



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 13, 2012

Ms. Laura S. Fowler
The Fowler Law Firm, P.C.
919 Congress Avenue, Suite 900
Austin, Texas 78701

OR2012-10853

Dear Ms. Fowler:

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# 458952.

Blinn College (the "college"), which you represent, received a request for all correspondence between the college and a specified law firm regarding a specified case. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the date the request was received or is not communications between the college and the specified law firm. This ruling does not address the public availability of non-responsive information, and the college is not required to release non-responsive information in response to this request.

¹Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002). Further, section 552.101 does not encompass rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. We note section 552.107 of the Government Code is the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code. See *id.* at 3.

Next, we note the United States Department of Education Family Policy Compliance Office has informed this office 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 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.² 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”). It appears you have submitted unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records, other than to note that an adult student has a right of access to her own education records and that this right of access prevails over a claim under section 552.103 of the Government Code. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; Open Records Decision No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to section 552.103). Such determinations under FERPA must be made by the educational authority in possession of the education records. The DOE also has informed this office, however, that an adult student’s right of access under FERPA to her own education records does not prevail over an educational authority’s right to assert the attorney-client privilege.³ Therefore, we will address the college’s assertion of the attorney-client privilege under section 552.107(1) of the Government Code for the submitted information. We will also consider your claim under section 552.103 of the Government Code to the extent the requestor does not have a right of access under FERPA.

Section 552.107(1) of the Government Code protects information coming 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. 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. 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. *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 a capacity other than that

²A copy of this letter may be found on the Office of the Attorney General’s website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

³Ordinarily, FERPA 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); ORD 431 at 3.

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. 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. *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 inform us the responsive information consists of communications between the college’s attorneys and college officials and staff in their capacities as clients, made for the purpose of the rendition of legal services to the college. You indicate some of the communications are with a consultant who has a common interest with the college. You state the communications were intended to be confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. Accordingly, the college may withhold the information we have marked within the responsive documents under section 552.107 of the Government Code.⁴ We note, however, the remaining information at issue consists of communications with a non-privileged party. Thus, we find you have failed to demonstrate any of the remaining responsive information documents privileged attorney-client communications. Accordingly, this information may not be withheld under section 552.107 of the Government Code.

You assert the remaining responsive information is excepted from disclosure under section 552.103 of the Government Code, which provides, in relevant part:

- (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.

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure.

(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.

Id. § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

We note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See id.* at 4-5. If the opposing party has seen or had access to information relating to pending or anticipated litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the remaining responsive information consists of correspondence from the college's attorney to the potential opposing party. Thus, the opposing party in the anticipated litigation has seen or had access to the information at issue. We therefore conclude the remaining responsive information may not be withheld under section 552.103 of the Government Code.

In summary, the college may withhold the information we have marked under section 552.107(1) of the Government Code. The remaining information must be released.⁵

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.

⁵In this instance, we note the information being released contains the requestor's own e-mail address, to which the requestor has a right of access pursuant to section 552.137(b) of the Government Code. *See* Gov't Code § 552.137(b). Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision. Accordingly, if the city receives another request from an individual other than this requestor, the city is authorized to withhold this requestor's e-mail address under section 552.137 without the necessity of requesting an attorney general decision.

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,



Charles Galindo Jr.
Assistant Attorney General
Open Records Division

CG/bs

Ref: ID# 458952

Enc. Submitted documents

c: Requestor
(w/o enclosures)