



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 14, 2010

Ms. Sandra D. Carpenter
Walsh, Anderson, Brown, Gallegos, and Green, P.C.
P.O. Box 168046
Irving, Texas 75016

OR2010-05330

Dear Ms. Carpenter: ATTORNEY GENERAL OF TEXAS

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# 375800.

The Alvarado Independent School District (the "district"), which you represent, received five requests from the same requestor for communications to or from twenty-five named individuals, pertaining to the requestor, her daughter, or two named individuals during a specified time period. You state you have released some of the responsive information. We understand you to claim portions of the submitted information are excepted from disclosure under section 552.107 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, although you raise Texas Rule of Evidence 503, in this instance, this information is properly addressed under section 552.107 of the Government Code. Additionally, although you raise section 552.022 of the Government Code, that provision is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See* Gov't Code § 552.022.

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the date the district received 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 is not required to release that information in response to the request.

We note 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"), 20 U.S.C. § 1232g, 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 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"). It appears you have submitted unredacted education records for our review. Because our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA should be made, we will not address the applicability of FERPA to any of the submitted records, other than to note parents have a right of access to their own child's education records. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations must be made by the educational authority in possession of the education record. We note the DOE has informed this office a parent's right of access under FERPA does not prevail over an educational institution's right to assert the attorney-client privilege.³ Therefore, to the extent the requestor has a right of access to the submitted information, we will address your assertions of the attorney-client privilege under section 552.107 of the Government Code.

Next, we note portions of the requested information are the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-17879 (2009). In that ruling, we determined the district must release the information responsive to the request because the district failed to meet the deadlines prescribed by section 552.301. You now seek to withhold a portion of the information previously ruled upon in Open Records Letter No. 2009-17879 under section 552.107 of the Government Code. Section 552.007 provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information

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>.

³Ordinarily, FERPA prevails over inconsistent provisions 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).

is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the district may not now withhold the previously released information unless its release is expressly prohibited by law or the information is confidential by law. You seek to withhold a portion of the information that has been previously released under section 552.107. Section 552.107 does not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) and Texas Rule of Evidence 503 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Further, the district does not raise any additional arguments to withhold the portions of the submitted information that were previously ordered to be released. Thus, with regard to the requested information that was previously requested and ruled on by this office, we conclude the district must continue to rely on Open Records Letter No. 2009-17879 as a previous determination and release the identical information in this request in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We have marked documents that must be released in accordance with the previous determination issued in Open Records Letter No. 2009-17879. We note the remaining information was created after September 15, 2009, and, thus, is not encompassed by that prior ruling. Accordingly, we will consider your arguments for the remaining submitted information.

Next, the requestor contends she was not timely notified of the district's request for a ruling from this office. Pursuant to section 552.301(d) of the Government Code, the governmental body must provide the requestor, within ten business days after the date of its receipt of the request for information, a statement the governmental body has asked for a decision from the attorney general and a copy of the governmental body's written communication to attorney general asking for a decision. *See id.* § 552.301(d). You state the district received the present requests for information on January 21, 2010. Thus, the district's ten business day deadline under section 552.301(d) was February 4, 2010. The requestor has provided our office with a copy of the envelope in which the district sent the information required under section 552.301(d). We note the envelope bears a postmark date of February 3, 2010. This date is within ten business days of the district's receipt of the request. *See id.* § 552.308 (request is timely if sent by first class United States mail properly addressed with postage or handling charges prepaid and bears post office cancellation mark or receipt mark of carrier indicating time within that period). Accordingly, we find the district complied with the requirements of section 552.301 with respect to the January 21, 2010, requests for information. Additionally, the requestor refers to a request for information addressed to the district dated October 9, 2009. We note no portion of the remaining information is

responsive to the October 9, 2009, request because it was created after October 9, 2009, or does not pertain to the subject matter of that request. Further, the documents submitted by the requestor reveal the district provided the information responsive to that request to the requestor. Accordingly, we find October 9, 2009, request is not at issue in this ruling.

Section 552.107(1) of the Government Code protects information that comes 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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. *See* 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. *See 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. *See* 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 claim portions of the remaining responsive information, which you have marked, are protected by section 552.107 of the Government Code. You state the information at issue consists of communications involving district representatives and attorneys that were made in connection with the rendition of legal services to the district. You state these communications were not intended to be released to other parties. Based on your representations and our review, we find you have demonstrated the applicability of the

attorney-client privilege to the remaining responsive information you have marked. Accordingly, with the exception of the documents marked for release, the district may withhold the remaining responsive information you have marked under section 552.107 of the Government Code.

We note the remaining information includes information that may be subject to section 552.117 of the Government Code.⁴ Section 552.117(a)(1) excepts from disclosure the personal information of current or former employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The district may only withhold information under section 552.117(a)(1) if the individual at issue elected confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individual at issue made a timely election under section 552.024 for the information we have marked, the district must withhold that information under section 552.117(a)(1). However, if the employee did not make a timely election under section 552.024 for the remaining information marked under section 552.117(a)(1), then the marked information is not excepted under section 552.117(a)(1) and may not be withheld on that basis.

In summary, the district must continue to rely on Open Records Letter No. 2009-17879 as a previous determination and release the identical requested information in accordance with that ruling, including the documents we have marked for release within the submitted information. With the exception of the documents marked for release, the district may withhold the information you have marked under section 552.107 of the Government Code. If the individual at issue made a timely election under section 552.024 for the information we have marked, the district must withhold that information under section 552.117(a)(1) of the Government Code. The remaining responsive information must be released.

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

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

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Claire Morris Sloan". The signature is fluid and cursive, with a long horizontal stroke at the end.

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/jb

Ref: ID# 375800

Enc. Submitted documents

c: Requestor
(w/o enclosures)