ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

October 17, 2012

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

OR2012-16567

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# 469160.

The El Paso Independent School District (the "district"), which you represent, received a request for information pertaining to Strategic Governmental Solutions; the Student Tracking Reporting System; the Individual Education Plan; the Medicaid School Health and Related Services Project; and two named individuals. You state some responsive materials will be released. You claim that the submitted information is excepted from disclosure under

sections 552.107 and 552.114 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted representative sample of information.[2]

Initially, 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.[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"). You have submitted 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.[4] Accordingly, we also do not address your argument 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 of the Government Code and FERPA).

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[1]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.

[2]We assume the "representative sample" of information 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 those submitted to this office.

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

[4]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.

You assert the submitted information is protected by the attorney-client privilege. 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. 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 state the submitted information constitutes e-mail communications amongst the attorneys for the district, a district representative serving as the district's public relations consultant, and district employees 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. As such, we find the district may generally withhold the submitted information under section 552.107(1). We note, however, an e-mail string includes e-mails received from or sent to a non-privileged party. Furthermore, if the e-mails received from or sent to a non-privileged party are removed from the e-mail string and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the district separate and apart from the otherwise privileged e-mail string in which they appear, then the district may

not withhold these non-privileged e-mails under section 552.107(1) of the Government Code, and must release them to the requestor.

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,

Sean Opperman
Assistant Attorney General
Open Records Division

SO/som

Ref: ID# 469160

Enc. Submitted documents

c: Requestor
(w/o enclosures)