



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 14, 2016

Ms. Stephanie E. Maher
Counsel for Fort Bend Independent School District
Rogers Morris & Grover
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2016-13500

Dear Ms. Maher:

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#613961 (FBISD ORR #2015-16-818, #2015-16-819, #2015-16-820, #2015-16-821).

The Fort Bend Independent School District (the "district"), which you represent, received four requests from the same requestor for information concerning special education personnel, worker's compensation paperwork, and complaints concerning a named employee. You state the district will release some of the information. You state there is no information responsive to the fourth request, assigned #2015-16-821.¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence. We have considered your arguments and reviewed the submitted representative sample of information.²

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1–2 (1990).

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

Some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2014-14480 (2014) and 2014-23274 (2014).³ You state the district will release or withhold that information in accordance with those rulings. *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). You also state the district will withhold information in accordance with Open Records Letter No. 2015-00445 (2015). That ruling was issued to the Texas Education Agency (the “agency”). Although the district submitted comments as an interested third party for that ruling, it may not rely on it as a previous determination because that ruling was issued to the agency, not the district. *See id.* Accordingly, the district must release that information or seek a ruling to withhold it. *See* Gov’t Code §§ 552.301, .302. Some of the requested information was created after the previous rulings were issued to the district; you are seeking a ruling related to that information, and we will consider your arguments accordingly.

You state portions of the information you submitted are not responsive because they deal with allegations other than those at issue in the request. However, upon review we find the entire report you submitted is responsive to the request. Accordingly, we will consider your arguments for the entire representative sample of information.

The information at issue concerns a completed investigation. Section 552.022(a)(1) of the Government Code provides for the required disclosure of “a completed . . . investigation made of, for, or by a governmental body,” unless it is excepted by section 552.108 of the Government Code or made confidential under the Act or other law. *Id.* § 552.022(a)(1). You raise section 552.107 of the Government Code, which does not make information confidential. *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). The district may not withhold the information at issue under section 552.107 of the Government Code. You also raise 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 consider your attorney-client privilege claim under rule 503 of the Texas Rules of Evidence. Section 552.101 of the Government Code also makes information confidential, so we will consider that exception as well.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides:

³Open Records Letter No. 2014-14480 authorized the district to withhold information under section 552.101 of the Government Code in conjunction with common-law privacy and under sections 552.102, 552.117(a)(1), and 552.136 of the Government Code. Open Records Letter No. 2014-23274 authorized the district to withhold information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code and under section 552.107(1) of the Government Code.

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 not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

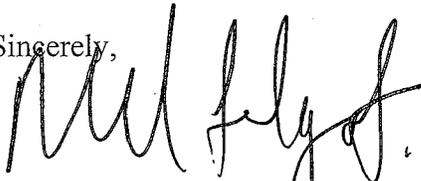
Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; 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* ORD 676. 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 state the information at issue concerns an investigation conducted by the district's outside legal counsel into allegations of certain conduct by the named employee. You state the final report was sent to the district by the attorney for the purpose of providing legal services to the district. You further state this report was intended to be, and has remained, confidential. Based on these representations and our review, we find the district has demonstrated the applicability of the attorney-client privilege. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding attorney's entire

investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, the district may withhold the information at issue under rule 503 of the Texas Rules of Evidence. As our ruling is dispositive, we need not address any remaining arguments.

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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/eb

Ref: ID# 613961

Enc. Submitted documents

c: Requestor
(w/o enclosures)