



October 31, 2001

Ms. Cheryl T. Mehl
Attorney for Bastrop I.S.D.
Schwartz & Eichelbaum, P.C.
4201 West Parmer Lane, Suite 100
Austin, Texas 78727

OR2001-4994

Dear Ms. Mehl:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 153574.

The Bastrop Independent School District (the "district"), which you represent, received a request for the amount of money that the district has spent on attorney's fees defending special education matters in the last three years, including the names of the attorneys and the breakdown of amount paid and what the service was for. The requestor also asks for the amount set aside and spent for residential treatment, a sample of the contract signed by new teachers, and the budget for the 2000-2001 school year. You claim that portions of the submitted attorney invoices are excepted from disclosure under section 552.107 of the Government Code. We have considered your exception and reviewed the submitted information.

Initially, you contend that some of the requested items are questions that need not be answered and state that other requested information does not exist. The Public Information Act (the "Act") does not require a governmental body to answer factual questions. *See* Open Records Decision No. 555 (1990). Further, the Act only applies to information in existence at the time of the request. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to open records requests. Open Records Decisions Nos. 452 (1986), 342 (1982). Furthermore, the Act does not ordinarily require a governmental body to obtain new information to comply with a request. Open Records Decision No. 561 (1990). However, a governmental body must make a good faith effort to relate a request for information to information which it holds. *Id.* You indicate that the district's attorney invoices will contain much of the requested information. You also state that you were able to provide some of the requested information. Therefore, we assume that you have released a sample contract, the budget and any existing information about the amount of money spent on residential treatment. If not, you must do so at this time. *See* Gov't Code §§ 552.301, .302.

You state that you have also redacted the names of students in the attorney invoices in accordance with Open Records Decision No. 634 (1995). In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by The Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g(b)(1), and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. Therefore, you must withhold the identity of all students in the requested information in accordance with FERPA.

Pursuant to section 552.301(e)(1), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). In your letter dated August 6, 2001, you state that the district received the request on August 2, 2001. The request itself is also stamped as received on August 2, 2001. Therefore, the district had until August 23, 2001 to submit the requested information to this office. Because the requested information was post-marked on August 24, you failed to request a decision as required by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You argue that the submitted information is excepted under section 552.107 of the Government Code. Section 552.107 does not provide a compelling reason to overcome the presumption of openness. *See* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)). Therefore, you may not withhold the submitted information under section 552.107 of the Government Code.

The submitted attorney invoices, however, are subject to section 552.022(a) of the Government Code. Section 552.022(a) provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege.

Gov't Code § 552.022(a)(16). Under section 552.022, attorney fee bills must be released unless they are expressly confidential under other law. However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we conclude that Rule 503 provides a compelling reason to overcome the presumption of openness and we will determine whether any of the information contained within the submitted attorney fee bills is confidential under Rule 503. *See Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).*

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

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. *See* Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that 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 that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under Rule 503, provided the client has not waived the privilege or the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ); *see also* Tex. R. Evid. 511 (waiver of privilege by voluntary disclosure). Whether there has been a waiver of the attorney-client privilege through the release of otherwise privileged information depends not on whether the disclosure was intentional or inadvertent, but whether the disclosure was voluntary or was consented to or whether the disclosure was compelled erroneously or was made without opportunity to claim the privilege. *See Gulf Oil Corp. v. Fuller*, 695 S.W.2d 769, 773 (Tex. App.–El Paso 1985, orig. proceeding).

After reviewing your arguments and the submitted attorney invoices, we believe that you have demonstrated that most of the highlighted entries constitute confidential communications made for the purpose of facilitating the rendition of professional legal services to the client and, therefore, may be withheld from disclosure pursuant to Rule 503 of the Texas Rules of Evidence. On the other hand, some of the highlighted entries reveal communications with opposing counsel and other third parties for whom you have not demonstrated the applicability of the attorney-client privilege. Thus, the district may not withhold the marked information contained within the submitted attorney invoices pursuant to Rule 503 of the Texas Rules of Evidence. Accordingly, the district must release the marked information, but the district may withhold the remaining highlighted information.¹

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the

¹Because only the highlighted text is responsive to the request for attorney’s fees spent defending special education matters, this ruling does not address the entries that are marked through with a vertical line.

governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

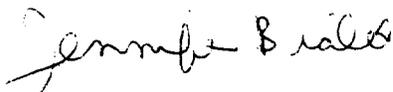
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dept. of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB/sdk

Ref: ID# 153543

Enc: Submitted documents

c: Ms. Debra Liva
In Child's Best Interest
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(w/o enclosures)