



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 26, 2009

Mr. Miguel A. Saldana
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
103 East Price Road, Suite A
Brownsville, Texas 78521

OR2009-02555

Dear Mr. Saldana:

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# 335876 (Public Information Request # 4873).

The Brownsville Independent School District (the "district"), which you represent, received a request for specific handouts from a district Board of Trustees meeting held on December 2, 2008. You claim that the submitted information is excepted from disclosure under section 552.107 of the Government Code and the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that "FERPA" 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.² Consequently, state and local educational authorities that

¹Although you raise section 552.101 of the Government Code, you have not asserted any law under which any of the information at issue is considered to be confidential for purposes of section 552.101. Thus, we assume you no longer claim this exception. *See* Gov't Code §§ 552.301, .302.

²A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

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 state that a portion of the submitted information is subject to FERPA. Because our office is prohibited from reviewing these education records, we will not address the applicability of FERPA to any of this information. Such determinations under FERPA must be made by the educational authority in possession of the education records.³

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that:

(a) the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

Id. § 552.022(a)(3). The submitted information includes expenditure reports detailing specific payments made to district consultants during the 2007 and 2008 fiscal year. We conclude that this is information in an account relating to the receipt or expenditure of public funds, and thus, the district must release this information under section 552.022(a)(3) of the Government Code unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly confidential under other law. You raise section 552.107 for the information subject to section 552.022(a)(3). However, 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 purposes of section 552.022. See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 676 at 10-11 (2002) (attorney-client privilege under section 552.107 may be waived). Accordingly, the district may not withhold the expenditure reports we have marked under section 552.107. We note that the attorney-client privilege, which you raise for the submitted information, is also found in Rule 503 of the Texas Rules of Evidence. The Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and 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); see also Open Records Decision No. 676 (2002). Accordingly, we will consider your assertion of the attorney-client privilege under Rule 503 with respect the expenditure reports subject to section 552.022.

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.

Rule 503 of the Texas Rules of Evidence, which encompasses the attorney-client privilege, 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:

(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. 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. *See* ORD 676. 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 generally assert that attorney-client privilege is applicable to the expenditure reports. However, you have provided no arguments demonstrating that the expenditure reports subject to section 552.022(a)(3) consist of privileged attorney-client communications. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain why stated exception

applies); ORD 676 at 6-7 (governmental body must demonstrate applicability of attorney-client privilege to information at issue). Accordingly, we conclude that the district may not withhold any of the information at issue under rule 503. As no further arguments are asserted for this information, it must be released to the requestor.

We will now address your claim under section 552.107 of the Government Code for the information not subject to section 552.022(a)(3). 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. *See* ORD 676 at 6-7. The elements of the privilege under section 552.107 are the same as those for Rule 503 outlined above. In this instance, although you generally assert that the remaining information is excepted from disclosure under section 552.107, you have not provided any arguments demonstrating how any of the information at issue constitutes confidential communications between privileged parties made for the purpose of facilitating the rendition of professional legal services. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Thus, we find you have failed to establish that the attorney-client privilege is applicable to the remaining information. Accordingly, no portion of the remaining information may be withheld under section 552.107 of the Government Code.

We note that portions of the submitted information appear to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the submitted information must be released to the requestor, but any information protected by copyright must be released in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Alvarado". The signature is fluid and cursive, with a large initial "C" and a long, sweeping underline.

Christina Alvarado
Assistant Attorney General
Open Records Division

CA/cc

Ref: ID# 335876

Enc. Submitted documents

cc: Requestor
(w/o enclosures)