



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 14, 2015

Ms. Holly G. McIntush  
Thompson & Horton, L.L.P.  
400 West 15th Street, Suite 1430  
Austin, Texas 78701

OR2015-14326

Dear Ms. McIntush:

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# 571221.

The Abilene Independent School District (the "district"), which you represent, received a request for all communications regarding two named individuals or certain subject matter from, to, or between specified individuals or agencies during a specified time period.<sup>1</sup> You state the district will withhold e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>2</sup> You state the district will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.109, 552.111, 552.114, 552.117, 552.135, and 552.147 of the Government

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<sup>1</sup>We note the district received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed). You inform us you sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the district received the required deposit on April 23, 2015. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

<sup>2</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Code and privileged under Texas Rule of Evidence 503.<sup>3</sup> We have considered your claims and reviewed the submitted representative sample of information.<sup>4</sup>

Initially, we note the United States Department of Education Family Policy Compliance Office (the "DOE") 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.<sup>5</sup> 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. We further note that the requestor may be the attorney for a student to whom some of the submitted information pertains. Because our office is prohibited from reviewing these education records to determine the applicability of FERPA, we will not address the applicability of FERPA to any of the submitted records, other than to note that an attorney has a right of access under FERPA to her client's education records and this right of access prevails over claims under sections 552.101, 552.103, and 552.135 of the Government Code. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; Open Records Decision No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to Gov't Code § 552.103); *see also Equal Employment Opportunity Comm'n v. City of Orange Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (holding FERPA prevails over inconsistent provision of state law). Such determinations under FERPA must be made by the educational authority in possession of the education records. Likewise, we do not address your argument under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), 552.114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). We will consider the district's claimed exceptions to the extent the student's attorney does not have a right of access to the submitted information under FERPA. In addition, the DOE has informed this office that a parent's or student's right of access to education records under FERPA does not prevail over

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<sup>3</sup>Additionally, although the district cites to rule 1.05 of the Texas Disciplinary Rules of Professional Responsibility, section 552.107 of the Government Code is the proper exception to claim for attorney-client privileged information.

<sup>4</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 those records contain substantially different types of information than that submitted to this office.

<sup>5</sup>A 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>.

an educational institution's right to assert the attorney-client privilege. Therefore, we will consider the district's assertion of this privilege.

You inform us some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2015-10980 (2015). In Open Records Letter No. 2015-10980, we concluded the district may withhold the information submitted as Exhibits A and B under section 552.103 of the Government Code. We understand there has been no change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, the district may continue to rely on Open Records Letter No. 2015-10980 as a previous determination and withhold or release the identical 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 that information is or is not excepted from disclosure). To the extent the submitted information was not responsive to the previous request for information, we will address your arguments against disclosure.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]
- (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). The submitted information includes completed evaluations and contracts relating to the receipt or expenditure of funds by the district which are subject to section 552.022. The district must release the completed evaluations pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law.<sup>6</sup> *See id.* § 552.022(a)(1). The district must release the contracts pursuant to section 552.022(a)(3) unless the information is made confidential under the Act or other law. You seek to withhold the information subject to section 552.022 under sections 552.103 and 552.107 of the

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<sup>6</sup>We note the district does not raise section 552.108 for the information subject to section 552.022(a)(1).

Government Code. However, these sections are discretionary in nature 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 Gov't Code § 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 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 information subject to section 552.022 may not be withheld under section 552.103 or section 552.107 of the Government Code. However, you claim the information subject to section 552.022 is privileged under rule 503 of the Texas Rules of Evidence. 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 information at issue. Further, because section 552.101 of the Government Code makes information confidential under the Act, we will consider your arguments under section 552.101 for the contracts which are subject to section 552.022(a)(3). We will also consider your arguments against disclosure of the information not subject to section 552.022 of the Government Code.

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

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

- (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
- (B) between the client's lawyer and the lawyer's representative;
- (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
- (D) between the client's representatives or between the client and the client's representative; 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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that 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 that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication 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 attaches to complete communication, including factual information).

You assert the information subject to section 552.022 consists of attachments to privileged attorney-client communications between the district's attorney and district staff or officials. You state the communications at issue were made for the purpose of the rendition of legal services to the district. You indicate these communications were intended to be confidential and have remained confidential. Based on the district's representations and our review of the information at issue, we find the district has established the information at issue constitutes attorney-client communications under Rule 503. Thus, the district may withhold the information subject to section 552.022 of the Government Code pursuant to Rule 503 of the Texas Rules of Evidence.<sup>7</sup>

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.

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<sup>7</sup>As we make this determination, we need not address your remaining claims for this 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 establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing litigation is reasonably anticipated by representing it received a notice-of-claim letter that is in compliance with the Texas Tort Claims Act (“TTCA”), chapter 101 of the Civil Practices and Remedies Code. If that representation is not made, the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *See* ORD 638 at 4.

The district argues the remaining information is related to reasonably anticipated civil litigation and thus is protected by section 552.103 of the Government Code. The district informs us the instant request for information states the requestor is an attorney representing a district student and is investigating certain “inappropriate, unethical and illegal actions” of a named former district employee against the requestor’s client. The requestor further states she is investigating the district’s handling of the former employee’s actions, and asks that the district “consider this letter a grievance under [district] policy[.]” In addition, you state in correspondence with the parents of the requestor’s client, the district was told by a parent “all future communications should go through their attorney.” Finally, you note in connection with a related police investigation, the chief of police of the Abilene Police Department has stated his belief that the administration of the district did not respond appropriately after learning of alleged inappropriate conduct. You do not affirmatively represent to this office the correspondence from the requestor is in compliance with the TTCA. Therefore, we will only consider the claim as a factor in determining whether the district reasonably anticipated litigation when it received the request for information. Based on your representations, our review of the submitted documents, and the totality of circumstances, we find the district has demonstrated it reasonably anticipated litigation when it received the request for information. We also find 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.<sup>8</sup>

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 continue to rely on Open Records Letter No. 2015-10980 as a previous determination and withhold or release the identical information in accordance with that ruling. The district may withhold the information subject to section 552.022 of the Government Code pursuant to Rule 503 of the Texas Rules of Evidence. The district may withhold the remaining information under section 552.103(a) 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](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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 571221

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>8</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.