



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 31, 2012

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

OR2012-11940

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# 460452.

The Klein Independent School District (the "district"), which you represent, received a request for eleven categories of information pertaining to the district's legal representation, district policies regarding business transactions between the district and private companies, and notary public ledgers for two individuals for the 2008-2009 school year.¹ You state the district has released some of the requested information to the requestor. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.² We have considered your submitted arguments and reviewed the submitted representative sample of

¹We note the district sought and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, 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).

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

Initially, we note portions of the submitted information, which we have marked, are not responsive to the instant request because they were created after the request for information was received. This ruling does not address the public availability of non-responsive information, and the district is not required to release non-responsive information in response to this request.

We note a portion of the information responsive to the request for information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2011-16704 (2011). In Open Records Letter No. 2011-16704, we determined the district may withhold portions of the information in Exhibit C under rule 503 of the Texas Rules of Evidence and must release the remaining information at issue in that ruling. We have no indication there has been any change in the law, facts, or circumstances on which the prior ruling was based. Accordingly, we conclude the district may rely on Open Records Letter No. 2011-16704 as a previous determination and withhold or release the information we have marked in Exhibit C in accordance with that ruling.⁴ *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).

Next, we note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, 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.⁵ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not

³We assume 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 those records contain substantially different types of information than that submitted to this office. Additionally, we note we understand Exhibit E to be for informational purposes only. This ruling does not address the public availability of non-responsive information, and the department is not required to release non-responsive information in response to this request.

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

⁵A 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>.

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”). You have submitted redacted and unredacted education records for our review. Because our office is prohibited from reviewing these records to determine the applicability of FERPA, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of such records.⁶ We will, however, address the applicability of the claimed exceptions to the submitted information.

Next, we note, and you acknowledge, the submitted information in Exhibit C contains attorney fee bills which are subject to section 552.022(a)(16) of the Government Code. We also note Exhibit F contains court-filed documents which are subject to section 552.022(a)(17) 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” and section 552.022(a)(17) requires disclosure of “information that is also contained in a public court record.” Gov’t Code § 552.022(a)(16), (17). Thus, this information must be released unless it is expressly confidential under the Act or other law. *Id.* Although the district seeks to withhold the court-filed documents under section 552.107 of the Government Code, this is a discretionary exception to disclosure and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 6 (section 552.107 is not other law for purposes of section 552.022), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district may not withhold the marked court-filed documents under section 552.107. However, the Texas Supreme Court has held 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). Accordingly, we will address your attorney-client privilege claim under rule 503 of the Texas Rules of Evidence for the attorney fee bills submitted in Exhibit C and the court-filed documents submitted in Exhibit F.

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;

⁶In the future, if the district does obtain parental consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

(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 it is 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 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Having considered your representations and reviewed the information at issue, we find you have established some of the information you seek to withhold in the attorney fee bills in Exhibit C constitutes privileged attorney-client communications that the district may withhold under rule 503 of the Texas Rules of Evidence. However, some of the information you have marked either does not reveal privileged communications or documents communications with individuals you have not identified. Therefore, the information we have marked for release may not be withheld under rule 503. As you raise no further exceptions for this information, it must be released.

Next, you claim the remaining submitted information not subject to section 552.022 is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for rule 503. 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* ORD 676 at 6-7. 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 state the remaining information in Exhibit F consists of confidential communications made in furtherance of professional legal services rendered to the district. You state these communications were exchanged between the district's attorneys and district employees and contain the legal advice and strategies of the attorneys for the district. You indicate these communications have remained confidential. Based on these representations, and our review, we agree section 552.107 is applicable to some of the information at issue. Therefore, except for the information we have marked for release, the district may generally withhold the information in Exhibit F under section 552.107(1) of the Government Code. We note, however, the privileged e-mail strings include e-mails shared with non-privileged parties that are separately responsive to the instant request. Consequently, if 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. Nevertheless, we find the you have not demonstrated how section 552.107(1) applies to the remaining information at issue in Exhibit F and it may not be withheld on this basis.

Section 552.137 of the Government Code 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 owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to the work e-mail address of an employee of a governmental body because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. In the event the non-privileged e-mails exist separate and apart from the privileged e-mail strings in which they were included and the district may not withhold them under section 552.107(1) of the Government Code, the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners affirmatively consent to their public disclosure.⁷

⁷We note 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 of the Government Code, without the necessity of requesting an attorney general opinion.

In summary, the district may rely on Open Records Letter No. 2011-16704 as a previous determination and withhold or release the information we have marked in Exhibit C in accordance with that ruling. Except for the information we have marked for release in the submitted attorney fee-bills the district may withhold the information it has marked in Exhibit C under rule 503 of the Texas Rules of Evidence. The district must release the remainder of the attorney fee-bills in Exhibit C and the court-filed documents in Exhibit F pursuant to section 552.022 of the Government Code. Except for the information we have marked for release, the district may withhold the remaining information in Exhibit F, which is not subject to section 552.022 of the Government Code, under section 552.107(1) of the Government Code. However, to the extent the non-privileged e-mails 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. In that case, the district must withhold the information we have marked under section 552.137 of the Government Code.

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,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/dls

Ref: ID# 460452

Enc. Submitted documents

c: Requestor
(w/o enclosures)