



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 8, 2012

Mr. Orlando Juarez, Jr.
Escamilla, Poneck & Cruz, L.L.P.
216 West Village Boulevard, Suite 202
Laredo, Texas 78041

OR2012-12465

Dear Mr. Juarez:

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# 461609.

The United Independent School District (the "district"), which you represent, received a request for the requestor's personnel records, records related to incidents involving the requestor, grievances, and letters for the duration of the requestor's employment with the district. You claim that the submitted information is excepted from disclosure under sections 552.102, 552.107, 552.114, 552.117, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

We note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this 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

¹Although you also raise section 552.026 of the Government Code as an exception to disclosure, section 552.026 is not an exception to disclosure. Rather, section 552.026 provides the Act does not require the release of information contained in education records except in conformity with the Family Educational Rights and Privacy Act of 1974. Gov't Code § 552.026. Additionally, although you also raise Texas Rule of Evidence 503 for Exhibit C, we note that, in this instance, the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107. *See* Open Records Decision No. 676 at 1-2 (2002).

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”). You state that Exhibit B contains student identifying education records that are protected under FERPA. Because our office is prohibited from reviewing these education records, we will not address the applicability of FERPA to the information in Exhibit B. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the educational authority in possession of such records.³ Likewise, we do not address your arguments under section 552.114 of the Government Code. *See* Gov’t Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure “student records”); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 and FERPA). However, we will consider your remaining arguments against disclosure of the information in Exhibits B and C.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Having carefully reviewed the information at issue, we conclude the district must withhold the information you have marked in Exhibit B under section 552.102(a) of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov’t Code § 552.107(1). 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.

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>.

³In the future, if the district does not 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.

App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a 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 to only communications between or among clients, client representatives, lawyers, and lawyer representatives. 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 applies to only 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). 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 state the information in Exhibit C constitutes communications between legal counsel for the district and district representatives in their capacity as clients that were made for the purpose of providing legal services to the district. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the information in Exhibit C consists of privileged attorney-client communications that the district may generally withhold under section 552.107(1) of the Government Code. However, we note three of the submitted e-mail strings include communications with a non-privileged party. To the extent the communications with this non-privileged party exist separate and apart from the e-mail strings in which they appear, then the district may not withhold the portions of the communications we have marked under section 552.107(1).

Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, a governmental body must withhold information under section 552.117 on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date

on which the request for this information was made. Accordingly, if the employee whose information is at issue timely elected to keep his personal information confidential pursuant to section 552.024, the district must withhold the information you have marked in Exhibit B under section 552.117(a)(1) of the Government Code. The district may not withhold this information under section 552.117 if the employee did not make a timely election to keep the information confidential.

To the extent the non-privileged communications we have marked in Exhibit C may not be withheld under section 552.107(1) of the Government Code, we address your arguments for this information under section 552.137 of the Government Code. 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). Gov’t Code § 552.137(a)-(c). The e-mail address you have marked and we have marked in Exhibit C is not of the type specifically excluded by section 552.137(c). Accordingly, the district must withhold the e-mail address you have marked and we have marked under section 552.137 of the Government Code unless the owner of the address affirmatively consents to its release.⁴

In summary, the district: (1) must withhold the information you have marked in Exhibit B under section 552.102(a) of the Government Code; (2) may withhold Exhibit C under section 552.107(1) of the Government Code with the exception of the information we have marked, to the extent the marked non-privileged communications exist separate and apart from the e-mail strings in which they appear; (3) must withhold the information you have marked in Exhibit B under section 552.117(a)(1) of the Government Code if the employee timely elected confidentiality; and (4) must withhold the e-mail address you have marked and we have marked in Exhibit C under section 552.137 of the Government Code unless the owner of the address affirmatively consents to its release. 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,

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 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 decision.

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 "Lindsay E. Hale". The signature is written in a cursive style with a large, looping initial "L".

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/ag

Ref: ID# 461609

Enc. Submitted documents

c: Requestor
(w/o enclosures)