ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 7, 2008

Ms. LeAnne Lundy
Feldman, Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2008-10795

Dear Ms. Lundy:

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# 318799.

The Alief Independent School District (the "district"), which you represent, received a request for information relating to legal services obtained by the district during a specified time interval. You state that the district has released some of the requested information. You have submitted information that the district seeks to withhold under sections 552.026, 552.101, 552.103, 552.107, 552.111, and 552.114 of the Government Code and Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information. We also have considered the comments that we received from the requestor.[1] We note that you have not submitted any information relating to the request for records of general counsel salary and benefits. We therefore assume that you have released any information that is responsive to that aspect of this request, to the extent that such information existed when the district received the request. If not, then any such information must be released immediately.[2] *See* Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

We also 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

[1]*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).

[2]We note that 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 dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

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.[3] 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"). In this instance, the submitted information includes education records in both redacted and unredacted form. Because our office is prohibited from reviewing education records to determine the applicability of FERPA, we will not address FERPA with respect to the education records that you have submitted, except 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 education records.[4] Likewise, we will not address sections 552.026 and 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into Act), 552.114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining that same analysis applies under Gov't Code § 552.114 and FERPA). 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.[5] Therefore, to the extent that the requestor has a right of access under FERPA to any of the information for which you claim the attorney-client privilege, we will consider your assertion of the privilege. We also will consider your other claims.

We next note that the submitted information is contained in attorney fee bills and thus is subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for 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). Sections 552.103, 552.107, and 552.111 of the Government Code, which you claim, are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470

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[3]A copy of this letter may be found on the attorney general's website, http://www.oag.state.tx.us/open/20060725usdoe.pdf.

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

[5]FERPA ordinarily 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).

at 7 (1987) (statutory predecessor to Gov't Code § 552.111 could be waived). As such, sections 552.103, 552.107, and 552.111 are not other law that makes information confidential for the purposes of section 552.022(a)(16). Therefore, the district may not withhold any of the submitted information under section 552.103, section 552.107, or section 552.111 of the Government Code. Although you also claim section 552.101 of the Government Code, which is a confidentiality provision for the purposes of section 552.022(a)(16), that exception does not encompass discovery privileges. *See* ORD 676 at 1-3. Therefore, the district may not withhold any of the submitted information on the basis of the attorney-client privilege under section 552.101 of the Government Code.

The Texas Supreme Court has held, however, 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). The attorney-client privilege also is found at Texas Rule of Evidence 503. Therefore, we will determine whether the district may withhold any of the submitted information under rule 503.

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

> 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:
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> > (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 it is 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that the submitted attorney fee bills document communications between attorneys for the district and client representatives that were made in connection with the rendition of professional legal services to the district. You also state that the communications were intended to be confidential, and you do not indicate that the privilege has been waived. You have identified some of the parties to the communications. Based on your representations and our review of the information at issue, we have marked the submitted information that the district may withhold under rule 503. We conclude that you have not demonstrated that any of the remaining information falls within the scope of the attorney-client privilege; therefore, the district may not withhold any of the remaining information on that basis.

In summary, the district may withhold the information that we have marked under Texas Rule of Evidence 503. The rest of the submitted information must be released. 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 consist 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 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). If the governmental body does not file suit over 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).

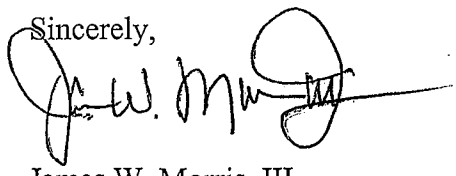
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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

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/jh

Ref: ID# 318799

Enc: Submitted documents

c: Ms. Gwendolyn Canady
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(w/o enclosures)