



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 9, 2014

Mr. W. Montgomery Meitler  
Senior Counsel  
Texas Education Agency  
1701 North Congress Avenue  
Austin, Texas 78701

OR2014-07887

Dear Mr. Meitler:

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# 522038 (TEA PIR Nos. 21401, 21402, 21430, 21432, 21433, 21434, 21437, 21439, 21443, 21446, 21447, 21448, 21461, 21464, 21466, 21467, 21479, & 21491).

The Texas Education Agency (the "agency") received multiple requests from the same requestor for information pertaining to a named school system for a specified period of time. You state you will make some information available to the requestor. We understand the agency has redacted some information from the submitted documents pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>1</sup> You claim portions of the submitted information are excepted from disclosure

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<sup>1</sup>The 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 student 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. A 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>.

under sections 552.107 and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant requests because it pertains to information that was created after the dates of the requests. This ruling does not address the public availability of any information that is not responsive to the requests and the agency is not required to release such information in response to these requests.

Section 552.116 of the Government Code provides the following:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

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<sup>2</sup>We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You assert some of the information you marked consists of "audit working papers prepared or maintained by [the agency's] Division of Educator Investigations in conjunction with investigations of alleged educator misconduct." You inform us the investigations were "authorized by sections 21.031 and 21.041 of the Education Code and section 249.14 of title 19 of the Texas Administrative Code." *See* Educ. Code §§ 21.031(a), .041(b); 19 T.A.C. § 249.14(a) (TEA may obtain and investigate information concerning an educator's alleged improper conduct). You further inform us some of the information you marked consists of "audit working papers prepared or maintained by [the agency's] Division of Complaints and Investigations in conjunction with audits of [the named schools]." You state the audits were "authorized by section 39.057(a)(4) of the Education Code, which permits special accreditation investigations to be conducted in response to established compliance reviews of a school district's financial accounting practices and state and federal program requirements." *See* Educ. Code § 39.057 (listing circumstances in which the commissioner shall authorize investigations). You assert the remaining information you marked under section 552.116 of the Government Code consists of "audit working papers prepared or maintained by [the agency's] Student Assessment Division Security Task Force and [the agency's] Division of Complaints and Investigations in conducting investigations of testing irregularities in the administration of statewide assessment instruments." You inform us the investigations were "authorized by section 39.057(a)(8) of the Education Code, which permits the [c]ommissioner of [e]ducation to authorize special accreditation investigations to be conducted in response to an allegation regarding or an analysis using a statistical method result indicating a possible violation of an assessment security procedure." *See id.* Based on your representations and our review, we agree the information you marked consists of audit working papers for purposes of section 552.116 of the Government Code. Accordingly, the agency may withhold the information you marked under section 552.116 of the Government Code.<sup>3</sup>

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)

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

(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, 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). 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.*, 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, orig. proceeding). 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 the remaining responsive information is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications between attorneys for the agency and agency staff. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the agency. You further state these communications were intended to be confidential 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 information at issue. Thus, the agency may withhold the remaining responsive information under section 552.107(1) of the Government Code.

In summary, the agency may withhold the information you marked under section 552.116 of the Government Code and the remaining responsive information under section 552.107(1) of the Government Code.

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](#), 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, appearing to read "Paige Thompson". The signature is fluid and cursive, with the first name "Paige" being more prominent and the last name "Thompson" following in a similar style.

Paige Thompson  
Assistant Attorney General  
Open Records Division

PT/dls

Ref: ID# 522038

Enc. Submitted documents

c: Requestor  
(w/o enclosures)