
Humble, Texas 77347

OR2011-07871

Dear Mr. Roser:

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# 419637.

The Humble Independent School District (the "district") received a request for a specified police report and information pertaining to the requestor's children for a specified time period. You state the district has released some of the requested information. We note you have redacted student-identifying information in Attachments A and B pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim that Attachments A, B, and C are excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code.² We have

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA 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. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

²Although you also raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, we note that section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-3 (2002). We further note section 552.101 does not encompass rule 1.05 of the Texas Disciplinary Rules of Professional Conduct.

considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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. Section 552.101 encompasses information that other statutes make confidential, such as section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997, are confidential under section 58.007. For purposes of section 58.007(c), "child" means a person who is ten years of age or older and under seventeen years of age. *See* Fam. Code § 51.02(2). Section 58.007 provides, in pertinent part, as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

...

(e) Law enforcement records and files concerning a child may be inspected or copied by a juvenile justice agency as that term is defined by Section 58.101, a criminal justice agency as that term is defined by Section 411.082, Government Code, the child, and the child's parent or guardian.

Id. § 58.007(c), (e). You assert that the district police department's law enforcement file in Attachment C is subject to section 58.007. Upon review, we agree that Attachment C involves allegations of juveniles engaged in delinquent conduct occurring after September 1, 1997; therefore, Attachment C is subject to section 58.007(c). Under section 58.007(e), a child's parent or guardian has a right to inspect or copy law enforcement records concerning their own child. *See id.* § 58.007(e). We note that the right of access under section 58.007(e) does not apply to the parent of a juvenile involved only as a

complainant, victim, witness, or other involved party; rather, the individual must be the parent of a juvenile suspect, offender, or defendant. In this instance, the requestor is the parent of the juvenile victims and, thus, does not possess a right of access to the submitted law enforcement records under section 58.007(e). Thus, the district must withhold Attachment C in its entirety under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code.³

Next, you claim that Attachments A and B are excepted under section 552.107 of the Government Code, which 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 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 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.). 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

³As our ruling is dispositive for Attachment C, we need not address your remaining arguments against its disclosure.

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 Attachments A and B consist of communications between the district's general counsel and district representatives that were made for the purpose of providing legal services to the district. You have identified all of the parties to the communications. You also indicate that these communications were made in confidence and the confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to Attachments A and B. However, we note some of the e-mails in Attachments A and B are non-privileged e-mails that are submitted in otherwise privileged e-mail strings. If these e-mails, which we have marked, do not exist separate and apart from the privileged strings in which they are submitted, they may be withheld along with the attached e-mail strings as privileged attorney-client communications under section 552.107. If these non-privileged e-mails exist separate and apart from the e-mail strings in which they are submitted, they may not be withheld under section 552.107(1) of the Government Code.

In summary, the district must withhold Attachment C in its entirety under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code. The district may withhold Attachments A and B under section 552.107(1) of the Government Code. However, to the extent the non-privileged e-mails we have marked in Attachments A and B exist separate and apart from the e-mail strings in which they are submitted, they 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,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/em

Ref: ID# 419637

Enc. Submitted documents

c: Requestor
(w/o enclosures)