



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 27, 2012

Mr. Clyde Pine, Jr.
Counsel for the El Paso Independent School District
Mounce, Green, Myers, Safi, Paxson & Galatzan
P.O. Box 1977
El Paso, Texas 79999-1977

OR2012-15423

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# 466309.

The El Paso Independent School District (the "district"), which you represent, received two requests from different requestors for information pertaining to the district's contract with or employment of a named individual, including any scope of work, payments to, invoices from, and meetings with the individual, as well as any e-mails between the individual and several specified individuals, during specified time periods. You state the district is releasing some of the requested information. 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 and rule 1.05 of the Texas Disciplinary Rules of Professional

Conduct.¹ We have considered the exception you claim and reviewed the submitted representative sample of information.²

Initially, you state the district has redacted information that identifies students from some of the submitted documents. The United States Department of Education Family Policy Compliance Office 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 review in the open records ruling process under the Act.³ 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"). Thus, because our office is prohibited from reviewing an education record for the purpose of determining whether appropriate redactions have been made under FERPA, we will not address the applicability of FERPA to the submitted information. Such determinations under FERPA must be made by the educational authority in possession of the education records.⁴ We will consider the district's arguments against disclosure under the Act.

Next, we note the submitted information contains attorney fee bills that are subject to section 552.022(a)(16) 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," unless the information is expressly confidential under the Act or other law. Gov't Code § 552.022(a)(16). You seek to withhold the information at issue under section 552.107(1) of the Government Code and rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. However, section 552.107(1) is

¹Although you also raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). We also note section 552.101 does not encompass Texas Disciplinary Rule of Professional Conduct 1.05. Accordingly, we do not address your argument under section 552.101.

²We 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.

³A copy of the letter may be found on the attorney general's website, <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

⁴If in the future the district obtains 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.

discretionary and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, the district may not withhold any portion of the submitted fee bills under section 552.107(1). Further, the Texas Disciplinary Rules of Professional Conduct are not considered “other law” for purposes of section 552.022. Therefore, we do not address your argument under rule 1.05, and none of the information at issue may be withheld on this basis. *See* ORD 676 at 3-4. However, the Texas Supreme Court has held 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 claim of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the submitted attorney fee bills. We will also consider your argument under section 552.107(1) of the Government Code for the information not subject to section 552.022.

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;
- (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).

You assert the portions of the submitted fee bills you have marked should be withheld under rule 503. You assert the submitted fee bills document privileged attorney-client communications between attorneys and special counsel for the district and district officials, trustees, and employees in their capacities as clients. You state the communications at issue were made for the purpose of the rendition of legal services to the district. You state the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on your representations and our review of the information at issue, we find the district has established the information we have marked constitutes attorney-client communications under rule 503. Thus, the district may withhold the information we have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. However, you have not identified some of the parties to the communications at issue. Further, some of the marked information does not document a communication. Thus, we find you have not demonstrated how the remaining information you marked documents an attorney-client communication for purposes of rule 503. Accordingly, the remaining information you have marked may not be withheld on that basis.

You claim section 552.107 of the Government Code for the information not subject to section 552.022. 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).

As noted above, you inform us the remaining information documents communications between attorneys and special counsel for the district and district officials, trustees, and employees in their capacities as clients, made for the purpose of the rendition of legal services to the district. You state the communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have

demonstrated the applicability of the attorney-client privilege to most of the information not subject to section 552.022. However, we note some of the information at issue consists of communications that have been shared with individuals who you state are not privileged parties. This information, which we have marked for release, may not be withheld under section 552.107(1) of the Government Code. Accordingly, with the exception of the information we marked for release, the district may generally withhold the information not subject to section 552.022 under section 552.107(1) of the Government Code. However, we note some of the individual e-mails within the otherwise privileged e-mail strings are communications with individuals whom you have not identified as privileged parties. Further, some of the individual e-mails within the otherwise privileged e-mail strings relate to contractual negotiations between the district and a third party. Because the district was involved in negotiations with the third party at the time the communications were made, we find their interests were adverse at that time. Accordingly, we find, at the time the communications were made, the district and the third party did not share a common interest that would allow the attorney-client privilege to apply. *See* TEX. R. EVID. 503(b)(1)(c); *In re Monsanto*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1999, orig. proceeding) (discussing the “joint-defense” privilege incorporated by rule 503(b)(1)(C)). Thus, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107(1).

We note the non-privileged e-mails contain e-mail addresses that are subject to section 552.137 of the Government Code.⁵ 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). *See id.* § 552.137(a)-(c). The e-mail addresses we have marked are not excluded by subsection (c). Therefore, the district must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.⁶

In summary, the district may withhold the information we have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. With the exception of the information we marked for release, the district may withhold the information not subject to section 552.022 under section 552.107(1) of the Government Code; however, to the extent the marked non-privileged e-mails exist separate and apart from the otherwise privileged e-mail strings, they may not be withheld under section 552.107(1). The district

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

⁶We 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 decision.

must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure. The remaining information must be released.

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 466309

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)