



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 4, 2008

Mr. Andrew Borrego
Escamilla & Poneck, Inc.
P.O. Box 200
San Antonio, Texas 78291-0200

OR2008-01584

Dear Mr. Borrego:

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# 301311.

The Clint Independent School District (the "district"), which you represent, received a request for eleven categories of information. You state that you have released a portion of the requested information. You claim that the submitted information is excepted from disclosure under section 552.107 of the Government Code and rule 503 of the Texas Rules of Evidence.¹ We have considered your arguments and reviewed the submitted information.

Initially, we note that because some of the submitted information was created after the date that the district received the request, the documents we have marked are not responsive to the instant request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the district need not release that information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dis'd); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

¹Although you raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code and rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privilege or other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-3 (2002), 575 at 2 (1990).

Next, we note that the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Education 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 purposes of our review in the open records ruling process under the Act.² 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 for our review, among other information, unredacted education records. Because our office is prohibited from reviewing these education records, we will not address the applicability of FERPA to the information at issue.³ Such determinations under FERPA must be made by the educational authority in possession of the education record. We will, however, address the applicability of section 552.107 and rule 503 to the remaining submitted information.

Next, we note that most of the remaining information is part of a completed investigation. Pursuant to section 552.022(a)(1) of the Government Code, a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Section 552.107 of the Government Code is a discretionary exception that protects a governmental body's interests and may be waived. As such, it is not other law that makes information confidential for the purposes of section 552.022. *See* Open Records Decision No. 676 at 10-11 (2002) (attorney-client privilege under section 552.107 may be waived). Therefore, the information subject to section 552.022 may not be withheld on the basis of section 552.107. However, 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 (Tex. 2001). The attorney client privilege is found at Texas Rule of Evidence 503. Accordingly, we will address your arguments under Texas Rule of Evidence 503 for the information subject to section 552.022(a)(1) of the Government Code.

Texas Rule of Evidence 503 encompasses the attorney client privilege. Rule 503(b)(1) provides as follows:

²A 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.

³In 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.

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. *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 state that the information at issue includes privileged attorney client communications exchanged between district employees and outside counsel made for the purpose of facilitating the rendition of professional legal services to the district. You further state that some of the information at issue was compiled by a consultant performing an investigation on behalf of the outside counsel. Having considered your representations and reviewed the information at issue, we conclude that you have established that some of the information at issue constitutes attorney client communications for the purposes of Texas Rule of Evidence 503. *See also Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex.

App.—Austin 2000, pet. denied) (attorney's entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, the district may withhold the information we have marked under rule 503.

We now address your claim under section 552.107 of the Government Code for the information not subject to section 552.022(a)(1). 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. 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 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)-(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 at issue consists of confidential communications exchanged between the district and the district's outside counsel for the purpose of facilitating the rendition of professional legal services to the district. Based on your representations and our review of the information at issue, we find that the information we have marked is protected

by the attorney-client privilege and may be withheld under section 552.107 of the Government Code. However, we determine that the district has failed to demonstrate that the remaining information constitutes confidential communications between privileged parties made for the purpose of facilitating the rendition of professional legal services. Accordingly, none of the remaining information may be withheld under section 552.107 of the Government Code.

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 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).⁴ See Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c). Therefore, unless the individual whose e-mail address is at issue consented to release of his e-mail address, the district must withhold the information we have marked under section 552.137 of the Government Code.

In summary, the district may withhold the information we have marked under Texas Rule of Evidence 503 and section 552.107(1) of the Government Code. The district must withhold the e-mail address we have marked under section 552.137 of the Government Code. The remaining 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

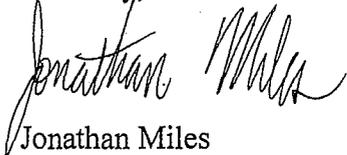
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/jh

Ref: ID# 300311

Enc. Submitted documents

c: Mr. Thomas E. Stanton
Attorney At Law
521 Texas Avenue
El Paso, Texas 79901
(w/o enclosures)