



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 22, 2014

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

OR2014-12641

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# 530043 (TEA PIR# 21958).

The Texas Education Agency (the "agency") received a request for seventeen categories of information regarding complaints against and investigations of Beaumont Independent School District, information regarding agency procedures and training, information concerning theft by agency employees during a specified time period, and information concerning investigations of other school districts.¹ You state some information will be released to the requestor. You state the agency has redacted some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.² You claim some of the submitted information is excepted from

¹You state the agency 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).

²The 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 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 education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>

disclosure under sections 552.107, 552.108, and 552.116 of the Government Code. Although you take no position regarding the release of the remaining information, you indicate release of the remaining information may implicate the interests of the El Paso County District Attorney's Office, the Hidalgo County District Attorney's Office, the Texas State Auditor's Office, the United States Department of Justice, the United States Department of Education (the "DOE"), and the United States Internal Revenue Service. Accordingly, you notified these third parties of the request for information and of their right to submit arguments stating why their information should not be released. *See* Gov't Code § 552.304 (interested party may submit written comments stating why information should or should not be released). As of the date of this letter, we have only received comments from the DOE. We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, you state portions of the requested information were the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2014-11727 (2014), 2014-08513 (2014), 2013-21160 (2013), 2013-19933 (2013), 2013-15863 (2013), 2013-11490 (2013), 2013-11009 (2013), 2013-01543 (2013), 2012-20199 (2012), 2012-16255 (2012), 2012-15681 (2012), 2012-11916 (2012), 2011-13763 (2011), 2011-08090 (2011), 2011-04693 (2011), and 2010-06403 (2010). We have no indication there has been any change in the law, facts, or circumstances on which these previous rulings were based. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon by this office, we conclude the agency may rely on Open Records Letter Nos. 2014-11727, 2014-08513, 2013-21160, 2013-19933, 2013-15863, 2013-11490, 2013-01543, 2012-20199, 2012-16255, 2012-15681, 2012-11916, 2011-13763, 2011-08090, 2011-04693, and 2010-06403, and must rely on Open Records Letter No. 2013-11009, as previous determinations and withhold or release the identical information in accordance with those rulings. *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 that information is or is not excepted from disclosure).

Next, we note the submitted information includes an indictment filed with a court, which is subject to section 552.022 of the Government Code. Section 552.022(a)(17) provides for the required public disclosure of "information that is also contained in a public court record" unless it is "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(17). Although you and the DOE raise section 552.108 of the Government Code for the submitted indictment, that section is a discretionary exception and does not make information

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.

confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). As such, section 552.108 does not make information confidential for the purposes of section 552.022. Therefore, the submitted indictment may not be withheld under section 552.108. As no further exceptions have been raised for this information, the agency must release the submitted indictment, which we have marked, to the requestor.

Section 552.107(1) of the Government Code protects information that comes 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. *See* 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. *See* 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. *See 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 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* 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. *See 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 state the information you have marked consists of communications involving agency attorneys and other agency employees. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the agency and these

communications have remained 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. Thus, the agency may withhold the information you have marked under section 552.107(1) of the Government Code.

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[.]” Gov’t Code § 552.108(a)(1). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *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 withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

The DOE’s Office of the Inspector General objects to the disclosure of a portion of the remaining information because its release would interfere with an ongoing criminal investigation. Based on these representations, we conclude the agency may withhold the information you have marked that is not subject to section 552.022 under section 552.108(a)(1) of the Government Code on behalf of the DOE. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

Section 552.116 of the Government Code provides the following:

