



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 14, 2011

Ms. LeAnne Lundy
For Klein Independent School District
Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2011-16704

Dear Ms. Lundy:

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# 436158.

The Klein Independent School District (the "district") received a request for seven categories of information related to a specified incident. You claim that the requested information is exempted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. Additionally, you claim the submitted attorney fee bills are privileged under rule 503 of the Texas Rules of Evidence.¹ You state you have redacted student identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.² We have considered the exceptions you

¹We note you raise rule 503 in conjunction with section 552.101 of the Government Code. However, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

²We note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit a state educational agency or institution to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). The DOE has determined that FERPA determinations must be made by the educational institution from which the education records were obtained. A copy of the DOE's letter to this office may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

claim and reviewed the submitted representative sample of information.³ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

You state the requested information is subject to Open Records Letter Ruling No. 2011-03529 (2011). In that ruling, we determined, among other things, that the district may withhold certain information under section 552.103. You claim some records now submitted to this office were at issue in that ruling and should be withheld under section 552.103 in accordance therewith. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, upon review of the district's arguments and comments submitted by the requestor, we find the facts, law, and circumstances on which the prior ruling was based have changed. Accordingly, the district may not rely on Open Records Letter No. 2011-03529 to withhold any of the submitted information.

We note that information you have submitted as Tab 2 consists of attorney fee bills which are subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege," unless the information is expressly confidential under "other law." Gov't Code § 552.022(a)(16). Although you seek to withhold Tab 2 under sections 552.103 and 552.107 of the Government Code, these exceptions are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, these exceptions are not "other law" that makes information confidential for the purposes of section 552.022(a)(16), and the district may not withhold any of the submitted attorney fee bills under sections 552.103 and 552.107 of the Government Code. The Texas Supreme Court has held, however, that the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001).

³We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Accordingly, we will address your attorney-client privilege claim under rule 503 of the Texas Rules of Evidence for the submitted attorney fee bills.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if 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). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert that some of the substantive billing entries in the fee bills, which you have marked, are privileged under rule 503. You state the information within the submitted

attorney fee bills reveals confidential communications with privileged parties, whom you identified as the district's outside counsel, officials, and staff. You also state these communications were made for the purpose of facilitating the rendition of professional legal services to the district. Based on your representations and our review, we conclude some of the information you have marked may be withheld under Texas Rule of Evidence 503. However, you have failed to demonstrate that portions of the information you have marked, which we have marked for release, reveal communications between privileged parties. See ORD 676. Thus, the remaining information you have marked is not privileged under rule 503. As you raise no additional exceptions for the remaining information in the fee bills, the district must release this information.

We now address your arguments against disclosure of the remaining information not subject to section 552.022 of the Government Code. Section 552.103 of the Government Code 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 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 is pending or reasonably anticipated, 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 district must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably

anticipated must be determined on a case-by-case basis. ORD 452 at 4. 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. 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 that nearly a year after the incident at issue, the requestor retained an attorney and filed a formal complaint with the Texas Education Agency (the "TEA") against the district. However, both you and the requestor state the attorney at issue is no longer representing the requestor in this matter. The requestor also states she has "repeatedly informed the [district's] Board of Trustees in writing, by certified mail, that [the requestor] has no intention of filing litigation against the [district]." In addition, although the requestor confirms she filed the complaint with the TEA, she states this complaint was filed on January 14, 2010, and that she was notified by the TEA by telephone on January 25, 2010, that TEA would not pursue her complaint, because she had not followed certain district complaint procedures. Finally, although you inform us the district "has received no information that the TEA has closed or otherwise dismissed the complaint," you likewise do not affirmatively inform us that the district has been contacted by TEA regarding the complaint. Accordingly, based on these representations and our review of the submitted information, we find the district has not established that it reasonably anticipated litigation on the date the district received the present request for information. Therefore, we conclude the district may not withhold any of the remaining information at issue under section 552.103.

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential, such as section 21.355 of the Education Code, which provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 at 3 (1996). We have determined the word "administrator" for purposes of section 21.355 means a person who (1) is required to, and does in fact, hold an administrator's certificate under subchapter B of chapter 21 of the Education Code, and (2) is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

You contend portions of the submitted information constitute confidential evaluations of administrators. You inform us the administrators were certified by the State Board for

Educator Certification and were acting as administrators at the time of the evaluations. However, we find the information at issue consists of letters sent to these administrators informing them of various job promotions. You have not demonstrated how this information constitutes evaluations for purposes of section 21.355 of the Education Code. Therefore, the information at issue may not be withheld under section 552.101 of the Government Code on that basis.

In summary, except as we have marked for release, the district may withhold the information it has marked under rule 503 of the Texas Rules of Evidence. The remaining information 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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 436158

Enc. Submitted documents

c: Requestor
(w/o enclosures)