



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 9, 2016

Ms. Sarah W. Langlois
Counsel for the Harris County Department of Education
Rogers Morris & Grover
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2016-16819A

Dear Mr. Langlois:

This office issued Open Records Letter No. 2016-16819 (2016) on July 26, 2016. We have examined this ruling and determined we will correct the previously issued ruling. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on July 26, 2016. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")). This ruling was assigned ID# 630319.

The Harris County Department of Education (the "department"), which you represent, received a request for (1) all requests for records from any Harris County School Trustee during a specified time period; (2) any records released to fulfill these requests; (3) any new contracts or changes made to old contracts which the department approved at a specified board meeting; and (4) information pertaining to a named individual. You state you have released information responsive to the first, third, and fourth categories of the request, and some information responsive to the second category of the request. You state you will redact information pursuant to section 552.0038(c) of the Government Code.¹ You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information,

¹Section 552.0038(c) of the Government Code provides that a governmental entity that maintains records of a participant in a retirement system's retirement program in cooperation with or on behalf of a retirement system is not required to accept or comply with a request for such information or to seek an opinion from the attorney general because the records are exempt from the provisions of the Act. *See* Gov't Code § 552.0038(c).

which you state constitutes a representative sample of some information responsive to the second category of the request.²

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 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 claim the submitted information consists of communications between department employees and the department’s attorney. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the department, and were intended to be confidential and have remained confidential. Upon review, we find you

²We 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 that those records contain substantially different types of information than that submitted to this office.

have demonstrated the applicability of the attorney-client privilege to the communications at issue. Therefore, the department may generally withhold the submitted information under section 552.107(1) of the Government Code. However, we note some of the otherwise privileged e-mail strings include an e-mail sent by the requestor, a non-privileged party. Furthermore, if the e-mail is removed from the e-mail strings and stands alone, it is responsive to the instant request. Therefore, if the department maintains this non-privileged e-mail, which we have marked, separate and apart from the otherwise privileged e-mail strings in which it appears, then the department may not withhold the non-privileged e-mail under section 552.107(1) and this information must be released.³

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,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/bhf

Ref: ID# 630319

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³To the extent the non-privileged e-mail we have marked is maintained by the department separate and apart from the otherwise privileged e-mail strings in which it appears, we note the information being released contains the requestor's e-mail address, to which the requestor has a right of access under section 552.137(b) of the Government Code. *See* Gov't Code § 552.137(b).