



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 21, 2014

Ms. Amanda M. Bigbee
General Counsel
Keller Independent School District
350 Keller Parkway
Keller, Texas 76248

OR2014-14714

Dear Ms. Bigbee:

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# 534642.

The Keller Independent School District (the "district") received four requests for a named district employee's e-mails. You state you will release some information to the requestors. You claim portions of the submitted information are excepted from disclosure under sections 552.107, 552.109, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note some of the submitted information is not responsive to the instant requests because it pertains to information that was created after the dates the district received the requests. This ruling does not address the public availability of any information that is not

¹Although you also raise Texas Rule of Evidence 503 and Texas Disciplinary Rule of Professional Conduct 1.05, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* Open Records Decision No. 676 at 1-2 (2002).

²We 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.

responsive to the requests and the district is not required to release such information in response to these requests.

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) (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 information you marked is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications between attorneys for the district, district administrators, and district employees. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the district and that these 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 at issue. Thus, the district may generally

withhold the information you marked under section 552.107(1) of the Government Code. We note, however, one of the e-mail strings includes e-mails received from or sent to individuals you have not demonstrated are privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the e-mail string and stand alone, they are responsive to the requests for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the district separate and apart from the otherwise privileged e-mail string in which they appear, then the district may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

Section 552.109 of the Government Code excepts from disclosure “[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]” Gov’t Code § 552.109. Upon review, we find you have not demonstrated how any of the information at issue consists of communications of an elected office holder. Therefore, the district may not withhold any of the information at issue under section 552.109 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). Upon review, we find the district must withhold the e-mail addresses you marked, and the additional e-mail addresses we marked, under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure.

In summary, the district may generally withhold the information you marked under section 552.107(1) of the Government Code. If the non-privileged e-mails we marked are maintained by the district separate and apart from the otherwise privileged e-mail string in which they appear, then the district may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. The district must withhold the e-mail addresses you marked, and the additional e-mail addresses we marked, under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure. 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,

A handwritten signature in black ink, appearing to read "Paige Thompson". The signature is written in a cursive, flowing style.

Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 534642

Enc. Submitted documents

c: 4 Requestors
(w/o enclosures)