



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 10, 2015

Ms. Lauri Schneidau Ruiz
Senior Assistant General Counsel
University of Houston System
311 E Cullen Building
Houston, Texas 77204-2028

OR2015-14027

Dear Ms. Ruiz:

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# 570943.

The University of Houston (the "university") received a request for all complaints, grievances, and reports of misconduct, as well as any related records, brought against or about the University of Houston Charter School (the "school"), two named school administrators, and any other school administrators over a specified time period. You state you have released some information to the requestor. You claim the submitted information is privileged under rule 503 of the Texas Rules of Evidence. We have considered your argument and reviewed the submitted information.

Initially, we note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, 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.¹ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not

¹A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

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”). We further note the requestor is a parent of the student to whom 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 parents have a right of access under FERPA to their own child’s education records and their right of access prevails over claims under section 552.101 of the Government Code. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; *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. The DOE has also informed our office, however, a parent’s right of access under FERPA to information about the parent’s child does not prevail over an educational institution’s right to assert the attorney-client privilege. Therefore, we will address your assertion of the attorney-client privilege to the information at issue.

Next, you state some of the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2015-07173 (2015). In that ruling, we determined (1) the university may withhold the marked information under Rule 503 of the Texas Rules of Evidence; (2) to the extent the university determines the submitted information does not constitute student records to which the student’s parent has a right of access under FERPA, the university must withhold the marked information under section 552.101 of the Government Code in conjunction with section 51.971(c) of the Education Code; and (3) the university must release the remaining information. You inform us there has been no change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the university must continue to rely on Open Records Letter No. 2015-07173 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). As the submitted information is not encompassed by the previous ruling, we address your argument against disclosure.

Next, we note the submitted information is part of a completed investigation subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless the information is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. Gov’t Code § 552.022(a)(1). You claim the information 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” for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). Accordingly, we will address your claim under rule 503 of the Texas Rules of Evidence.

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 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 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 state the submitted information consists of communications made between university general counsel and school and university staff members in their capacity as clients. You state these communications were made for the purpose of facilitating the rendition of professional legal services. You further states these communications were intended to be confidential and have remained confidential. Based on your representations and our review of the information at issue, we find the university has established the submitted information constitutes privileged attorney-client communications under rule 503. Thus, the university may withhold the submitted information pursuant to rule 503 of the Texas Rules of Evidence. However, some of the otherwise-privileged e-mail strings include e-mails and attachments received from or sent to non-privileged third parties. We find these e-mails and attachments are separately responsive. Therefore, if these non-privileged e-mails and attachments, which we have marked, are maintained by the university separate and apart from the otherwise-privileged e-mail strings in which they appear, then the university may not withhold them under rule 503 of the Texas Rules of Evidence. In that instance, as you raise no further exceptions against disclosure, the university must release the marked non-privileged e-mails and attachments.

In summary, the university must continue to rely on Open Records Letter No. 2015-07173 as a previous determination and withhold or release the identical information in accordance with that ruling. The university may withhold the submitted information pursuant to rule 503 of the Texas Rules of Evidence. However, if the non-privileged e-mails and attachments, which we have marked, exist separate and apart from the otherwise privileged e-mail strings in which they appear, then the university must release the non-privileged e-mails and attachments.²

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

²We note the requestor has a right of access to her own personal e-mail address in the information that is being released. See Gov't Code § 552.137(b) (personal email address of member of public may be disclosed if owner of address affirmatively consents to its disclosure).

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script that reads "Abigail T. Adams". The signature is written in black ink and is positioned above the typed name.

Abigail T. Adams
Assistant Attorney General
Open Records Division

ATA/akg

Ref: ID# 570943

Enc. Submitted documents

c: Requestor
(w/o enclosures)