



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 28, 2013

Mr. Christopher B. Gilbert  
Counsel for the Katy Independent School District  
Thompson & Horton, L.L.P.  
3200 Southwest Freeway, Suite 2000  
Houston, Texas 77027

OR2013-14999

Dear Mr. Gilbert:

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# 497852.

The Katy Independent School District (the "district"), which you represent, received a request for five categories of information pertaining to the attorneys hired in relation to a specified grievance. You state the district maintains no information responsive to three of the requested categories of information.<sup>1</sup> You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.<sup>2</sup> We have considered the submitted arguments and reviewed the submitted information.

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, 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 also raise section 552.103 of the Government Code, you have not provided any argument to support this exception. Therefore, we assume you have withdrawn your claim that this section applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

Initially, we note the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code, 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.<sup>3</sup> 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”). You have submitted unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records, except to note the requestor has a right of access under FERPA to her child’s education records. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. Such determinations under FERPA must be made by the educational authority in possession of the education records. The DOE also has informed our office, however, the right of access of a student or a student’s legal representative under FERPA to information about the student does not prevail over an educational institution’s right to assert the attorney-client privilege. Accordingly, we will consider your argument under section 552.107 of the Government Code and rule 305 of the Texas Rules of Evidence for the submitted information.

Next, we note the information submitted as Exhibit A consists of attorney fee bills that are subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of “information that is in a bill for attorney’s fees and that is not privileged under the attorney-client privilege,” unless the information is expressly confidential under the Act or other law. Gov’t Code § 552.022(a)(16). You seek to withhold the information at issue under section 552.107(1) of the Government Code. However, section 552.107(1) is discretionary and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, the district may not withhold any portion of the submitted fee bills under section 552.107(1). However, the Texas Supreme Court has held the 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, 336 (Tex. 2001). Accordingly, we will address your claim of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the submitted attorney fee bills. We will also consider your argument under section 552.107(1) of the Government Code for the information submitted as Exhibit B, which is not subject to section 552.022.

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<sup>3</sup>A copy of this letter may be found on the Office of the Attorney General’s website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

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).

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. 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert the portions of the submitted fee bills you have marked should be withheld under rule 503. You assert the submitted fee bills include privileged attorney-client communications between the district's outside attorney and district officials and staff in their capacities as clients. You state the communications at issue were made for the purpose of

the rendition of legal services to the district. You indicate the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on your representations and our review of the information at issue, we find the district has established the information we have marked constitutes attorney-client communications under rule 503. Thus, the district may withhold the information we have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. However, the remaining information you have marked documents communications with individuals whom you have not identified as privileged parties, or does not document a communication. Thus, we find you have not demonstrated how the remaining information you marked documents a privileged attorney-client communication for purposes of rule 503. Accordingly, the remaining information you have marked may not be withheld under rule 503 of the Texas Rules of Evidence.

You claim section 552.107 of the Government Code for portions of the 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 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).

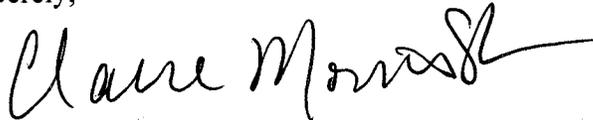
As noted above, you inform us some of the remaining information, which you have marked, consists of communications between the district's outside attorney and district officials and staff in their capacities as clients, made for the purpose of the rendition of legal services to the district. You state the communications were intended to be confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have marked in Exhibit B. Accordingly, the district may withhold the information you have marked within the remaining documents under section 552.107 of the Government Code.

In summary, the district may withhold the information we have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. The district may withhold the information you have marked within Exhibit B under section 552.107 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Claire Morris Sloan". The signature is written in a cursive, flowing style.

Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/som

Ref: ID# 497852

Enc. Submitted documents

c: Requestor  
(w/o enclosures)