



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 26, 2016

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

OR2016-04685

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# 599776 (TEA PIR#s 25930, 25931, 25934, 25941, 25957).

The Texas Education Agency (the "agency") received five separate requests from one requestor for information pertaining to La Marque Independent School District (the "district") during specified time periods.¹ 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 state the agency will release some information to the requestor. You claim the submitted information is excepted from

¹We note the district sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing 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) (if a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for 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.texasattorneygeneral.gov/open/20060725usdoe.pdf>.

disclosure under sections 552.107 and 552.116 of the Government Code. We have considered the exceptions you claim 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. 2016-04576 (2016), 2016-04647 (2016), 2016-04665 (2016), 2016-04678 (2016), 2016-04680 (2016), 2015-26470 (2015), 2015-09330 (2015), 2015-08386 (2015), and 2014-09036 (2014). We have no indication there has been any change in the law, facts, or circumstances on which the previous rulings were based. Accordingly, the agency must rely on these rulings 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 information is or is not excepted from disclosure).

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 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

³We 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.

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 information you have marked consists of communications between and among agency attorneys, agency representatives, and agency staff. You further 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. Upon review, we find the agency has demonstrated the applicability of the attorney-client privilege to the information you have marked. Thus, the agency may withhold the information you have marked under section 552.107(1) of the Government Code.

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 [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] 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 assert the remaining information consists of audit working papers prepared or maintained by the agency for different audits authorized by statute.

You state a portion of the remaining information consists of audit working papers prepared or maintained by the agency's Division of Program Monitoring and Interventions and Performance Reporting in conjunction with audits of the district. You inform us these audits were conducted under the authority granted to the agency by section 7.021(b)(1) of the Education Code. *See* Educ. Code § 7.021(b)(1) (agency shall administer and monitor compliance with education programs). Additionally, you explain section 7.028(a) of the Education Code authorizes the agency to monitor compliance with federal law and regulations, financial accountability, including compliance with grant requirements, and data integrity. *See id.* § 7.028(a). You state another portion of the remaining information consists of audit working papers prepared or maintained by the agency's Division of Accreditation and School Improvement and Complaints, Investigations, and Enforcement in conjunction with audits of the district. You inform us these audits were authorized by sections 39.051, 39.052, and 39.102 of the Education Code. *Id.* § 39.051 (commissioner of education by rule shall determine criteria for accreditation statuses of accredited, accredited-warned, and accredited probation); *see also id.* §§ 39.052(a), (b)(1)-(2) (commissioner of education shall annually determine accreditation status of school districts and shall assign accreditation status or revoke accreditation and order closure of district), .102 (setting forth actions to be taken by commissioner of education if district does not satisfy accreditation criteria under section 39.052). You state another portion of the remaining information 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 agency commissioner 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 instrument security procedure. *See id.* § 39.057 (listing circumstances in which the commissioner of education shall authorize investigations). Finally, you state the last portion of the remaining information consists of audit working papers prepared or maintained by the agency's Divisions of State Funding and Financial Compliance in conjunction with audits of the district. You inform us these audits were authorized by former section 39.0822 of the Education Code. *See id.* § 39.0822 (repealed 2014) (requiring agency to develop process to anticipate future financial solvency

of each school district). Based on your representations and our review, we agree the remaining information consists of audit working papers for purposes of section 552.116. Accordingly, the agency may withhold the remaining information under section 552.116 of the Government Code.

In summary, the agency may withhold the information you have marked under section 552.107(1) of the Government Code. The agency may withhold the remaining information under section 552.116 of the Government Code.

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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/dls

Ref: ID# 599776

Enc. Submitted documents

c: Requestor
(w/o enclosures)