



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 23, 2012

Ms. LeAnne Lundy
Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2012-16947

Dear Ms. Lundy:

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# 468844.

The Association for the Development of Academic Excellence d/b/a Girls and Boys Preparatory Academy (the "academy"), which you represent, received a request for communications and documents exchanged between two named individuals for a specified period of time and documents submitted by a named individual to the Texas Education Agency (the "TEA") for the same period of time.¹ You state the academy has made some of the requested information available to the requestor but claim the submitted information is excepted from disclosure under section 552.107 of the Government Code.² We have considered the exception you claim and reviewed the submitted representative sample of information.³

¹You inform us the Association for the Development of Academic Excellence conducts business on behalf of the academy.

²Although you also raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 677 (2002), 676 (2002). The proper exceptions to raise when asserting the attorney client for information not subject to section 552.022 of the Government Code is section 552.107. *See* ORDs 677, 676.

³We 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.

Initially, we note some of the information you have submitted to us for review is not responsive to the request for information because it was created after the academy received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the academy is not required to release this information, which we have marked, in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed).

The United States Department of Education Family Policy Compliance Office 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.⁴ 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, among other things, unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of the education records.⁵ We will, however, address the applicability of the remaining claimed exceptions to the submitted information.

Section 552.107(1) of the Government Code protects information coming 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. ORD 676 at 6-7. First, a governmental body must demonstrate 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

⁴A copy of this letter may be found on the Office of the Attorney General’s website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

⁵In the future, if the academy does obtain parental or an adult student’s consent to submit unredacted education records and the academy seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

government does not demonstrate this element. Third, the privilege applies only to 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 only to 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 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 explain the submitted information constitutes confidential communications between an attorney for the academy and academy employees, board members, and an individual who was appointed conservator of the academy by the TEA. In particular, you explain the TEA granted the conservator the authority to oversee all activities with respect to the operation of the academy and to approve or disapprove any action of the superintendent, school board members, and principals of the academy and corporate board of the ADAE. You state these communications were made in furtherance of the rendition of professional legal services. You also assert the communications were intended to be confidential and their confidentiality has been maintained. Some of the responsive information you seek to withhold consists of communications between academy employees that were not subject to the attorney-client privilege on the date the academy received the request for information. We note our office must rely on the facts as they existed on the date the academy received the request for information. Thus, you have not established this information is excepted from release pursuant to section 552.107. Nevertheless, we agree the remaining responsive information constitutes communications between privileged parties that are protected by the attorney-client privilege. Therefore, the academy may generally withhold the remaining responsive information, which we have marked, under section 552.107 of the Government Code. We note, however, some of the privilege e-mail strings at issue include e-mails received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the e-mail strings 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 academy separate and apart from the otherwise privileged e-mail strings in which they appear, then the academy may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

Section 552.117 of the Government Code may be applicable to some of the submitted information.⁶ Section 552.117(a)(1) 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). Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular phone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). 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 the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only 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. Therefore, the academy must withhold the cellular telephone number we have marked under section 552.117(a)(1) if the employee at issue made a timely election to keep the information confidential and if it was not provided to the employee at issue at public expense.

The remaining information contains e-mail addresses of members of the public. 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 member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the academy must withhold the e-mail addresses we have marked under section 552.137.⁷

To conclude, this ruling does not address the applicability of FERPA to the submitted information. Should the academy determine that all or portions of the submitted information consist of "education records" that must be withheld under FERPA, the academy must

⁶The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

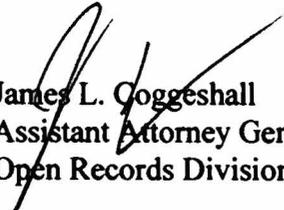
⁷This office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general opinion.

dispose of that information in accordance with FERPA, rather than the Act. The academy may withhold the information we have marked under section 552.107; however, if the non-privileged e-mail we have marked are maintained by the academy separate and apart from the otherwise privileged e-mail strings in which they appear, then the academy may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. The academy must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code if the employee at issue made a timely election to keep the information confidential and if it was not provided to the employee at issue at public expense. The academy must also withhold the information we have marked under section 552.137 of the Government Code. The academy must release the remaining responsive information.⁸

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 468844

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁸We note the submitted information contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.