



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 25, 2016

Ms. Ylise Janssen
Senior School Law Attorney
Austin Independent School District
1111 West Sixth Street, Suite A240
Austin, Texas 78703

OR2016-01744

Dear Ms. Janssen:

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# 595458.

The Austin Independent School District (the "district") received a request for all correspondence between eight named individuals discussing two named individuals or one specified district high school. We understand you have redacted some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.¹ You have also redacted e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).² You claim portions of the submitted information are excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

¹The 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>.

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold specific categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code. ORD 684.

Initially, we note some of the submitted information, which we have marked, was created after the date of the request and is not responsive to the request. This ruling does not address the public availability of information that is not responsive to a request, and the district attorney's office is not required to release non-responsive information.³

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). 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 that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate 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)(A), (B), (C), (D), (E). 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.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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 that 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 responsive information you have marked consists of communications involving attorneys for the district and district employees and officials. You state the communications at issue were made for the purpose of facilitating the rendition of professional legal services to the district and these communications have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to most of the

³As our ruling is dispositive, we need not address your arguments against disclosure of this information.

information at issue. However, some of the communications at issue are with individuals the district has not demonstrated are privileged parties. Thus, we find the district has not demonstrated this information, which we have marked, reveals privileged attorney-client communications for the purposes of section 552.107(1). Therefore, except for the information we have marked for release, the district may withhold the responsive information you have marked under section 552.107(1) of the Government Code.⁴

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. Open Records Decision No. 677 at 4-8 (2002); see *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 377 (Téx. 2000). Rule 192.5 defines work product as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a)(1)-(2). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*; ORD 677 at 6-8.

You claim the attorney work-product privilege of section 552.111 of the Government Code for the remaining responsive information you have marked. You state the information at issue consists of materials prepared by attorneys for the district in anticipation of litigation. However, as previously noted, the information we have marked for release was sent to or received from third parties the district has not demonstrated are privileged. Therefore, because non-privileged parties have had access to this information, the work product privilege under section 552.111 has been waived. Accordingly, the district may not withhold any portion of the remaining responsive information as attorney work product under section 552.111 of the Government Code.

As noted above, you have redacted e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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). Upon review, we find the district must withhold the additional e-mail addresses we have marked in the remaining responsive information under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure.

In summary, except for the information we have marked for release, the district may withhold the responsive information you have marked under section 552.107(1) of the Government Code. The district must withhold the additional e-mail addresses we have marked in the remaining responsive information under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure. The district must release the remaining responsive information.⁵

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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

⁵We note the information being released contains information to which the requestor has a right of access under section 552.023 of the Government Code. *See* Gov’t Code § 552.023; *see also* Open Records Decision No. 481 at 4 (1987). However, we also note section 552.024(c) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee to whom the information pertains timely chooses not to allow public access to the information. *See* Gov’t Code § 552.024(c)(2). Thus, if the district receives another request for the submitted information from a different requestor, section 552.024(c) authorizes the district to withhold the requestor’s personal information if the individual whose information is at issue has timely chosen not to allow access to the information.

Ref: ID# 595458

Enc. Submitted documents

c: Requestor
(w/o enclosures)