



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 26, 2016

Mr. W. Montgomery Meitler
Senior Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2016-04680

Dear Mr. Meitler:

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# 599772 (TEA PIR# 25928 and 25929).

The Texas Education Agency (the "agency") received two requests from the same requestor for information pertaining to the determination to close a specified school district, and all candidate districts considered for potential annexation of all or part of the specified school district. You state the agency will release some responsive information. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, you assert some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2015-08386, 2016-04647 (2016), and 2016-04678 (2016). In Open Records Letter Nos. 2015-08386 and 2016-04647, we determined the agency may withhold the information at issue under section 552.116 of the Government Code. In Open Records Letter No. 2016-04678, we determined the agency may withhold the information you marked under

¹We 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.

section 552.107(1) of the Government Code and the remaining information at issue under section 552.116 of the Government Code. We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Accordingly, the agency must continue to rely on Open Records Letter Nos. 2015-08386, 2016-04647, and 2016-04678 as previous determinations and withhold the identical information in accordance with those rulings. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). We will address your arguments against release of the submitted information, which is not encompassed by those rulings.

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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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. *See* 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. *See 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 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. *See* 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. Finally, 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. *See 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 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 some of the submitted information reveals communications involving agency attorneys, agency representatives, and other agency staff and clients. You state the communications were made for the purpose of facilitating the rendition of professional legal

services to the agency and these communications have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the agency may withhold the information you have marked under section 552.107(1) of the Government Code.

Section 552.116 of the Government Code provides the following:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state the remaining submitted information consists of audit working papers that were prepared or are maintained by the agency's Division of Accreditation and School Improvement, and Division of Complaints, Investigation, and Enforcement in conjunction with an audit of the school district specified in the request. You inform us this audit was authorized by sections 39.051 and 39.052 of the Education Code. *See* Educ. Code §§ 39.051 (commissioner of education by rule shall determine criteria for accreditation statuses of accredited, accredited-warned, and accredited probation), .052(a), (b)(1)-(2) (commissioner of education shall annually determine accreditation status of school

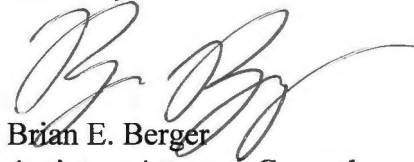
districts and shall assign accreditation status or revoke accreditation and order closure of district); *see also* § 39.102 (setting forth actions to be taken by commissioner of education if district does not satisfy accreditation criteria under section 39.052). Based on your representations and our review, we agree the information at issue consists of audit working papers for purposes of section 552.116. Accordingly, the agency may withhold the remaining submitted information under section 552.116 of the Government Code.

In summary, the agency must continue to rely on Open Records Letter Nos. 2015-08386, 2016-04647, and 2016-04678 and withhold the identical information in accordance with those rulings. The agency may withhold the information you have marked under section 552.107(1) of the Government Code. The agency may withhold the remaining submitted information under section 552.116 of the Government Code.

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,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 599772

Enc. Submitted documents

c: Requestor
(w/o enclosures)