



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 28, 2014

Ms. Ellen H. Spalding
Counsel for the Eanes Independent School District
Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2014-09100

Dear Ms. Spalding:

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# 523959 (EISD Request No. 6955).

The Eanes Independent School District (the "district"), which you represent, received two requests from the same requestor for the bills from a specified law firm related to the district, the requestor, and another named person during a specified time period. You inform us you have redacted student-identifying 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.¹ You state the district has released some of the requested information. You claim the submitted information is excepted from disclosure under section 552.107 of

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 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>.

the Government Code and privileged under rule 503 of the Texas Rules of Evidence.² We have considered your arguments and reviewed the submitted representative sample of information.³

Initially, we note the requestor seeks information created after the date the request was received. It is implicit in several provisions of the Act that the Act applies only to information already in existence. *See Gov't Code §§ 552.002, .021, .227, .351.* The Act does not require a governmental body to prepare new information in response to a request. *See Attorney General Opinion H-90 (1973); see also Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 87 (1975).* Consequently, a governmental body is not required to comply with a standing request to supply information prepared in the future. *See Attorney General Opinion JM-48 at 2 (1983); see also Open Records Decision Nos. 476 at 1 (1987), 465 at 1 (1987).* Thus, the only information encompassed by the present request consists of information the district maintained or had a right of access to as of the date it received the request.

Next, we note some of the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2014-05218 (2014). In Open Records Letter No. 2014-05218, we ruled the district may withhold certain information under Texas Rule of Evidence 503 and must release the remaining information. We have no indication the law, facts, or circumstances on which Open Records Letter No. 2014-05218 was based have changed. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon by this office in the prior ruling, we conclude the district may continue to rely on Open Records Letter No. 2014-05218 as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling. *See Open Records Decision No. 673 (2001)* (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). To the extent the information at issue is not encompassed by the previous ruling, we will address your arguments against its release.

Next, we note the submitted information 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

²Although 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).*

³We 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 those records contain substantially different types of information than that submitted to this office.

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 (2002) (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.

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 contend the attorney-client privilege is applicable to the entirety of the information in the submitted attorney fee bills. Alternatively, you seek to withhold the portions of the fee bills you have marked. We note section 552.022(a)(16) provides that information “that is *in* a bill for attorney’s fees” is not excepted from disclosure unless the information is confidential under the Act or other law or protected by the attorney-client privilege. *See* Gov’t Code § 552.022(a)(16) (emphasis added). Thus, by its express language, section 552.022(a)(16) does not permit an attorney fee bill to be withheld in its entirety. *See also* Open Records Decisions Nos. 676 (attorney fee bill cannot be withheld in its entirety on basis it contains or is attorney-client communication pursuant to language in Gov’t Code § 552.022(a)(16)), 589 (1991) (information in attorney fee bill is excepted only to extent it reveals client confidences or attorney’s legal advice). Accordingly, we will determine whether the district may withhold the information you have marked in the fee bills under rule 503.

You assert the information you have marked consists of privileged attorney-client communications between the district’s attorneys 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 most of the information you marked constitutes attorney-client communications under rule 503. However, we find the remaining information either does not indicate it was communicated or the information does not reveal the content of a communication. This information, which we have marked for release, may not be withheld under rule 503. Thus, except for the information we marked for release, the district may withhold the information you marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence.

In summary, to the extent the requested information is identical to the information at issue in Open Records Letter No. 2014-05218, the district may rely on that ruling as a previous determination and withhold or release such information in accordance with that ruling. The district may withhold the information you marked within the submitted attorney fee bills

pursuant to Texas Rule of Evidence 503. 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, 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,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/tch

Ref: ID# 523959

Enc. Submitted documents

c: Requestor
(w/o enclosures)