



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 11, 2013

Mr. Christopher B. Gilbert  
Counsel for Katy Independent School District  
Thompson & Horton, L.L.P.  
3200 Southwest Freeway, Suite 2000  
Houston, Texas 77027

OR2013-21559

Dear Mr. Gilbert:

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# 508405.

The Katy Independent School District (the "district"), which you represent, received two requests from the same requestor for four categories of information relating to the attorneys hired in relation to a specified grievance and letters written to and received from our office regarding the requestor's requests for information. You state the district has released some of the requested information. You state the district has redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).<sup>1</sup> 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). You claim some of the submitted information is excepted from disclosure under section 552.107 of the

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<sup>1</sup>The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the educational records. We have posted a copy of the letter from the DOE on the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

Government Code and privileged under Texas Rule of Evidence 503.<sup>2</sup> We have considered your arguments and reviewed the submitted information.

Initially, you state some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2013-14999 (2013). In Open Records Letter No. 2013-14999, we concluded the district may withhold the information we marked under Texas Rule of Evidence 503, and the information you marked under section 552.107(1) of the Government Code, and must release the remaining information. There is no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the district may continue to rely on Open Records Letter No. 2013-14999 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and 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 information is or is not excepted from disclosure). However, we will address your arguments for the information not previously ruled on.

Next, we note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(1), (16). The information in Exhibit C consists of a completed report subject to subsection 552.022(a)(1). The district must release the completed report pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under

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<sup>2</sup>Although you raise sections 552.101 and 552.103 of the Government Code, you make no arguments to support these exceptions. Therefore, we assume you have withdrawn your claim these sections apply to the submitted information. *See* Gov't Code §§ 552.301, .302.

section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* § 552.022(a)(1). The information in Exhibit A consists of attorney fee bills subject to subsection 552.022(a)(16). This information must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(16). Although you raise section 552.107 of the Government Code for the information at issue, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, none of the information subject to subsections 552.022(a)(1) and 552.022(a)(16) may be withheld under section 552.107. The Texas Supreme Court has held, however, that the Texas Rules of Evidence are “other law” that makes information expressly confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will address your claim under Texas Rule of Evidence 503 for the information subject to section 552.022. Further, we will address your claim under section 552.107 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 in Exhibit A and the entirety of the information in Exhibit C should be withheld under rule 503. You assert the information at issue includes privileged attorney-client communications between the district's outside attorney and district officials and staff 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 indicate 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 in Exhibit A and the entirety of the information in Exhibit C constitutes attorney-client communications under rule 503. Thus, the district may withhold the information we have marked in Exhibit A and the entirety of the information in Exhibit C pursuant to rule 503 of the Texas Rules of Evidence. However, the remaining information you have marked in Exhibit A does not document a communication. Thus, we find you have not demonstrated how the remaining information you marked in Exhibit A documents a privileged attorney-client communication for purposes of rule 503. Accordingly, the remaining information you have marked in Exhibit A may not be withheld under rule 503 of the Texas Rules of Evidence.

You claim section 552.107 of the Government Code for a portion of the information in Exhibit B. 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).

You claim the information you have marked in Exhibit B consists of a communication from the district's outside attorney to the district's board of trustees, made for the purpose of the rendition of legal services to the district. You state the communication was intended to be confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the district may withhold the information you have marked in Exhibit B under section 552.107 of the Government Code.

In summary, the district may withhold the information we have marked in Exhibit A and the entirety of the information in Exhibit C pursuant to Texas Rule of Evidence 503. The district may withhold the information you have marked in Exhibit B under section 552.107 of the Government Code. The district 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,



David L. Wheelus  
Assistant Attorney General  
Open Records Division

DLW/akg

Ref: ID# 508405

Enc. Submitted documents

c: Requestor  
(w/o enclosures)