



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 5, 2007

Mr. Jeffrey L. Moore
Brown & Hofmeister, L.L.P.
For Celina Independent School District
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2007-01436

Dear Mr. Moore:

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# 270763.

The Celina Independent School District (the "district"), which you represent, received a request for information regarding billings for legal services involving a particular time interval and certain specified matters. You seek to withhold some of the requested information on the basis of the attorney-client privilege under Texas Rule of Evidence 503. We have considered your arguments and have reviewed the information you submitted. We also have considered the comments that we received from the requestor. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

Initially, we address the requestor's assertion that the submitted information was responsive to a previous request for information and must now be released. The requestor contends that the submitted information was encompassed by part of a request that he submitted to the district on April 27, 2006. He argues that the district failed to oppose disclosure of the submitted information when it received the previous request and may not now do so.¹ The district states that when it previously received what is now the present request, the request was interpreted as being confined to attorney fee bills concerning a Level 3 grievance filed by the requestor and his wife. The district represents to this office that the submitted attorney fee bills were not considered to be responsive to the previous request because they either pre-

¹The district states that it has released information that was responsive to the previous request, which was the subject of Open Records Letter No. 2006-7573 (2006).

dated the filing of the Level 3 grievance or do not concern legal services relating to that grievance. The question of whether the submitted information was responsive to the previous request is a factual issue. This office cannot resolve factual disputes in its decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision or on those facts that are discernible from the documents submitted for our inspection. *See* Open Records Decision No. 552 at 4 (1990). The district represents to this office that although it made a good-faith effort to relate the previous request to responsive information, the district did not consider the submitted information to be encompassed by the previous request.² Having considered all of the parties' arguments and reviewed the documentation they have submitted, we accept the district's representations and will address the public availability of the submitted information.³

We note that the submitted information includes education records. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, 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.⁴ 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. *See* 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

²We note that although a governmental body must make a good-faith effort to relate a request to information that is within its possession or control, the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 561 at 8-9 (1990), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

³We note that, based on the district's representation that it received the present request for information on November 10, 2006, the district's request for this decision was timely. *See* Gov't Code §§ 552.301, .302.

⁴A copy of this letter may be found on the attorney general's website, http://www.oag.state.tx.us/opinopen/og_resources.shtml.

education records.⁵ The DOE also has informed this office, however, that a parent's right of access under FERPA to information about that parent's child does not prevail over an educational institution's right to assert the attorney-client privilege.⁶ Therefore, to the extent that the requestor has a right of access under FERPA to any of the information for which the district claims the attorney-client privilege, we will consider the district's assertion of the privilege under Texas Rule of Evidence 503.

We next note that the submitted information is contained in attorney fee bills and thus is subject to section 552.022 of the Government Code. Section 552.022(a) provides for the required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege," unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(16). The Texas Supreme Court has held that the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Texas Rule of Evidence 503 enacts the attorney-client privilege and provides in part:

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.

⁵In 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.

⁶Ordinarily, FERPA prevails over an inconsistent provision of state law. *See Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F.Supp. 381, 382 (E.D. Tex. 1995); Open Records Decision No. 431 at 3 (1985).

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. *Id.* 503(a)(5).

Thus, 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 document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You have highlighted the information that the district seeks to withhold under rule 503. You state that the information at issue is related to attorney-client communications that were made for the purpose of providing legal services to the district. You inform us that these communications were intended to be and remain confidential. You have identified the parties to these communications. Based on your representations and our review of the information at issue, we have marked the information that the district may withhold under Texas Rule of Evidence 503. The rest of the submitted information is not protected by the attorney-client privilege under rule 503 and must be released. This ruling does not address the applicability of FERPA to the information at issue. Should the district determine that all or portions of the submitted information consists of “education records” that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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).

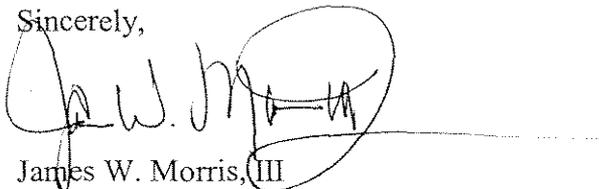
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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/jww

Ref: ID# 270763

Enc: Submitted documents

c: Mr. James E. Urmin, Esquire
1304 Lakeview Drive
Celina, Texas 75009
(w/o enclosures)