



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 17, 2006

Ms. Ann Greenberg  
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P. O. Box 2156  
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OR2006-12207

Dear Ms. Greenberg:

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# 262302.

The Lake Travis Independent School District (the "district"), which you represent, received six requests from the same requestor seeking the following information for July 2006: (1) certain e-mail correspondence transmitted by the district's board of trustees; (2) the "Administration Building Visitor Log"; (3) expenditures made under a specified expenditure code; (4) correspondence containing the names of the requestor or three other specified individuals; and (5) correspondence between the district and the Texas Education Agency ("TEA") related to a specified complaint.<sup>1</sup> You state that the district has released some of the requested information, but you claim that some of the submitted information is excepted from disclosure based on sections 552.103, 552.107, 552.111, 552.117, 552.130, 552.136, and 552.137 of the Government Code as well as Texas Rule of Evidence 503 and Texas Rule

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<sup>1</sup>For reference, you have numbered these six requests 1785, 1790, 1791, 1800, 1809, and 1810.

of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information, portions of which consist of representative samples of information.<sup>2</sup>

Initially, we note that some of the submitted information consists of education records. Recently, the United States Department of Education Family Policy Compliance Office (the "DOE") informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a) 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.<sup>3</sup> Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). You have submitted, among other things, unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine the applicability of FERPA, we will not address FERPA with respect to these records other than to note that parents have a right of access to their own child's education records. 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. Such determinations under FERPA must be made by the educational authority in possession of the education records.<sup>4</sup> We will, however, address your claimed exceptions for the submitted information.

We begin with your claim under section 552.103 of the Government Code. This section provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the person's office or employment, is or may be a party.

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<sup>2</sup>We 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.

<sup>3</sup>A copy of this letter may be found on the attorney general's website, *available at* [http://www.oag.state.tx.us/opinopen/og\\_resources.shtml](http://www.oag.state.tx.us/opinopen/og_resources.shtml).

<sup>4</sup>In the future, if the district does obtain parental consent to submit unredacted education records, and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103 exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that, if an individual publicly threatens to bring suit against a governmental body but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You assert that some of the submitted information is excepted from disclosure under section 552.103 because “[TEA] has received a formal complaint filed by [the third party], alleging that the District was in noncompliance with the Individuals with Disabilities Act . . . and [FERPA].” You also state that TEA has issued an investigation report and currently “[t]he District is requesting the reconsideration of the TEA’s findings contained in [that report].” You do not explain, however, how participation in this complaint and investigative process establishes “litigation” for the purposes of section 552.103. Therefore, the district may not withhold any of the submitted information under section 552.103 of the Government Code.

Next, we address your claim under section 552.107 of the Government Code.<sup>5</sup> When asserting the attorney-client privilege under section 552.107, 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 “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 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 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. *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 explain that the information for which you claim section 552.107 consists of communications between the district, its attorneys, and staff made for the purpose of facilitating the rendition of professional legal services to the district. You also represent that the confidentiality of these communications has been maintained. Based on your arguments and our review of this information, we find that you have demonstrated that some of the information responsive to the request numbered 1800 consists of privileged attorney-client

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<sup>5</sup>You also claim this information is protected under the attorney-client privilege based on Texas Rule of Evidence 503. In this instance, however, because the information at issue is not subject to section 552.022 of the Government Code, this claim is properly addressed here under section 552.107, rather than rule 503. Open Records Decision No. 676 at 3 (2002); *see also* Gov’t Code § 552.022 (listing categories of information that are expressly public under the Act and must be released unless confidential under “other law”). As such, we address your arguments related to the attorney-client privilege under section 552.107.

communications. We have marked this information, which the district may withhold under section 552.107.<sup>6</sup> We note, however, that the remaining information for which you claim section 552.107 includes correspondence with the requestor, TEA, and the opposing party to a complaint made against the district. You have not explained how communications with these parties come within the attorney-client privilege. Thus, we find that you have not demonstrated the applicability of section 552.107 to any of this remaining information. We therefore conclude that none of the remaining information at issue may be withheld under section 552.107.

Next, you claim section 552.117 of the Government Code for some of the remaining information. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code §§ 552.024, .117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You inform us, and provide documentation indicating, that the employee at issue made a timely election for confidentiality under section 552.024. We therefore conclude that the district must withhold under section 552.117(a)(1) the information pertaining to this employee that you have marked.

Next, you claim that a driver's license number you have marked in the remaining information is excepted from disclosure under section 552.130 of the Government Code. This section excepts from disclosure information that relates to a driver's license or motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130. If the number you have marked is a Texas driver's license number, then it must be withheld under section 552.130.

You raise section 552.136 for a bank account number, an Office Depot account number, and an Ozarka account number. Section 552.136 states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136. We agree that the bank account number you have marked must be withheld in accordance with section 552.136. You explain that the other two numbers you have marked are "account membership numbers." We find that you have not explained, nor is it apparent to this office, how these other numbers constitute "credit card, debit card, charge card, or access device number[s]" for purposes of section 552.136. *See id.* Thus, we conclude that the district may not withhold the Office Depot account number or the Ozarka account number under section 552.136.

Lastly, section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically

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<sup>6</sup>As we reach this determination, we need not address your remaining arguments against disclosure of this information.

with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail address that you have marked does not appear to be of a type specifically excluded by section 552.137(c). As such, this e-mail address must be withheld under section 552.137 unless its owner has affirmatively consented to its release. *See id.* § 552.137(b).

In summary, this ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consists of “education records” subject to FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act. With respect to your claimed exceptions, the district may withhold the information we have marked under section 552.107 of the Government Code. The district must withhold the number you have marked under section 552.130 of the Government Code if it is a Texas driver’s license number. The employee’s personal information and the bank account number that you have marked must be withheld under sections 552.117(a)(1) and 552.136 of the Government Code, respectively. The e-mail address you have marked must be withheld under section 552.137 unless the district receives consent for its release. The remaining submitted information 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 ten 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).

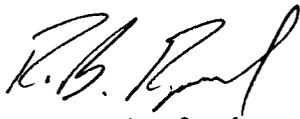
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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); *Tex. 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 ten calendar days of the date of this ruling.

Sincerely,



Robert B. Rapfogel  
Assistant Attorney General  
Open Records Division

RBR/eb

Ref: ID# 262302

Enc. Submitted documents

c: Mr. David Lovelace  
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(w/o enclosures)