



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 7, 2011

Mr. Robb D. Decker  
Walsh, Anderson, Brown, Gallegos and Green, P.C.  
For the Northside Independent School District  
P.O. Box 460606  
San Antonio, Texas 78246

OR2011-08017

Dear Mr. Decker:

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# 419762.

The Northside Independent School District (the "district"), which you represent, received a request for records pertaining to the requestor's client. You state the district will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.108, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you inform us the district has redacted student-identifying information in the submitted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>1</sup> We note FERPA is not applicable to law enforcement records maintained by the district's police department (the "department") that were created by the department for a law enforcement purpose.

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<sup>1</sup>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. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

*See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8. Upon review, we find the records labeled AG-0007 through AG-0010 are law enforcement records that relate to an investigation by the department and are maintained by the department. Thus, these records are not subject to FERPA, and no portion of these records may be withheld on that basis.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes, such as section 261.201(a) of the Family Code, which provides:

(a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Upon review, we find the records labeled AG-0001 through AG-0003 and AG-0007 through AG-0010 were used or developed in an investigation by the department of alleged child abuse. *See id.* § 261.001(1) (defining “abuse” for purposes of Fam. Code ch. 261); *see also* 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). You have not indicated the department has adopted a rule that governs the release of this type of information; therefore, we assume no such regulation exists. Given that assumption, the district must withhold the records labeled AG-0001 through AG-0003 and AG-0007 through AG-0010 under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.<sup>2</sup> *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). We note, however, the district is not an agency authorized to conduct an investigation under chapter 261 of the Family Code. Fam. Code § 261.103 (listing agencies that may conduct child abuse investigations). The records labeled AG-0004 through AG-0006 consist of notes and documentation collected or generated by the district for its administrative investigation. You do not explain, and we cannot discern, whether these documents were used by the Child Protective Services Division of the Texas Department of Family and Protective Services or by the department in an investigation under chapter 261. *See id.* § 261.201(a)(2). Thus, we conclude you have failed to demonstrate how the records labeled AG-0004 through AG-0006

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments for this information.

constitute information used or developed in an investigation under chapter 261. Consequently, the district may not withhold the records labeled AG-0004 through AG-0006 under section 552.101 in conjunction with section 261.201.

You claim the records labeled AG-0011 through AG-0013 are excepted under section 552.107(1) of the Government Code, which 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. 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 Texas 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 a 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 a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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. *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 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 records labeled AG-0011 through AG-0013 consist of a communication between an attorney for and an employee of the district that was made for the purpose of facilitating the rendition of professional legal services to the district. You state that this communication was made in confidence and its confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the records labeled AG-0011 through AG-0013. Accordingly,

the district may withhold the records labeled AG-0011 through AG-0013 under section 552.107(1) of the Government Code.

In summary, the district must withhold the records labeled AG-0001 through AG-0003 and AG-0007 through AG-0010 under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. The district may withhold the records labeled AG-0011 through AG-0013 under section 552.107(1) of the Government Code. The district must release the remaining information.

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](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, toll free at (888) 672-6787.

Sincerely,



Sean Nottingham  
Assistant Attorney General  
Open Records Division

SN/bs

Ref: ID# 419762

Enc. Submitted documents

c: Requestor  
(w/o enclosures)