



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 12, 2012

Mr. Jeffrey R. Crownover
Counsel for the Carroll ISD
Walsh, Anderson, Gallegos, Green and Treviño, P.C.
P.O. Box 168046
Irving, Texas 75016

OR2012-09045

Dear Mr. Crownover:

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# 456105 (PIA# 3.21.12).

The Carroll Independent School District (the "district"), which you represent, received a request for the requestor's child's educational record and all "documents personally identifiable" to the requestor's child or the requestor. You state you have released some of the requested information. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive because it was created after the date the request was received. The district need not release non-responsive information in response to the request, and this ruling will not address that information.

Next, we 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.¹ 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.² 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. *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.

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 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

¹A 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>.

²If 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.

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 claim the information at issue consists of e-mail correspondence that is protected by section 552.107(1) of the Government Code. You state the e-mails consist of attorney-client communications that were made among attorneys representing the district and district employees in their capacities as client representatives for the purpose of rendering professional legal services to the district. You state these communications were intended to be, and remain, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the district may generally withhold the information at issue under section 552.107(1) of the Government Code. We note, however, some of these privileged e-mail strings include e-mails to and from a non-privileged party that are separately responsive to the instant request. Consequently, to the extent these e-mails, which we have marked, exist separate and apart from the privileged e-mail strings in which they were included, the district may not withhold them under section 552.107(1) of the Government Code. If these e-mails do not exist separate and apart from the privileged e-mail strings in which they were included, the district may withhold them as privileged attorney-client communications under section 552.107(1) of the Government Code.

In the event the non-privileged e-mails we have marked exist separate and apart from the otherwise privileged e-mail strings, we will address section 552.137 of the Government Code for the information we have marked.³ Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov’t Code* § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the district must withhold the personal e-mail addresses we have marked under

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

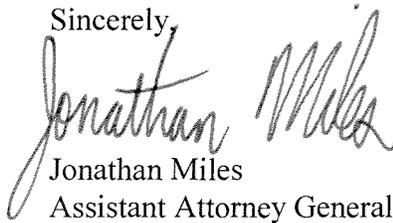
section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.⁴

In summary, the district may generally withhold the submitted information under section 552.107(1) of the Government Code. However, if the non-privileged e-mails, which we have marked, exist separate and apart from the privileged e-mail strings in which they were included, the district may not withhold them under section 552.107(1). In that event, the district must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure; and the district must release the remaining information.

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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/bhf

Ref: ID# 456105

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.