



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 12, 2004

Mr. David Anderson
General Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2004-0234

Dear Mr. Anderson:

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# 194166.

The Texas Education Agency (the "agency") received a request for all documents pertaining to a specific program. You claim that the requested information is excepted from disclosure under sections 552.107, 552.116, and 552.137¹ of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted documents include information that is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

¹You have raised section 552.136 of the Government Code with respect to certain e-mail addresses. We note, however, that the Seventy-eighth Legislature recently repealed section 552.136 of the Government Code as it applies to the confidentiality of e-mail addresses. *See* Act of May 23, 2001, 77th Leg., R.S., ch. 545, § 5, 2001 Tex. Gen. & Spec. Laws 1036, repealed by Act of May 21, 2003, 78th Leg., R.S., ch. 1276, § 9.013, 2003 Tex. Sess. Law Serv. 4218. The section was duplicative of section 552.137. *See* Act of May 21, 2003, 78th Leg., R.S., ch. 1276, 2003 Tex. Sess. Law Serv. 4218. Accordingly, we will address your claim with respect to section 552.136 under section 552.137.

public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

- (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

The information in exhibit 3 includes an executed contract relating to the receipt or expenditure of public funds. Therefore, as prescribed by section 552.022, such information must be released unless it is confidential under other law. You claim that this information is excepted from disclosure under section 552.116. However, section 552.116 is a discretionary exception that does not constitute other law for purposes of section 552.022.² Therefore, in accordance with section 552.022(a)(3), the contract we have marked must be released.

We now address your claim under section 552.116 for the remaining information at issue in exhibit 3. Section 552.116 provides in pertinent part:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency . . . is excepted from [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 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.

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

Act of May 28, 2003, 78th Leg., R.S., ch. 379, § 1, 2003 Tex. Sess. Law Serv. 1604 (to be codified as amendment to Gov't Code § 552.116). A governmental body that invokes section 552.116 must demonstrate that the audit working papers are from an audit authorized or required by statute by identifying the applicable statute. You inform us that sections 300.660 through 300.662 of title 34 of the Code of Federal Regulations oblige the agency to conduct audits of school districts as part of state complaints procedures under the federal Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* You explain that the information at issue is maintained as part of the agency's audit of a school district in response to a complaint under the IDEA. Further, you note that the agency's audit is pending. Based on our review of your representations and the submitted information, we find you have sufficiently demonstrated that the information at issue was prepared or maintained by the agency's auditor in conducting an audit authorized or required by a statute of this state or the United States. *See* Gov't Code §§ 552.116(a), (b)(1), (b)(2). Accordingly, the agency may withhold the remaining information under section 552.116 of the Government Code.

Next, you claim that the information submitted as exhibit 2 is excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *See id.* at 7. Second, the communication must have been made "for the purpose of facilitating 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 capacity other than that of attorney). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, 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. Finally, 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 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).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.--Waco 1997, no writ). 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 assert that exhibit 2 consists of e-mail messages that reveal confidential communications made in furtherance of rendering professional legal services to the agency. You also indicate that the confidentiality of the e-mail messages has been maintained. Based on these representations, we conclude that some of this information is excepted from disclosure under section 552.107, and we have marked the information accordingly. However, some of the information included in exhibit 2 consists of e-mail messages that were sent to individuals outside the agency whom you have not demonstrated to be privileged parties. Therefore, the remaining messages may not be withheld under section 552.107.

However, the remaining messages in exhibit 2 contain e-mail addresses that may be excepted from disclosure under section 552.137 of the Government Code. Section 552.137 states:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the act].
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.
- (c) Subsection (a) does not apply to an e-mail address:
 - (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;
 - (2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;
 - (3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a

governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78th Leg., R.S., ch. 1089, § 1, 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov't Code § 552.137). Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the relevant members of the public have affirmatively consented to the release of the e-mail addresses. We note, however, that section 552.137 does not apply to the work e-mail addresses of officers or employees of a governmental body, a website address or Uniform Resource Locator, or the general e-mail address of a business. E-mail addresses within the scope of section 552.137(c) are also not excepted from disclosure under section 552.137. We determine that the e-mail addresses we have marked in the remaining messages in exhibit 2 fall within the scope of section 552.137(a). Unless the agency has received affirmative consent to disclose these e-mail addresses, they must be withheld under section 552.137. The remaining information in exhibit 2 must be released.

In summary, the agency must release the contract that we have marked in exhibit 3 pursuant to section 552.022(a)(3) of the Government Code. The agency may withhold the remaining information contained in exhibit 3 pursuant to section 552.116. The agency may also withhold the e-mail messages that we have marked in exhibit 2 pursuant to section 552.107. The e-mail addresses that we have marked in the remaining messages in exhibit 2 must be withheld under section 552.137 unless the agency has received affirmative consent to their disclosure; the remaining information in exhibit 2 must be released.

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 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).

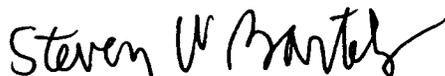
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Steven W. Bartels
Assistant Attorney General
Open Records Division

SWB/seg

Ref: ID# 194166

Enc. Submitted documents

c: Mr. Scott F. Carroll
Route 3 Box 337
Los Fresnos, Texas 78566
(w/o enclosures)