



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 7, 2016

Ms. Amber K. King  
General Counsel  
Lake Travis Independent School District  
3322 Ranch Road 620 South  
Austin, Texas 78738

OR2016-15408

Dear Ms. King:

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# 619607.

The Lake Travis Independent School District (the "district") received a request for six categories of information related to the requestor, the requestor's spouse, and a student. You state you have made responsive information available to the requestor. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code<sup>1</sup>. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have redacted some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA 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 purposes of our review in the open records ruling

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<sup>1</sup>Although you also raise section 552.022 of the Government Code, we note section 552.022 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.

process under the Act.<sup>2</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”). 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, other than to note parents and their legal representatives have a right of access to their child’s education records. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3 (“Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian.”); *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.<sup>3</sup> The DOE also has informed our office, however, a parent’s or legal representative’s right of access under FERPA to information about the child does not prevail over an educational institution’s right to assert the attorney-client and attorney work product privileges. Therefore, to the extent the requestor has a right of access under FERPA to any of the information for which the district claims the attorney-client and work product privileges, we will consider the district’s claims.

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. Open Records Decision No. 676 at 6-7 (2002). 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

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<sup>2</sup>A copy of this letter may be found on the Office of the Attorney General’s website: <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

<sup>3</sup>In the future, if the district does obtain parental or an adult student’s consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

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 Exhibit A consists of documents or communications involving attorneys for the district and district employees and officials. You state 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 demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, the district may generally withhold the information in Exhibit A under section 552.107(1) of the Government Code. However, we note the information at issue includes e-mails received from non-privileged parties. Furthermore, if these e-mails are removed from the otherwise privileged e-mail strings in which they appear and stand alone, they are responsive to the request for information. Therefore, if the district maintains these non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

We note a portion of the non-privileged e-mail is subject to section 552.137 of the Government Code.<sup>4</sup> 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). The e-mail address at issue is not of a type excluded by subsection (c). Therefore, the district must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

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<sup>4</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470(1987).*

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” *See* Gov’t Code § 552.111. This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision 677 at 4-8 (2002). Rule 192.5 defines work product as:

(1) [M]aterial prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat’l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

You assert the information in Exhibit B is attorney work product protected under section 552.111. You state the information at issue was created by attorneys representing the district in anticipation of and in preparation for litigation. You indicate the information at issue reflects the mental impressions, conclusions, and legal theories of attorneys representing the district. Based on your representations and our review, we conclude the district may withhold Exhibit B under the work product privilege encompassed by section 552.111 of the Government Code.

In summary, the district may generally withhold the information in Exhibit A under section 552.107(1) of the Government Code. However, if the district maintains the non-privileged e-mails, which we have marked, separate and apart from the otherwise

privileged e-mail strings to which they are attached, then the district may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.<sup>5</sup> To the extent the non-privileged emails exist separate and apart from the otherwise privileged e-mail strings in which they appear, the district must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. The district may withhold the information in Exhibit B under the work product privilege encompassed by section 552.111 of the Government Code. 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](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,



Kelly McWethy  
Assistant Attorney General  
Open Records Division

KSM/eb

Ref: ID# 619607

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>5</sup>To the extent the non-privileged e-mails we have marked are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, we note the requestor has a right of access to her own personal e-mail addresses being released to her. *See* Gov't Code § 552.137(b) (personal e-mail address of member of public may be disclosed if owner of address affirmatively consents to its disclosure).