



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 13, 2013

Mr. W. Montgomery Meitler  
Assistant Counsel  
Office of Legal Services  
Texas Education Agency  
1701 North Congress Avenue  
Austin, Texas 78701-1494

OR2013-15987

Dear Mr. Meitler:

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# 499213 (TEA PIR# 19992).

The Texas Education Agency (the "TEA") received a request for e-mails by two named individuals during a specified time period pertaining to specified topics or including a correspondent from the Texas State Auditor's Office (the "SAO") or the El Paso Independent School District.<sup>1</sup> You state a portion of the requested information will be provided to the requestor. You claim the remaining requested information is excepted from disclosure under sections 552.107, 552.108, and 552.116 of the Government Code. We have

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<sup>1</sup>You state the TEA sought and received clarification of the information requested. See Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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. Open Records Decision No. 676 at 6-7 (2002). 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 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).

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<sup>2</sup>We assume that 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 that those records contain substantially different types of information than that submitted to this office.

You state the e-mails you have marked under section 552.107 consist of attorney-client privileged communications between TEA attorneys and attorney representatives and TEA staff. You further state these communications were made for the purpose of facilitating the rendition of professional legal services to the TEA, and these communications were not intended to be disclosed to third parties and have remained confidential. Based on your representations and our review, we find the attorney-client privilege is applicable to the information at issue, and the TEA may generally withhold the information at issue under section 552.107(1). However, we note the information at issue includes non-privileged e-mails that are included in otherwise privileged e-mail strings. Furthermore, if the e-mails are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails, which we have marked, are maintained by the TEA separate and apart from the otherwise privileged e-mail strings in which they appear, then the TEA may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. However, if the non-privileged e-mails are not maintained separate and apart from the otherwise privileged e-mail strings, the TEA may withhold the marked e-mails under section 552.107(1) of the Government Code.

We note the non-privileged e-mails contain a personal e-mail address subject to section 552.137 of the Government Code.<sup>3</sup> 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* Gov’t Code § 552.137(a)-(c). The e-mail address at issue is not a type specifically excluded by section 552.137(c). Accordingly, in the event the non-privileged e-mails exist separate and apart from the otherwise privileged e-mail strings, the TEA must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its disclosure.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” *Id.* § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5 (1987)*. Where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

withhold the information if it provides this office with a demonstration the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

You state the information you have marked under section 552.108 of the Government Code consists of correspondence with or concerning the United States Department of Education Office of the Inspector General (the "OIG") and the United States Department of Justice (the "DOJ") regarding a pending criminal investigation being conducted by the OIG and the DOJ. However, you have not provided a representation from either the OIG, the DOJ, or any other law enforcement agency objecting to the release of the information at issue, nor has this office received any such representation. Accordingly, the TEA may not withhold any of the information at issue under section 552.108 of the Government Code.

Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state some of the information you have marked under section 552.116 of the Government Code consists of working papers created or used during the course of an audit conducted by the TEA's Division of Program Monitoring and Interventions and authorized under section 39.057(a)(4) of the Education Code, which permits special accreditation investigations to be conducted in response to established compliance reviews of a school district's financial accounting practices and state and federal program requirements. *See* Educ. Code § 39.057 (listing circumstances in which the commissioner shall authorize investigations). Based on your representations and our review, we agree the information at issue constitutes audit working papers under section 552.116. Thus, the TEA may withhold the information at issue, which we have marked, pursuant to section 552.116 of the Government Code.

You state the remaining information you have marked under section 552.116 of the Government Code consists of "audit working papers prepared or maintained by TEA and/or the State Auditor's Office." You state these audits are authorized under chapter 321 of the Government Code. *See* Gov't Code § 321.0136 (defining "investigation" for purposes of chapter 321 of the Government Code). Further, you state a portion of the information at issue was submitted to the SAO pursuant to section 321.022 of the Government Code. *See id.* § 321.022 (if administrative head of department has reasonable cause to believe money may have been lost, misappropriated, or misused, or that other fraudulent or unlawful conduct has occurred, the administrative head shall report the reason and basis for this belief to the state auditor and all records of a communication to the state auditor relating to a report to the state auditor are audit working papers of the state auditor).

Some of the information at issue pertains to an audit of the TEA by the SAO. We note the SAO is the independent auditor for the Texas state government. *See generally id.* ch. 321. The SAO has authority under section 321.013 of the Government Code to conduct audits of all state departments as specified in the audit plan. *Id.* § 321.013(a). The remaining information at issue pertains to an audit of the TEA conducted by KPMG, an audit, tax, and advisory firm, and this information indicates the audit was conducted to ensure compliance with federal requirements. We note section 552.116 is intended to protect the auditor's interests. As the auditee, the TEA cannot assert section 552.116 in order to protect its own interest in the information at issue under section 552.116. Accordingly, the TEA may not withhold any portion of the remaining information you have marked under section 552.116 of the Government Code.

In summary, the TEA may withhold the information you have marked under section 552.107(1) of the Government Code. However, to the extent the non-privileged e-mails we have marked exist separate and apart from the otherwise privileged e-mail strings in which they appear, the TEA may not withhold them under section 552.107(1) of the Government Code. In that case, the TEA must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless its owner affirmatively consents to its public disclosure, and release the remaining information. The TEA may withhold the

information we have marked under section 552.116 of the Government Code. The TEA must release the remaining information.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kristi L. Wilkins  
Assistant Attorney General  
Open Records Division

KLW/bhf

Ref: ID# 499213

Enc. Submitted documents

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