



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 20, 2012

Mr. Cory Rush
Counsel for the Tomball ISD
Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2012-13083

Dear Mr. Rush:

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# 462772.

The Tomball Independent School District (the "district"), which you represent, received a request for all electronic records pertaining to the requestor's son.¹ You claim the requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions 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 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 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

¹We note the district sought 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).

²A copy of this letter may be found on the attorney general's website, <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

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.³ 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 children’s education records. See 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. This statutory 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 Gov’t Code § 552.103); see also *Equal Employment Opportunity Comm’n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (FERPA prevails over inconsistent provision of state law). The DOE has informed us, 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. Therefore, we will determine whether the district may withhold the information for which it claims the attorney-client privilege on that basis, including any information to which the requestor would have a right of access under FERPA. We also will address the district’s claim for the submitted information under section 552.103 of the Government Code to the extent the requestor does not have a right of access to the information under FERPA.

Section 552.103 of the Government Code, the “litigation exception,” provides in 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.

...

(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.

³If 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.

Gov't Code § 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, no pet.); *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).*

To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Open Records Decision No. 452 at 4 (1986).* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁴ *See Open Records Decision No. 555 (1990); see also Open Records Decision No. 518 at 5 (1989)* (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See Open Records Decision No. 331 (1982).* Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See Open Records Decision No. 361 (1983).*

You contend the submitted information is related to anticipated litigation with the requestor. You note the requestor has retained an attorney, who has advised the requestor that “there a [sic] couple of solid points to be made in a hearing.” You state that, based on the requestor’s previous interactions with the district and her request for the submitted information, the district anticipates that the requestor intends to seek a due process hearing regarding the district’s provision of special education services to her child. Having considered your arguments, we find you have not sufficiently demonstrated that litigation was reasonably anticipated when the district received the present request for information. *See Open Records Decision Nos. 361 (fact that request was made by attorney on behalf of rejected applicant not sufficient to invoke litigation exception), 331 (1982)* (mere chance of litigation not sufficient to trigger statutory predecessor to Gov’t Code § 552.103). We

⁴This office also has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see Open Records Decision No. 336 (1982)*; hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see Open Records Decision No. 346 (1982)*; and threatened to sue on several occasions and hired an attorney, *see Open Records Decision No. 288 (1981).*

therefore conclude the district may not withhold any of the submitted information under section 552.103 of the Government Code.

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. 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 marked the information the district seeks to withhold under section 552.107(1). You state the marked information consists of confidential communications made in connection with the rendition of legal services to the district. You have generally identified the parties to the communications. You indicate the communications were intended to be and remain confidential. Based on your representations and our review, we conclude the district may generally withhold the marked information under section 552.107(1) of the Government Code. We note, however, that many of the submitted e-mail strings contain communications with the requestor and her attorney, who are not privileged parties. Therefore, those communications, which we have marked, may not be withheld under

section 552.107(1) to the extent they exist separate and apart from the e-mail strings in which they appear.

We note the district's communications with the requestor's attorney, including communications the district does not seek to withhold under section 552.107(1), contain his e-mail address. We have marked that information. 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 has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c).⁵ Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address a governmental entity maintains for one of its officials or employees. Thus, in releasing the communications with the requestor's attorney that may not be withheld under section 552.107(1), the district must withhold his e-mail address under section 552.137 of the Government Code, unless he has affirmatively consented to its public disclosure. Likewise, to the extent any other communications with the requestor's attorney exist separate and apart from the submitted e-mail strings, so as not to be protected by section 552.107(1), his e-mail address must be withheld under section 552.137, unless he has consented to its disclosure.⁶ We note the requestor has a right of access to her own e-mail address under section 552.137(b).

In summary, the district (1) may generally withhold the information you have marked under section 552.107(1) of the Government Code, but may not withhold the communications with the requestor and her attorney we have marked to the extent they exist separate and apart from the e-mail strings, and (2) must release any communications with the requestor and her attorney that are not protected by section 552.107(1), except for the requestor's attorney's e-mail address, which must be withheld under section 552.137 of the Government Code unless he has affirmatively consented to its public disclosure. 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.

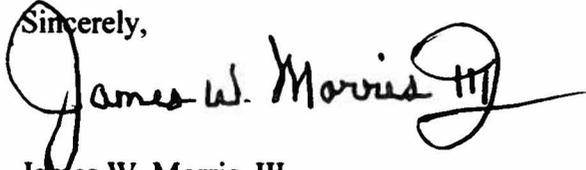
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

⁵This office will raise section 552.137 on behalf of a governmental body, as this section is a mandatory exception to disclosure. See Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

⁶We note Open Records Decision No. 684 (2009) is a previous determination issued by this office 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 of the Government Code.

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 long horizontal stroke at the end.

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

JWM/bhf

Ref: ID# 462772

Enc: Submitted documents

c: Requestor
(w/o enclosures)