



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 10, 2012

Mr. Clyde A. Pine, Jr.  
Mounce, Green, Myers, Safi, Paxson & Galatzan, P.C.  
P.O. Box 1977  
El Paso, Texas 79999-1977

OR2012-14289

Dear Mr. Pine:

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# 464348.

The El Paso Independent School District (the "district"), which you represent, received two requests from the same requestor for information pertaining to a specified investigation, including statements, as well as information previously requested by a named entity relating to any public relations, community relations, media and/or image consultant hired during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.114, and 552.135 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of information submitted in response to the first request, which we have marked, is not responsive because it was created after the district received the request.

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<sup>1</sup>Although you raise section 552.101 of the Government Code in conjunction with the attorney-client privilege in Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). We also note section 552.101 does not encompass of the Texas Disciplinary Rule of Professional Conduct 1.05. Further, although you assert the attorney-client privilege under Texas Rule of Evidence 503, we note none of the information for which you claim this privilege is subject to section 552.022 of the Government Code. Therefore, section 552.107 of the Government Code is the proper exception to raise for your attorney-client privilege claim. Additionally, although you also raise section 552.026 of the Government Code as an exception to disclosure, we note 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.

The district need not release this nonresponsive information and this ruling will not address that information.

Next, we note some of the submitted information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-12522 (2012). In Open Records Letter No. 2012-12522, we found the district may withhold the information we marked under section 552.107(1) of the Government Code, must withhold the e-mail addresses we marked under section 552.137 of the Government Code unless the owners of the e-mail addresses consent to their release, and must release the remaining information. We have no indication the law, facts, and circumstances on which Open Records Letter No. 2012-12522 was based have changed. Accordingly, with regard to the requested information that is identical to the information previously requested and ruled upon by this office in Open Records Letter Nos. 2012-12522, we conclude the district must continue to rely on that ruling as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, 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). To the extent the submitted information is not encompassed by the previous ruling, we will address your arguments against its release.

Next, we note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the federal 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.<sup>2</sup> 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 have submitted redacted and unredacted student records for our review. Because our office is prohibited from reviewing education records to determine the applicability of FERPA, we will not address FERPA with respect to this information. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. Such determinations under FERPA must be made by the educational authority in possession of the education record.<sup>3</sup> Accordingly, we also do not address your argument under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating

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

<sup>3</sup>In the future, if the district does obtain 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.

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 of the Government Code and FERPA).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* 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. ORD 676 at 6-7. 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 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, 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 Exhibit C consists of e-mail communications between the district’s outside counsel, a district official, district employees, and the district’s consultants that were made for the purpose of facilitating the rendition of professional legal services to the district. You also inform us that these communications were intended to be, and have remained, confidential. As such, we find the district may withhold Exhibit C under section 552.107(1) of the Government Code.<sup>4</sup>

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<sup>4</sup>As our ruling is dispositive, we do not address your remaining argument for Exhibit C.

Section 552.135 of the Government Code provides the following:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov't Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under the exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* § 552.301(e)(1)(A). Additionally, individuals who provide information in the course of an investigation, but do not make the initial report are not informants for purposes of section 552.135.

You claim the remaining information reveals the identities of district employees who reported possible violations of section 247.2 of title 19 of the Texas Administrative Code to their supervisors and other district personnel. *See* Educ. Code § 21.041(b) (Texas Education Agency shall propose rules providing for disciplinary proceedings); 19 T.A.C. § 247.2 (Code of Ethics and Standard Practices for Texas Educators). You also state the individuals at issue have not consented to disclosure of their identities. Based on your representations and our review, we conclude the district must withhold the identifying information of the employee who reported the possible violations, which we have marked, under section 552.135 of the Government Code. However, we find the district has failed to demonstrate how any of the remaining information reveals the identity of an individual who made an initial report of a possible violation to the school district or the proper regulatory enforcement authority and, thus, has not demonstrated the remaining information reveals the identity of an informer for the purposes of section 552.135. Therefore, the district may not withhold any portion of the remaining information under section 552.135.

We note portions of the remaining information are subject to section 552.117 of the Government Code.<sup>5</sup> Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of

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<sup>5</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. We note section 552.117 excepts a cellular telephone number from disclosure, provided the cellular telephone service is not paid for with public funds. *See* Open Records Decision No. 506 at 5-6 (1988). We have marked personal information of district employees. If these individuals timely elected to withhold the marked information, the district must withhold the marked information under section 552.117(a)(1); however, the district may only withhold the marked cellular telephone number if the cellular telephone service is not paid for with public funds. If the individuals whose information we have marked did not timely elect to withhold the marked information, then the district may not withhold the marked information under section 552.117(a)(1).

In summary, with regard to the requested information that is identical to the information previously requested and ruled upon by this office in Open Records Letter No. 2012-12522, we conclude the district must continue to rely on that ruling as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling. The district may withhold Exhibit C under section 552.107(1) of the Government Code. The district must withhold the information we have marked under section 552.135 of the Government Code. Provided the individuals whose information we have marked timely elected to keep such information confidential, the district must withhold the marked information under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone number may only be withheld if the cellular telephone service is not paid for with public funds. The district must release the remaining information.<sup>6</sup>

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](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free,

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<sup>6</sup>We note the requestor has a right of access to some of the information being released, which the district would be required to withhold from the public under section 552.117(a)(1) of the Government Code to protect his privacy. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Should the district receive another request for the information at issue from a different requestor, section 552.024(c) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) without the necessity of requesting a decision under the Act if the current or former employee to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2).

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,



Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/ag

Ref: ID# 464348

Enc. Submitted documents

c: Requestor  
(w/o enclosures)