



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 23, 2013

Mr. Darin Darby
Counsel for Comal Independent School District
Escamilla, Poneck & Cruz, L.L.P.
P.O. Box 200
San Antonio, Texas 78291-0200

OR2013-08601

Dear Mr. Darby:

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# 488145.

The Comal Independent School District (the "district"), which you represent, received a request for the transcript of a specified meeting and all paperwork, recordings, and documentation pertaining to the requestor from a specified time period. You state the district will redact information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).¹ See Gov't Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.116, 552.135, and 552.137 of the Government Code and portions of the submitted information are

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student's 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 educational records. We have posted a copy of the letter from the DOE on the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

privileged under rule 192.3 of the Texas Rule of Civil Procedure.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 522.108[.]

Gov't Code § 552.022(a)(1). A portion of the submitted information, which we have marked, consists of a completed report subject to subsection 552.022(a)(1). The district must release the completed report pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* § 552.022(a)(1). Although you raise sections 552.103, 552.107, 552.111, and 552.116 of the Government Code for the information, these sections are discretionary exceptions to disclosure and do not make information confidential under the Act. *See 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); *see also* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 6-7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). As such, sections 552.103, 552.107, 552.111, and 552.116 do not make information confidential for the purposes of section 552.022. Therefore, none of the information subject to section 552.022, which we have marked, may be withheld under section 552.103, section 552.107, section 552.111, or section 552.116. However, information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code. Thus, we will address your argument under section 552.108 for the submitted information. Additionally, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503. You also claim some of the information subject to section 552.022 is protected from disclosure under section 552.101 in conjunction with

²Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Civil Procedure 192.3, 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).

the common-law informer's privilege. The common-law informer's privilege is other law for the purpose of section 552.022. *See id.*; *Tex. Comm'n on Envtl. Quality v. Abbott*, No. GV-300417 (126th Dist. Ct., Travis County, Tex.). Thus, we will address your assertion of section 552.101 in conjunction with the informer's privilege. Finally, you claim the information at issue is excepted under sections 552.135 and 552.137, which can make information confidential for purposes of section 552.022. Thus, we will consider your arguments under these exceptions for the information subject to section 552.022. Further, we will consider all your arguments for the information not subject to section 552.022.

First, we will address your arguments for the completed report. 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:

(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).

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* ORD 676 at 6-7. Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body

must: (1) show 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *Id.* Upon a demonstration of all three factors, the entire communication 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). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege extends to entire communication, including factual information).

You assert the completed report consists of communications between the district, district lawyers, and a consulting expert. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the district and have remained confidential. Based on your representations and our review, we find the district has established the completed report constitutes an attorney-client communication under rule 503. Thus, the district may withhold the completed report under Texas Rule of Evidence 503.³

You claim section 552.107 of the Government Code for the remaining information not subject to section 552.022. Section 552.107(1) protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed above for rule 503. 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* ORD 676 at 6-7. 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 the remaining information is protected by section 552.107(1) of the Government Code. As noted above, you assert the remaining information consists of communications between the district, district lawyers, and a consulting expert. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the district 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 remaining information. *See Harlandale Indep. Sch. Dist. V. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding attorney's entire investigation report was protected by attorney-client privilege where attorney was retained to conduct investigation

³As our ruling is dispositive with respect to the information at issue, we need not address your remaining arguments against its disclosure.

in her capacity as attorney for purpose of providing legal services and advice). Thus, the district may withhold the remaining information under section 552.107(1) of the Government Code.⁴

In summary, the district may withhold the completed report we have marked subject to section 552.022 of the Government Code under Texas Rule of Evidence 503. The district may withhold the remaining information not subject to section 552.022 under section 552.107(1).

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,



David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/dls

Ref: ID# 488145

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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