



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 24, 2012

Ms. Christine Badillo
Walsh, Anderson, Brown, Gallegos & Green, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2012-01125

Dear Ms. Badillo:

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# 443687.

The Coleman Independent School District (the "district"), which you represent, received a request for fifteen categories of information, including (1) records related to assault, bullying, or harassment during specified time periods, including information involving a particular student; (2) records regarding administrators, counselors, and other district staff who provided instruction to the student during two specified school years; (3) curriculum and lesson plans used for the student during the same specified school years; (4) records regarding bus driver(s) on the student's route during a specified school year; (4) memoranda, nursing logs, progress notes, medical records, telephone logs, and counseling records related to the student during the same school year; (5) records of district policies and in-service training pertaining to bullying, harassment, abuse, or neglect during the same school year; (6) admission, review, and dismissal (ARD) records; (7) individualized education program ("IEP") progress reports; and (8) evaluations and assessments of the district. You state some of the requested information has been released. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the information you submitted. We also have considered comments submitted on behalf of the requestor. *See Gov't Code*

¹We note you also raise Texas Rule of Evidence 503, which has been held to be other law that makes information confidential for purposes of section 552.022 of the Government Code. In this instance, however, the information at issue does not fall within the scope of section 552.022. *See Gov't Code* § 552.022; *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001).

§ 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

We first note this office has been informed by the United States Department of Education Family Policy Compliance Office (the “DOE”) that the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code, 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 requests for education records from members 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”). We understand you to assert FERPA applies to the information you have redacted from the submitted records. Because this office is prohibited from reviewing education records, we will not address the applicability of FERPA to the submitted records. Determinations under FERPA must be made by the educational authority in possession of the education records.³ Nevertheless, we note a student’s parents and the parents’ legal representatives have a right of access to the student’s education records. The parental right of access under FERPA generally prevails over inconsistent provisions of state law, such as section 552.111 of the Government Code. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; *Equal Employment Opportunity Comm’n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995). The DOE also has informed us, however, that a right of access under FERPA to information about a student does not prevail over an educational authority’s right to assert the attorney-client privilege. Therefore, we will address the district’s assertion of the attorney-client privilege under section 552.107(1) of the Government Code for the submitted information. We also will address the district’s claim under section 552.111 of the Government Code for the information at issue, to the extent the student’s parents or the parents’ legal representatives do not have a right of access to the submitted information under FERPA.

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. *See* 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. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an

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>.

³If in the future the district does obtain parental consent to submit unredacted education records and seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

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)(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. *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 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).

We understand you to claim the attorney-client privilege for all the submitted information. You contend the information at issue documents communications between an attorney for and a representative of the district that were made in connection with the rendition of professional legal services to the district. You state these communications were intended to be confidential, and you do not indicate their confidentiality has been waived. Based on your representations and our review of the information at issue, we conclude the district may withhold the information we have marked under section 552.107(1) of the Government Code. We note the remaining information at issue consists of records of a district representative’s communications with persons who clearly are neither attorneys for the district nor representatives of the district’s attorneys. You have not explained how or why the remaining information either documents or constitutes privileged attorney-communications. We therefore conclude the district may not withhold any of the remaining information under section 552.107(1).

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 deliberative process privilege. *See Open Records Decision No. 615 at 2* (1993). The purpose of this privilege is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); *Open Records*

Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 exempts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; see also *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. See Open Records Decision No. 631 at 3 (1995). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. See ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982).

We note the deliberative process privilege under section 552.111 can protect communications between a governmental body and a third party. See Open Records Decision Nos. 631 at 2 (1995) (Gov't Code § 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (Gov't Code § 552.111 applies to memoranda prepared by governmental body's consultants). In order for section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. See ORD 561 at 9.

You claim the deliberative process privilege for the remaining information at issue, including information related to communications between representatives of the district and the Coleman Police Department (the "department"). You have not explained, however, why or how the district and the department would have a privity of interest or common deliberative process. Likewise, you have not explained why or how the remaining information, which is entirely factual, constitutes advice, opinion, or recommendations that implicate the district's policymaking processes. We therefore conclude the district may not withhold any of the remaining information under section 552.111 of the Government Code.

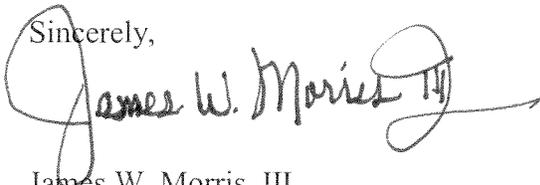
In summary, the district may withhold the information we have marked under section 552.107(1) of the Government Code. The rest of the submitted information must be

released. This ruling does not address the applicability of FERPA to the submitted information. Should the district determine all or portions of the submitted information consist of "education records" that must be withheld under FERPA, the district must dispose of any such information in accordance with FERPA, rather than the Act.

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,

A handwritten signature in black ink that reads "James W. Morris III". The signature is written in a cursive style with a long horizontal line extending to the right from the end of the name.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 443687

Enc: Submitted documents

c: Requestor
(w/o enclosures)