(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, a hospital 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, the bylaws adopted by or other action of the governing board of a hospital district, 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 a portion of the information you have marked under section 552.116 constitutes audit working papers prepared or maintained by the agency's Division of Grants and Federal Fiscal Compliance in conjunction with audits of grant recipients. You further state the audits are authorized by section 7.021(b)(1) of the Education Code, subsections 7.028(a)(1) and (a)(2) of the Education Code, section 76.770 of title 34 of the Code of Federal Regulations, and subpart D of Office of Management and Budget Circular A-133. *See* Educ. Code §§ 7.021(b)(1) (agency shall administer and monitor compliance with education programs), .028 (a)(1)-(2) (agency may monitor program to ensure compliance with federal law and grant requirements); 34 C.F.R. § 76.770 (state shall perform state determined procedures and evaluations to ensure subgrantee compliance with statutes and regulations). Additionally, you state some of the information you have marked under section 552.116 consists of audit working papers prepared or maintained by the agency's Division of Program Monitoring and Interventions in conjunction with audits of certain school districts. You inform us these audits were conducted under the authority granted to the agency by section 7.028 of the Education Code and section 80.40 of title 34 of the Code of Federal Regulations. *See* Educ. Code § 7.028 (a)(1)-(2) (agency may monitor program to ensure compliance with federal law and grant requirements); 34 C.F.R. § 80.40(a) (requiring agency to monitor grant and subgrant supported activities to assure compliance with applicable federal requirements). You state some of the information at issue consists of audit working papers prepared or maintained by the agency's Divisions of Enforcement Coordination and Governance and Complaints and Investigations in conjunction with audits of certain school districts. You inform us these audits were authorized by section 39.057(a)(4) of the Education Code. Educ. Code § 39.057 (listing circumstances in which the commissioner shall authorize investigations). Further, you state the remaining portion of the information at issue consists of audit working papers prepared or maintained by the agency's Student Assessment Division Security Task Force in conducting

investigations of testing irregularities in the administration of statewide assessment instruments. You inform us the investigations were “authorized by section 39.057(a)(8) of the Education Code, which permits the [c]ommissioner of [e]ducation to authorize special accreditation investigations to be conducted in response to an allegation regarding or an analysis using a statistical method result indicating a possible violation of an assessment security procedure.” *See id.* Based on your representations and our review, we agree the information you have marked consists of audit working papers for purposes of section 552.116. Therefore, the agency may withhold the information you have marked under section 552.116 of the Government Code.

The remaining documents include information that is subject to section 552.136 of the Government Code.⁴ Section 552.136 of the Government Code provides, “Notwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, the agency must withhold the partial credit card numbers we have marked under section 552.136 of the Government Code.

In summary, to the extent the requested information is identical to the information previously requested and ruled upon by this office, we conclude the agency may rely on Open Records Letter Nos. 2014-11727, 2014-08513, 2013-21160, 2013-19933, 2013-15863, 2013-11490, 2013-01543, 2012-20199, 2012-16255, 2012-15681, 2012-11916, 2011-13763, 2011-08090, 2011-04693, and 2010-06403, and must rely on Open Records Letter No. 2013-11009, as previous determinations and withhold or release the identical information in accordance with those rulings. The agency must release the submitted indictment pursuant to section 552.022(a)(17) of the Government Code. The agency may withhold the information you have marked under section 552.107(1) of the Government Code. The agency may withhold the information you have marked that is not subject to section 552.022 under section 552.108(a)(1) of the Government Code on behalf of the DOE. The agency may withhold the information you have marked under section 552.116 of the Government Code. The agency must withhold the information we have marked under section 552.136 of the Government Code. The agency 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/>

⁴The 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).

[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. Godden
Assistant Attorney General
Open Records Division

KLG/tch

Ref: ID# 530043

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Neil E. Sanchez
Special Agent in Charge
Office of Inspector General
United States Department of Education
1999 Bryan Street, Suite 1440
Dallas, Texas 75201
(w/o enclosures)

Mr. Jaime Esparza
District Attorney
El Paso County District Attorney's Office
500 East San Antonio, 2nd Floor
El Paso, Texas 79901
(w/o enclosures)

Ms. Angie A. Welborn
Senior Legal Counsel
Texas State Auditor's Office
P.O. Box 12067
Austin, Texas 78711-2067
(w/o enclosures)

Mr. René Guerra
District Attorney
Hidalgo County District Attorney's Office
P.O. Box 87
Edinburg, Texas 78539
(w/o enclosures)

Mr. Quincy L. Ollison
Assistant United States Attorney
United States Department of Justice
1000 Louisiana Street, Suite 2300
Houston, Texas 77002
(w/o enclosures)

Internal Revenue Service
Stop C2003
Fresno, California 93888
(w/o enclosures)