



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 8, 2015

Mr. Darin Darby
Counsel for Edgewood Independent School District
Escamilla & Poneck, L.L.P.
700 North Saint Mary's Street, Suite 850
San Antonio, Texas 78205

OR2015-11185

Dear Mr. Darby:

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# 566314.

The Edgewood Independent School District (the "district"), which you represent, received a request for all documents and communications made during a specified investigation involving the requestor. You state the district has released some information to the requestor. You further state the district has redacted motor vehicle record information pursuant to section 552.130(c) of the Government Code and social security numbers pursuant to section 552.147(b) of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.107(1), 552.108, and 552.114 of the

¹Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(a), (c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See id.* § 552.147(b).

Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

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 consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.³ 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. However, in this instance, we note some of the submitted information was obtained from or created by the district’s police department (the “department”). FERPA is not applicable to records that were created by a law enforcement unit of an educational agency or institution for a law enforcement purpose and that are maintained by the law enforcement unit. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8. You do not indicate, however, whether the information at issue is maintained exclusively by the department. Records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of an educational agency or institution other than the law enforcement unit are not records of the law enforcement unit. *See* 34 C.F.R. § 99.8(b)(2). Thus, to the extent the information at issue is maintained by the department, the information is not encompassed by FERPA, and none of it may be withheld on that basis. However, to the extent the information at issue is maintained by a component of the district other than the department, such records are subject to FERPA. Nevertheless, because our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to the submitted information. Such determinations under FERPA must be made by the educational authority in possession of the education record. Likewise, we do not address your argument under section 552.114 of the Government Code. *See* Gov’t Code

²Although you raise section 552.022 of the Government Code, this section is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are made confidential under the Act or other law. *See* Gov’t Code § 552.022. Although you raise section 552.026 of the Government Code, section 552.026 is also not an exception to disclosure. Rather, section 552.026 provides the Act does not require the release of information contained in education records except in conformity with the Family Educational Rights and Privacy Act of 1974. *See id.* § 552.026. Furthermore, although you raise Texas Rule of Evidence 503, 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(1) of the Government Code. *See* Open Records Decision No. 676 at 1-2 (2002).

³A 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>.

§§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure “student records”); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 and FERPA). However, to the extent the submitted information is not governed by FERPA, we will consider your remaining arguments against disclosure.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov’t Code § 552.107(1). 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. ORD 676 at 6-7. First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “to facilitate the rendition of professional legal services” to the client governmental body. 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. *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 a 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, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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. *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 that 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 state the submitted information consists of communications between the district’s counsel, district administrators, and district board members. You also state the communications were made for the purpose of facilitating the rendition of professional legal services to the district. You further state the communications were not intended to be disclosed to third parties, and the district has not waived its privilege. Based on your representations and our review, we find you have demonstrated the applicability of the

attorney-client privilege to the information we have marked. Thus, the district may generally withhold the information we have marked under section 552.107(1) of the Government Code.⁴ However, we note one of the privileged e-mail strings we have marked includes e-mails sent to or received from a non-privileged party. If these e-mails are removed from the privileged e-mail string and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails 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. To the extent the e-mails at issue exist separate and apart, we will consider your remaining argument against disclosure of this information. Further, we find you have not demonstrated the applicability of the attorney-client privilege to any of the remaining information. Thus, the district may not withhold any of the remaining information under section 552.107(1) of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information protected by other statutes, such as section 261.201 of the Family Code, which provides, in pertinent part:

(a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). We note the district is not an agency authorized to conduct an investigation under chapter 261 of the Family Code. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). However, upon review, we find some of the remaining information, which we have marked, was used or developed by the department in an investigation of alleged or suspected child abuse. *See id.* §§ 101.003(a) (defining “child” for purposes of section 261.201), 261.001(1) (defining “abuse” for purposes of section 261.201). Accordingly, we find this information is within the scope of section 261.201(a). You do not indicate the department has adopted a rule governing the

⁴As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

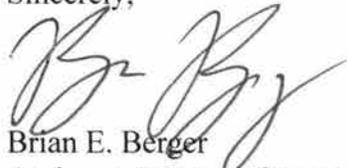
release of this type of information; therefore, we assume no such regulations exists. Thus, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.⁵ However, we find you have failed to demonstrate any of the remaining information was used or developed in an investigation of alleged or suspected child abuse or neglect, or consists of a report of alleged or suspected abuse or neglect, under chapter 261 of the Family Code. *See id.* § 261.201(a). Therefore, the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.

In summary, the district may generally withhold the information we have marked under section 552.107(1) of the Government Code; however, if the district maintains the non-privileged e-mails we have marked separate and apart from the otherwise privileged e-mail string in which they appear, then the district must release them. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. The remaining information must be released.

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,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/dls

⁵As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

Mr. Darin Darby - Page 6

Ref: ID# 566314

Enc. Submitted documents

c: Requestor
(w/o enclosures)