



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 9, 2006

Ms. Chris G. Elizalde
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2006-06109

Dear Ms. Elizalde:

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# 251207.

The Poteet Independent School District (the "district"), which you represent, received a request for information relating to an employee of the district. You inform us that the district has released some of the requested information. You claim that other responsive information is excepted from disclosure under sections 552.026, 552.101, 552.107, 552.111, and 552.114 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is made confidential by other statutes, including the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or

institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Section 552.026 of the Government Code incorporates FERPA into the Act. *See* Gov't Code § 552.026 (Act does not require release of information contained in education records of educational agency or institution, except in conformity with [FERPA]).

Section 552.114 of the Government Code excepts from public disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114. This office generally has treated "student record" information under section 552.114 as the equivalent of "education record" information under FERPA. *See* Open Records Decision No. 634 at 5 (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 FERPA and excepted from required public disclosure under sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions, and (2) a state-funded educational agency or institution may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 of the Government Code 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. *See* Open Records Decision No. 634 at 5-8 (1995).

In this instance, you have submitted the information that the district seeks to withhold under FERPA. Generally, FERPA requires that information be withheld from the public only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 at 3 (1982), 206 at 2 (1978). We understand you to argue, however, that the release of the submitted information would reveal to this requestor the identities of the students to whom the information pertains. *See* 34 C.F.R. § 99.3 ("personally identifiable information" includes, among other things, "[o]ther information that would make the student's identity easily traceable"). Based on your arguments and our review of the information at issue, we have marked the information that the district must withhold under section 552.101 of the Government Code in conjunction with FERPA.

You also raise section 552.101 in conjunction with section 551.104 of the Open Meetings Act, chapter 551 of the Government Code. Section 551.104(c) provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." Gov't Code § 551.104(c). Thus, such information cannot be released to a member of the public in response to an open records request. Section 551.146 of the Open Meetings Act makes it a criminal offense to disclose a certified agenda or tape recording of a lawfully closed meeting to a member of the public. *See id.* § 551.146(a)-(b); *see also* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether governmental body may withhold such information from disclosure under statutory predecessor to Gov't Code § 552.101).

You inform us that the information to which the requestor seeks access includes certified agendas and tape recordings of closed meetings of the district's board of trustees. We agree that the district must withhold that information under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code.

Next, we address your claim under section 552.107 of the Government Code. Section 552.107(1) protects information that comes 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. *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. See *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. See *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). 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. See *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 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 state that some of the submitted information consists of communications between attorneys for the district and their clients that were made in connection with the rendition of professional legal services to the district. You also state that these communications were intended to be and remain confidential. Based on your representations and our review of the information in question, we conclude that all of the information for which the district claims

the attorney-client privilege is excepted from disclosure under section 552.107(1) of the Government Code.

In summary: (1) the district must withhold the marked information that is confidential under section 552.101 of the Government Code in conjunction with FERPA; (2) the district must withhold the certified agendas and tape recordings of closed meetings of the board of trustees under section 552.101 in conjunction with section 551.104 of the Government Code; and (3) the district may withhold all of the information for which it claims the attorney-client privilege under section 552.107(1) of the Government Code. As we are able to make these determinations, we do not address your other arguments against disclosure.

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).

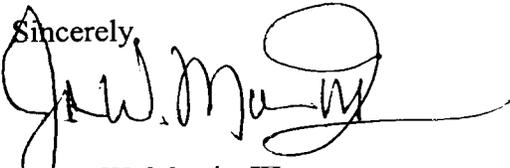
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,


James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 251207

Enc: Submitted documents

c: Mr. R. Douglas Nall, Jr.
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