



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 8, 2014

Mr. Orlando Juarez, Jr.
Counsel for San Marcos Consolidated Independent School District
J. Cruz & Associates, L.L.C.
216 West Village Boulevard, Suite 202
Laredo, Texas 78041

OR2014-18040

Dear Mr. Juarez:

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# 538689.

The San Marcos Consolidated Independent School District (the "district"), which you represent, received five requests from different requestors for a specified investigative report. The third requestor also seeks communications from a named trustee in 2014 pertaining to a specified topic and audio recordings of a specified school board meeting. The fifth requestor also seeks information pertaining to the specified investigation, including the total cost charged for the completion of the investigation and the name of the person or firm commissioned to conduct the investigation. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.114 of the Government Code and privileged pursuant to rule 503 of the Texas Rules of Evidence.¹ We have considered your arguments and reviewed the submitted information.

¹Although you raise section 552.026 of the Government Code, 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 ("FERPA") of 1974. Gov't Code § 552.026. Although you also raise sections 552.101 and 552.111 of the Government Code and rule 192.5 of the Texas Rules of Civil Procedure, you make no arguments to support these exceptions or this rule. Therefore, we understand the district no longer asserts these exceptions or this rule. *See id.* §§ 552.301, .302.

Initially, we note you have not submitted information responsive to portions of the third and fifth requests. We assume, to the extent any information responsive to those portions of the requests existed on the date the district received the requests, the district has released it. If the district has not released any such information, it must do so at this time. *See Gov't Code* §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we note 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 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.² 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 assert FERPA applies to portions of the submitted information. We note you have submitted redacted education records for our review. Because our office is prohibited from reviewing these 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. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the educational authority in possession of the education records. Likewise, we 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). However, we will address the applicability of the remaining claimed exceptions to the submitted information.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless it is excepted by section 552.108 of the Government Code or "made confidential under [the Act] or other law[.]" *Gov't Code* § 552.022(a)(1). The information we have marked consists of a completed investigation that is subject to section 552.022(a)(1) and must be released unless it is either excepted under section 552.108 of the Government Code or is confidential under the Act or other law. Although you assert the information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code, these sections are discretionary and do not make information confidential under the Act. *See*

²A copy of this letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

Dallas Area Rapid Transit v. Dallas Morning News, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 6 (2002) (attorney-client privilege under section 552.107(1) may be waived), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district may not withhold the information subject to section 552.022 under section 552.103 or section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will address your assertion of the attorney-client privilege for the information subject to section 552.022 under Texas Rule of Evidence 503. We will also consider your arguments under section 552.107 for the information not subject to section 552.022.

Texas Rule of Evidence 503(b)(1) provides the following:

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 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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (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. See ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You inform us the information subject to section 552.022 consists of an investigation conducted by a third party investigator retained by the district's attorneys. You indicate the information was created in furtherance of the rendition of professional legal services to the district. You state the information at issue was not intended for release to third parties and the district has maintained the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information subject to section 552.022. See *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney's entire investigative report protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, the district may withhold the information subject to section 552.022, which we have marked, under rule 503 of the Texas Rules of Evidence.³

Next, we address your arguments for the information not subject to section 552.022. You assert Exhibits B-1 and B-2 are excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) also protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107(1) 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*, 922 S.W.2d at 923.

You explain Exhibits B-1 and B-2 consist of confidential communications between attorneys and employees of the district that 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. Upon review, we find the district has

³As our ruling is dispositive, we do not address your other arguments to withhold this information.

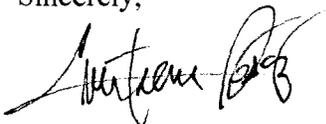
demonstrated the applicability of the attorney-client privilege to Exhibits B-1 and B-2. Thus, the district may withhold the information at issue under section 552.107(1) of the Government Code.

In summary, the district may withhold the information subject to section 552.022, which we have marked, under rule 503 of the Texas Rules of Evidence. The district may withhold the information in Exhibits B-1 and B-2 under section 552.107(1) of the Government Code. The district must release the remaining information. This ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consist of "education records" that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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, 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,



Cristian Rosas-Grillet
Assistant Attorney General
Open Records Division

CRG/dls

Ref: ID# 538689

Enc. Submitted documents

c: 5 Requestors
(w/o enclosures)

