



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 29, 2015

Mr. Mike Harper
Professional Standards Administrator
Killeen Independent School District
P.O. Box 967
Killeen, Texas 76540-0967

OR2015-22683

Dear Mr. Harper:

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# 584972.

The Killeen Independent School District (the "district") received a request for information pertaining to the requestor's child. You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code and privileged under Texas Rule of Evidence 503.¹ We have considered the submitted arguments and reviewed the submitted representative sample of information.²

¹Although you raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code and Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass other exceptions found in the Act or discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

²We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Initially, you state you have redacted information that is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Next, we note some of the responsive information may have been the subject of a previous request for information in response to which this office issued Open Records Letter No. 2015-15584 (2015). In Open Records Letter No. 2015-15584, we ruled the district may withhold the marked information under Texas Rule of Evidence 503 and must release the remaining responsive information to the requestor. As we have no indication the law, facts, and circumstances on which the prior ruling was based has changed, the district must continue to rely on Open Records Letter No. 2015-15584 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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the information at issue was not previously ruled upon, we will address the submitted arguments against disclosure.

You also state you have redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code. 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 process under the Act.³ 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”). You have submitted redacted and unredacted education records for our review. 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 and their right of access prevails over a claim under section 552.103 of the Government Code. *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.”); Open Records Decision No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to Gov’t Code § 552.103); *see also*

³A 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>.

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.⁴ 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 privilege. Therefore, to the extent that the requestor has a right of access under FERPA to any of the information for which you claim the attorney-client privilege, we will consider your claim. We will also consider the district's arguments with respect to the rest of the responsive information.

We note some of the responsive information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege; [and]

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(16), (17). The information submitted as Exhibit B consists of attorney fee bills subject to section 552.022(a)(16), and the information submitted as Exhibit C consists of court-filed documents subject to section 552.022(a)(17). The district must release this information unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(16), (17). Although you assert the court-filed documents in Exhibit C are excepted from disclosure under section 552.103 of the Government Code and the information in Exhibit B is excepted from disclosure under section 552.107(1) of the Government Code, these sections are discretionary and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the district may not withhold Exhibit C under section 552.103 of the Government Code. As you

⁴In 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.

have not claimed any other exceptions to disclosure for this information, the district must release Exhibit C. Likewise, the district may not withhold Exhibit B under section 552.107(1) of the Government Code. However, the attorney-client privilege is also found under Texas Rule of Evidence 503. 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 assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the attorney fee bills in Exhibit B. We will also consider your argument under section 552.103 for the information not subject to section 552.022.

Texas Rule of Evidence 503(b)(1) provides the following:

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 assert the submitted fee bills should be withheld under rule 503. You state the attorney fee bills contain communications between attorneys for the district and district officers and employees that were made for the purpose of facilitating the rendition of professional legal services. You do not indicate the district has waived the attorney-client privilege with regard to the communications. Upon review, we find the district may withhold the information we have marked under Texas Rule of Evidence 503. However, some of the communications are with individuals you have not demonstrated are privileged parties. Further, some of the information at issue does not document a communication. We note an entry stating a memorandum or an email was prepared or drafted does not demonstrate the document was communicated to the client. Thus, we find you have not demonstrated the remaining information constitutes privileged attorney-client communications for the purposes of Texas Rule of Evidence 503. Thus, the district may not withhold the remaining responsive information at issue on that basis.

Section 552.103 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the

governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

You state, and provide documentation showing, prior to the district's receipt of the instant request, a lawsuit styled *Davis v. Killeen Independent School District*, Case No. 6:14-CV-00332-WSS-JCM, was filed and is currently pending against the district in the United States District Court for the Western District of Texas, Waco Division. Therefore, we agree litigation was pending on the date the district received the present request for information. You also state Exhibit D pertains to the substance of the lawsuit claims. Based on your representations and our review, we find Exhibit D is related to the pending litigation. Therefore, we conclude the district may withhold Exhibit D under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

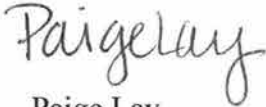
In summary, to the extent any of the requested information was at issue in Open Records Letter No. 2015-15584, the district must continue to rely on Open Records Letter No. 2015-15584 as a previous determination and withhold or release the identical information in accordance with that ruling. The district may withhold the information we have marked under Texas Rule of Evidence 503. The district may withhold Exhibit D under section 552.103 of the Government Code. The remaining responsive 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,

A handwritten signature in cursive script that reads "Paigelay".

Paige Lay
Assistant Attorney General
Open Records Division

PL/dls

Ref: ID# 584972

Enc. Submitted documents

cc: Requestor
(w/o enclosures)