



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 15, 2012

Ms. Stephanie S. Rosenbery
General Counsel
Humble Independent School District
P.O. Box 2000
Humble, Texas 77347-2000

OR2012-09271

Dear Mr. Roser:

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# 456386.

The Humble Independent School District (the "district") received a request for a list of the date, time, location, and reason for all visits by the district Superintendent to district campuses during a specified time period and a list of the date, time, location, reason, names of attending officials, and names of involved organizations for out-of-school events in which the district Superintendent participated and discussed any district affair during a specified time period. You state some of the submitted information has been redacted pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim some of the requested information is not subject to the Act or, in the alternative, is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. You claim other requested information is excepted from disclosure under sections 552.105 and 552.107 of the Government Code. We have considered your arguments

¹The 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 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>.

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).

Initially, you state the district sought clarification with respect to the request for information. *See id.* § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010). You state the district has not received a response from the requestor. We note a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990). In this case, as you have submitted information responsive to the request and have made arguments against disclosure of this information, we will address the applicability of your arguments to the submitted information.

Next, we address your claim some of the calendar entries you have marked are not subject to the Act. The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002(a) provides that "public information" consists of the following:

[I]nformation 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). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You claim the calendar entries you have marked are not subject to the Act. You state these entries pertain to doctor's appointments and personal activities. You state the marked entries are not related to the Superintendent's status as a superintendent or to district business and the entries are not collected, assembled, or maintained in connection with the transaction of official business. Based on your representations and our review of the submitted information, we conclude the calendar entries you have marked do not constitute public information for the purposes of section 552.002. *See* Open Records Decision No. 635 at 4 (1995) (section 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state

resources). Therefore, the calendar entries you have marked are not subject to the Act, and the district need not release them in response to this request.²

You seek to withhold the calendar entry you have marked pursuant to section 552.105 of the Government Code. Section 552.105(1) excepts from disclosure information relating to “the location of real or personal property for a public purpose prior to public announcement of the project[.]” Gov’t Code § 552.105(1). Section 552.105 is designed to protect a governmental body’s planning and negotiating position with respect to particular transactions. Open Records Decision Nos. 564 at 2 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. A governmental body may withhold information “which, if released, would impair or tend to impair [its] ‘planning and negotiating position in regard to particular transactions.’” ORD 357 at 3 (quoting Open Record Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body’s planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body’s good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You state the marked calendar entry reveals the location of “real property that was considered for acquisition by the [d]istrict.” You explain “the owner and the [d]istrict eventually broke off discussions and there was no public announcement of a potential transaction.” Upon review, we find you have not demonstrated how release of the marked information would impair the district’s negotiating position with regard to a particular transaction. Accordingly, the district may not withhold any of the remaining information under section 552.105 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov’t Code § 552.107(1). 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 a capacity other than that of attorney). Governmental attorneys often act in

²As we are able to make this determination, we do not address your arguments against disclosure of the marked calendar entries.

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 to only communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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 to only a confidential communication, *id.*, 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 the calendar entries you have marked document or consist of communications between district staff, district officials, and attorneys for the district that were made for the purpose of providing legal advice to the district. You also state the communications to which the calendar entries pertain and the calendar entries themselves were made in confidence and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the calendar entries you have marked. Accordingly, the district may withhold the marked calendar entries under section 552.107(1) of the Government Code.

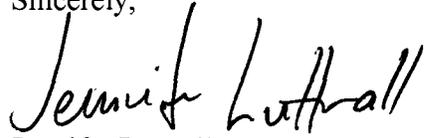
In summary, the calendar entries the district has marked are not subject to the Act, and the district need not release them in response to this request. The district may withhold the calendar entries you have marked under section 552.107(1) of the Government Code. The remaining information must be released.

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

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 that reads "Jennifer Luttrall". The signature is written in a cursive style with a large initial "J".

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 456386

Enc. Submitted documents

c: Requestor
(w/o enclosures)