April 7, 2008

Ms. LeAnne Lundy
Feldman, Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2008-04627

Dear Ms. Lundy:

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# 306708.

The Galveston Independent School District (the "district"), which you represent, received a request for copies of the legal fees provided to the school board on January 16, 2008. You state that you have provided a portion of the requested information to the requestor. You state that you are withholding some of the information pursuant to the federal Family Educational Rights and Privacy Act ("FERPA").¹ You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code and Texas Rule of Evidence 503. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note and you acknowledge, the submitted information consists entirely of attorney fee bills that are subject to section 552.022 of the Government Code. Section 552.022(a)(16) provides for the required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege," unless

¹We note that the United States Department of Education Family Policy Compliance Office (the "DOE") informed this office that FERPA, 20 U.S.C. § 1232(a), 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 that 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: http://www.oag.state.tx.us/opinion/og_resources.shtml.
the information is expressly confidential under other law. Gov't Code § 552.022(a)(16). Section 552.101 is other law that makes information confidential for the purposes of section 552.022. Additionally, the Texas Supreme Court has held that 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 assertions of section 552.101 and the attorney-client privilege under Texas Rule of Evidence 503.


This office addressed the interplay of the Privacy Rule and the Act in Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. See 45 C.F.R. § 164.512(a)(1). We further noted that the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." See Open Records Decision No. 681 at 8 (2004); see also Gov't Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. Abbott v. Tex. Dep't of Mental Health & Mental Retardation, 212 S.W.3d 648 (Tex.App.—Austin 2006, no pet.); see also Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the district may withhold requested protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

You claim a portion of the information at issue is also confidential under section 552.101 in conjunction with the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12101 et seq. The ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept
in separate medical files, and 3) treated as a confidential medical record. In addition, an employer’s medical examination or inquiry into the ability of an employee to perform job-related functions is to be treated as confidential medical records. 29 C.F.R. § 1630.14(c); see also Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission (the “EEOC”) has determined that medical information for the purposes of the ADA includes “specific information about an individual’s disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual.” See Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997).

Federal regulations define “disability” for purposes of the ADA as “(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.” 29 C.F.R. § 1630.2(g). The regulations further provide that:

physical or mental impairment means: (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h). Upon review of your arguments and the information at issue, we find that the district has failed to demonstrate that the information at issue is confidential under the ADA. Accordingly, the district may not withhold any of the requested information under section 552.101 of the Government Code in conjunction with the ADA.

We now address your claim under Texas Rule of Evidence 503 which enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

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

(A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer’s representative;

(C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a
representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; 

(D) between representatives of the client or between the client and a representative of the client; 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 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).

Thus, 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. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). Pittsburgh Corning Corp. v. Caldwell, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You have marked information in the submitted attorney fee bills which you state documents communications between the district’s attorneys and their client that were made in connection with the rendition of professional legal services to the district. You also state that these communications were intended to be confidential. You have identified most of the parties to the communications. Based on your representations and our review of the information at issue, we have marked the information that the district may withhold on the basis of the attorney-client privilege under Texas Rule of Evidence 503. As you have not demonstrated how any of the remaining information at issue constitutes confidential communications between privileged parties made for the purpose of facilitating the rendition of professional legal services, the rest of the submitted information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in
Travis County within 30 calendar days. Id. § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. Id. § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. Id. § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. Id. § 552.321(a); Texas Dep’t of Pub. Safety v. Gilbreath, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Chris Schulz
Assistant Attorney General
Open Records Division

CS/jb
Ref: ID# 306708

Enc. Submitted documents

c: Ms. Rhiannon Meyers
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(w/o enclosures)