



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 11, 2011

Ms. Susan B. Graham  
For McKinney Independent School District  
Walsh, Anderson, Brown, Gallegos and Green, P.C.  
P.O. Box 2156  
Austin, Texas 78768

OR2011-14711

Dear Ms. Graham:

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# 432675.

The McKinney Independent School District (the "district"), which you represent, received a request for (1) all records for the past 2 years pertaining to the requestor's clients' child; (2) all documents regarding training attended by school staff involved in the child's education; and (3) all peer-reviewed, scientifically-based studies showing the efficacy of a particular school's programming and methodology used for students with disabilities. You state the district will provide the requested student records to the requestor pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. *See* 20 U.S.C. § 1232g(a)(1)(A) (providing parents have right of access to own child's education records); *see also* 34 C.F.R. § 99.3 (defining "parents" and "education records"). You claim the present request is not a request for information under the Act. Alternatively, you claim the remaining requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.<sup>1</sup>

We begin by addressing your claim the present request is not a request for information under the Act. You inform us the requested information relates to a pending due process hearing involving the requestor's clients. You state discovery in a due process hearing is "limited

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<sup>1</sup>We 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 that submitted to this office.

to those [methods] specified in the Administrative Procedure Act (“APA”), Texas Government Code, Chapter 2001 ... [and] discovery between parties engaged in a contested case such as the one at issue here is conducted under the Texas Rules of Civil Procedure.” You argue that because legal authority already exists that governs the production of documents, the request is not subject to the Act. Section 552.0055 of the Government Code provides “[a] subpoena duces tecum or a request for discovery that is issued in compliance with a statute or a rule of civil or criminal procedure is not considered to be a request for information under [the Act].” Gov’t Code § 552.0055. This section does not apply in all instances in which a governmental body could have received such a subpoena or discovery request. *See Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865-66 (Tex. 1999) (stating in interpreting statutes, goal of discerning legislature’s intent is served by beginning with statute’s plain language because it is assumed legislature tried to say what it meant and its words are, therefore, surest guide to its intent); *see also City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 324 (Tex. App.—Austin 2002, no pet.) (citing *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex.1994)) (“In applying the plain and common meaning of a statute, [one] may not by implication enlarge the meaning of any word in the statute beyond its ordinary meaning, especially when [one] can discern the legislative intent from a reasonable interpretation of the statute as it is written.”).

You do not assert the request the district received is in fact a “subpoena duces tecum or a request for discovery that is issued in compliance with a statute or a rule of civil or criminal procedure.” Gov’t Code § 552.0055. Nothing in the request reflects it meets the elements of a subpoena duces tecum. *See* Code Crim. Proc. arts. 24.02 (defining subpoena duces tecum), .03 (describing procedures for obtaining subpoenas, including subpoena duces tecum). Furthermore, you have not demonstrated, and the request does not indicate, the request for information constitutes a discovery request issued in compliance with a statute or a rule of civil or criminal procedure. In her request, the requestor lists the “Texas Open Records Act” as a basis for requesting the information. Although discovery in a contested case is conducted under the Texas Rules of Civil Procedure, nothing prevents the requestor from also submitting a request for information under the Act. Therefore, we find the district received a request for information under the Act. Consequently, we will consider your claimed exceptions to disclosure for the information at issue.

You claim the information represented in Tab 3 is excepted from disclosure under section 552.103 of the Government Code, which provides:

- (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). The district 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 (1) litigation was pending or reasonably anticipated on the date of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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 district must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us, and the request reflects, that simultaneously with the submission of the request for information, the requestor requested a due process hearing before the Texas Education Agency involving the district. You explain the due process hearing is a contested case hearing, which is governed by 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 determine litigation involving the district was pending on the date the district received the request for information. Furthermore, upon review of the training records and education materials submitted in Tab 3, we find this information relates to the pending litigation because it pertains to the basis of the litigation. Accordingly, the district may withhold the information represented by Tab 3 under section 552.103 of the Government Code.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending 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 been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You seek to withhold the information represented in Tab 4 under section 552.107(1) 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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.

*See* 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. *See 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 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. *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, *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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 e-mail strings and attachments represented in Tab 4 consist of communications between attorneys for the district and district officials that were made in furtherance of the rendition of professional legal services. You also state the communications were made in confidence, and that confidentiality has been maintained. Based on your representations and our review of the information at issue, we find you have generally demonstrated the applicability of the attorney-client privilege to most of the information at issue. We note, however, one of the e-mail strings and some of the individual e-mail messages in the remaining privileged e-mail strings consist of communications with parties you have not shown to be privileged, including the requestor and the requestor’s clients. Thus, the district may not withhold the non-privileged e-mail string, which we have marked, under section 552.107(1) of the Government Code. Furthermore, if the individual e-mail messages, which we have marked, exist separate and apart from the otherwise privileged e-mail strings to which they are attached, the district may not withhold the marked individual e-mail messages under section 552.107(1) of the Government Code. As you have not claimed any other exceptions to disclosure, the marked non-privileged e-mail string and individual e-mail messages must be released. If the marked individual e-mail messages do not exist separate and apart from the privileged e-mail strings, the district may withhold them under section 552.107(1) of the Government Code. Regardless, the district may withhold the remaining privileged e-mail information under section 552.107(1) of the Government Code.

In summary, the district may withhold the information represented by Tab 3 under section 552.103 of the Government Code. The district must release the non-privileged e-mail string we have marked in Tab 4. The district may generally withhold the remaining e-mail strings and attachments represented by Tab 4 under section 552.107(1) of the Government Code, but may not withhold the non-privileged individual e-mail messages we have marked, if the messages exist separate and apart from the otherwise privileged e-mail strings to which they are attached.

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](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,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/dls

Ref: ID# 432675

Enc. Submitted documents

c: Requestor  
(w/o enclosures)