



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 16, 2014

Mr. C. Cory Rush
Counsel for Fort Bend Independent School District
Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2014-10359

Dear Mr. Rush:

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# 526117 (FBISD Request No. 2013-14-688).

The Fort Bend Independent School District (the "district") received a request for 1) communications or reports from or to district personnel regarding a specified incident involving the requestor's child, 2) communications or reports to or from district personnel regarding the requestor's efforts to meet with district personnel and to gain information regarding the specified incident, 3) a specified video recording, 4) communications between district personnel and Fort Bend County EMS regarding the specified incident, 5) district documents providing guidance on responding to medical emergencies involving students and how to interact with parents regarding such emergencies, 6) information regarding Kickstart Kids programs in district schools. You claim the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted representative sample of information.

Initially, we note you have not submitted information responsive to items 3 and 4 of the request for information. Although you state the district has submitted a representative sample of the requested information, we find the submitted information is not representative of the information requested in items 3 and 4 of the request for information. Please be advised this open records letter ruling applies only to the type of information you have

submitted for our review. This ruling does not authorize the district to withhold any type of information that is substantially different from the types of information you submitted to this office. *See* Gov't Code § 552.302 (where request for attorney general decision does not comply with requirements of section 552.301, information at issue is presumed to be public). Therefore, we presume the district has released the information responsive to items 3 and 4 of the request, to the extent such information existed and was maintained by the district when it received this request for information. If not, then the district must release any such information immediately. *See id.* §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

Next, we note the United States Department of Education ("DOE") 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.¹ 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 redacted 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. We note, however, that relying on a statement from the director of the DOE's Family Policy and Regulations Office, this office has determined that FERPA does not prevent a governmental body from making the education records of deceased students available to members of the public. *See* Open Records Decision No. 524 (1989). This conclusion is consistent with the premise that an individual's privacy rights lapse on the individual's death. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146–47 (N.D. Tex. 1979) ("action for invasion of privacy can be maintained only by a living individual whose privacy is invaded") (quoting Restatement of Torts 2d). Thus, the information relating to the deceased student is not subject to FERPA and may not be withheld on that basis.

We next note some of the submitted information is subject to section 552.022 of the Government Code, which provides in relevant part the following:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public

¹A 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>.

information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(3), (15). The submitted information includes an executed contract relating to the expenditure of public funds by the district which is subject to section 552.022(a)(3) of the Government Code. The submitted information also includes district policies that the district has published on its website. Accordingly, we find the district policies are subject to section 552.022(a)(15) of the Government Code. *See id.* § 552.022(a)(15). You assert the information subject to section 552.022 is excepted from release under sections 552.103 and 552.107 of the Government Code. However, those sections are discretionary 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 section 552.103); 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). Therefore, the district may not withhold the submitted information subject to section 552.022 of the Government Code under section 552.103 or section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider the district's assertion of the attorney-client privilege under Texas Rule of Evidence 503. Additionally, the district raises section 552.101 for this information, which makes information confidential for purposes of section 552.022. Accordingly, we will also consider the applicability of that exception to the information subject to section 552.022. Further, we will address the district's arguments against disclosure of the remaining information.

Texas Rule of Evidence 503(b)(1) provides the following:

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).

The district states the information subject to section 552.022 was communicated between district attorneys and district employees and officials. The district states the communications were made for the purpose of facilitating the rendition of professional legal services to the district and these communications have remained confidential. Upon review, we find the district has established the information at issue constitutes attorney-client communications under rule 503. Accordingly, the district may generally withhold the information subject to

section 552.022 of the Government Code under rule 503 of the Texas Rules of Evidence. We note, however, the executed contract and the district policies are separately responsive to the request. Consequently, to the extent these documents also exist separate and apart from the privileged communications to which they are attached, the district may not them under rule 503. In that case, as you raise no further exceptions to disclosure of this information, the executed contract and district policies must be released.

Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several

occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

You state the remaining information pertains to an incident in which the requestor's child died after participating in a physical education class offered by the district. You contend the district reasonably anticipated litigation when it received the request for information because the family of the deceased child hired an attorney and made comments to the media stating that the district failed to take necessary steps in responding to the child's medical emergency. Based upon your representations, our review of the information at issue, and the totality of the circumstances, we find the district has demonstrated it reasonably anticipated litigation when it received the request for information. We also find the district has established the information at issue is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the district may withhold the remaining information under section 552.103(a) of the Government Code.²

However, once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded or is no longer anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, the district may generally withhold the executed contract and district policies subject to section 552.022 of the Government Code under rule 503 of the Texas Rules of Evidence; however, to the extent the executed contract and district policies we have marked also exist separate and apart from the privileged communications to which they are attached, the district may not withhold them under rule 503 and they must be released. The district may withhold the remaining information under section 552.103 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

²As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

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 "Kristi L. Wilkins". The signature is fluid and cursive, with the first name "Kristi" being more prominent.

Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/tch

Ref: ID# 526117

Enc. Submitted documents

c: Requestor
(w/o enclosures)