



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 19, 2012

Mr. Christopher B. Gilbert
Thompson & Horton LLP
3200 Southwest Freeway, Suite 2000
Houston, Texas 77027

OR2012-04010

Dear Mr. Gilbert:

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# 448263 (PIR #11228).

The Katy Independent School District (the “district”), which you represent, received a request for communications regarding the requestor’s child from a specified time period.¹ You claim some of the requested information is excepted from disclosure under section 552.107 of the Government Code.² We have considered the exception you claim and reviewed the information you submitted.

We note the submitted information includes redacted education records. The United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this

¹We note the district requested and received clarification of the request. *See* Gov’t Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (when governmental entity, acting in good faith, requests clarification or narrowing of unclear or over-broad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

²We note you also claim the attorney-client privilege under section 552.101 of the Government Code and Texas Rule of Evidence 503. Our office has determined section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-3 (2002). Therefore, we do not address your claim under section 552.101. Although the Texas Rules of Evidence have been held to be other law that makes information confidential for purposes of section 552.022 of the Government Code, section 552.022 is not applicable in this instance. *See* Gov’t Code § 552.022(a); *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we do not address your claim under rule 503.

office 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.³ 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”). Determinations under FERPA must be made by the educational authority in possession of the education records.⁴ Therefore, because our office is prohibited from reviewing education records to determine the applicability of FERPA, we will not address the applicability of FERPA to the submitted education records, except to note parents have a right of access under FERPA to their child’s education records. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. The DOE also has informed our office, however, that a parent’s right of access under FERPA to information about the parent’s child does not prevail over an educational institution’s right to assert the attorney-client privilege.⁵ Therefore, we will determine whether the information at issue may be withheld on that basis, including any information to which the requestor would have a right of access 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 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.

³A copy of this letter may be found on the attorney general’s website, <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

⁴If 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 records in compliance with FERPA, we will rule accordingly.

⁵We note FERPA ordinarily prevails over an inconsistent provision of state law. *See Equal Employment Opportunity Comm’n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995); Open Records Decision No. 431 at 3 (1985).

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).

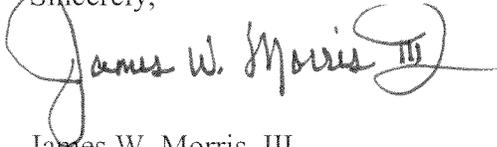
You have highlighted the information the district seeks to withhold under section 552.107(1). You state the highlighted information consists of communications among attorneys for and representatives of the district that were made for the purpose of facilitating the rendition of professional legal services to the district. You have generally identified the parties to the communications concerned. You also state the communications were intended to be and remain confidential. Based on your representations and our review of the information at issue, we conclude the district may withhold the highlighted information under section 552.107(1) of the Government Code. The rest of the submitted information must be released.⁶ This ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consist of “education records” that must be withheld under FERPA, the district must dispose of that 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.

⁶We note the remaining information includes the requestor’s e-mail address, which the district would be required to withhold from the public under section 552.137 of the Government Code unless the requestor has consented to its disclosure. *See* Gov’t Code § 552.137(a)-(b). The requestor has a right of access, however, to her own e-mail address under section 552.137(b). We also note this office issued a previous determination in Open Records Decision No. 684 (2009) authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137. Thus, should the district receive another request for the submitted information from a person who would not have a right of access to this requestor’s e-mail address, Open Records Decision No. 684 authorizes the district to withhold her e-mail address without the necessity of requesting another ruling.

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 large initial "J" and a stylized "III" at the end.

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

JWM/em

Ref: ID# 448263

Enc: Submitted documents

c: Requestor
(w/o enclosures)