



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 29, 2008

Ms. Laura C. Rodriguez
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2008-07268

Dear Ms. Rodriguez:

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# 311238.

The Northside Independent School District (the "district"), which you represent, received a request for all the superintendent's incoming and outgoing e-mails on February 27, 2008. You state that the district is withholding some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.¹ You assert that a portion of the submitted information is not subject to the Act. You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.104, 552.107, 552.117, and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹We note that our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made; therefore, we will not address the applicability of FERPA to any of the submitted records.

²Although you raise section 552.101 of the Government Code in conjunction with Rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Furthermore, we note that, in this instance, the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 is section 552.107. See Open Records Decision Nos. 677 (2002), 676 at 6.

Initially, you claim that the e-mails in AG-0001 through AG-0014 are not subject to the Act. The Act is only applicable to "public information." See Gov't Code § 552.021. Section 552.002(a) defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). Information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if it is maintained for a governmental body, the governmental body owns or has a right of access to the information, and the information pertains to the transaction of official business. See Open Records Decision No. 462 (1987).

After reviewing the information at issue, we agree that the e-mails in AG-0001 through AG-0014 are purely personal, and thus do not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the district. See Gov't Code § 552.021; see also Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving de minimis use of state resources). Thus, we conclude that this information is not subject to the Act, and need not be released in response to this request.

You claim that some of the submitted information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. See Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978).

You inform us that the district is currently in contract negotiations with its health management organization, but has not yet executed a contract. You state that, "[s]hould favorable terms for contract renewal not be achieved, the [d]istrict will be required to seek bids from other providers." Based on our review of your representations and the submitted information, we conclude that the district may withhold the information you have marked in AG-0073, AG-0074, AG-0078, and AG-0079 under section 552.104 of the Government Code until such time as a contract has been executed. See Open Records Decision No. 170 at 2 (1977) (release of bids while negotiation of proposed contract is in progress would necessarily result in an advantage to certain bidders at the expense of others and could be detrimental to the public interest in the contract under negotiation).

Next, you claim that some of the submitted information is excepted from disclosure under section 552.107(1) 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. 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, lawyer representatives, and lawyers representing another party in a pending action concerning a matter of common interest therein. 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 state that the e-mails in AG-0015 through AG-0071 are communications between the district and the district’s outside counsel, and that these communications were made in furtherance of the rendition of legal services and advice for the district. You further state that all of these communications were made in confidence, intended for the sole use of the district and its attorneys, and that they have not been shared or distributed to others. Based on our review of your representations and the submitted information, we find that you have demonstrated the applicability of the attorney-client privilege to the e-mails at issue. Accordingly, the district may withhold the e-mails in AG-0015 through AG-0071 under section 552.107 of the Government Code.

In summary: (1) the e-mails in AG-001 through AG-0014 are not subject to the Act and need not be released; (2) the district may withhold the information you have marked in AG-0073, AG-0074, AG-0078, and AG-0079 under section 552.104 of the Government Code; and (3) the district may withhold the e-mails in AG-0015 through AG-0071 under section 552.107 of the Government Code. The remaining information must be released.³

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).

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.

³As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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,



Bill Dobie
Assistant Attorney General
Open Records Division

WJD/jh

Ref: ID# 311238

Enc. Submitted documents

c: Mr. Raymond Tamayo
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(w/o enclosures)