



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 5, 2016

Ms. Jeanne C. Collins
General Counsel
El Paso Independent School District
6531 Boeing Drive
El Paso, Texas 79925

OR2016-17685

Dear Ms. Collins:

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# 621426 (EPISD ORR# 2016.136).

The El Paso Independent School District (the "district") received a request for six categories of information pertaining to a named employee. You state the district has redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You also state the district has released some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.107 and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request because it does not pertain to the named employee. The

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA 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. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

district need not release nonresponsive information in response to this request, and this ruling will not address that information.

Section 552.107(1) of the Government Code protects information subject to 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. 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 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 information you have marked constitutes communications between attorneys for the district and district employees that were made for the purpose of facilitating the rendition of professional legal services to the district. You also state the communications were intended to be confidential and have remained confidential. Thus, the district may generally withhold the information you have marked under section 552.107(1) of the Government Code. We note, however, one of the e-mail strings and one of the memoranda at issue include attachments received from or sent to non-privileged parties. Furthermore, if the attachments received from or sent to non-privileged parties are removed from the e-

mail string and memorandum at issue and stand alone, they are responsive to the request for information. Therefore, if these non-privileged attachments, which we have marked, are maintained by the district separate and apart from the otherwise privileged e-mail string and memorandum to which they are attached, then the district may not withhold these non-privileged attachments under section 552.107(1) of the Government Code.

Section 552.135 of the Government Code provides, in relevant part:

(a) "Informer" means a student or a former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

Gov't Code § 552.135(a)-(c). Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under that exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* § 552.301(e)(1)(A). Additionally, individuals who provide information in the course of an investigation, but do not report a violation are not informants for purposes of section 552.135 of the Government Code. In this instance, the district asserts section 552.135 protects some of the remaining information because it reveals the identities of individuals who made reports of alleged violations of the Code of Ethics and Standard Practices for Texas Educators, section 247.2 of title 19 of the Texas Administrative Code. Based on the district's representations and our review, we conclude the district must withhold the information we marked under section 552.135 of the Government Code. However, we find the district has not demonstrated any of the remaining information at issue

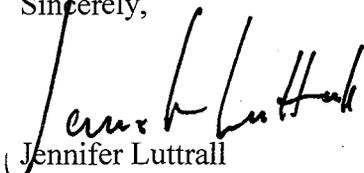
identifies an informer for purposes of section 552.135. Therefore, the district may not withhold any of the remaining information at issue on that basis.

In summary, the district may generally withhold the information you have marked under section 552.107(1) of the Government Code. However, if the non-privileged attachments we have marked are maintained by the district separate and apart from the otherwise privileged e-mail string and memorandum to which they are attached, then the district may not withhold these non-privileged attachments under section 552.107(1) of the Government Code. The district must withhold the information we marked under section 552.135 of the Government 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/akg

Ref: ID# 621426

Enc. Submitted documents

c: Requestor
(w/o enclosures)