



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 4, 2016

Ms. Katheryne Ellison
Assistant General Counsel
Houston Independent School District
4400 West 18th Street
Houston, Texas 77092-8501

OR2016-22329

Dear Ms. Ellison:

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# 629100 (File No. SxxxxxxKTRK070516).

The Houston Independent School District (the "district") received a request for e-mails sent or received by a named employee for a specified period of time.¹ The district states it is producing some of the requested information to the requestor, but claims the submitted information is excepted from disclosure under sections 552.107 and 552.116 of the

¹We note the district sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Government Code.² We have considered the submitted arguments and reviewed the submitted representative sample of information.³

We note some of the requested information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2016-14594 (2016). In Open Records Letter No. 2016-14594 we determined pursuant to section 552.007 of the Government Code the district must provide to the requestor any of the submitted information to the extent the district previously released it to a member of the public. To the extent the information was not subject to section 552.007, we determined the district (1) may withhold the information subject to section 552.022 of the Government Code under Texas Rule of Evidence 503; (2) may withhold the remaining information in Exhibit D and the information we have marked under section 552.107(1) of the Government Code; (3) may withhold the information we have marked under section 552.111 of the Government Code; (4) may withhold the remaining information in Exhibit F under section 552.116(a) of the Government Code; and (5) must release the remaining information. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, to the extent the submitted information is identical to the information previously submitted and ruled on by this office, we conclude the district may continue to rely on Open Records Letter No. 2016-14594 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). To the extent the submitted information is not subject to Open Records Letter No. 2016-14594, we will address the district's arguments against release of the submitted information.

Section 552.107(1) of the Government Code protects information coming within 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. ORD 676 at 6-7. 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

²Although the district also raises section 552.101 in conjunction with the attorney-client privilege, this office has concluded section 552.101 does not encompass discovery privileges. Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990) (predecessor statute).

³We assume 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 those records contain substantially different types of information than that submitted to this office.

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).

The district explains the information in Exhibit 2 constitutes confidential communications between attorneys, employees, and board members of the district that were made in furtherance of the rendition of professional legal services. The district also asserts the communications were intended to be confidential and their confidentiality has been maintained. Upon review, we find the district has demonstrated the applicability of the attorney-client privilege to the communications in Exhibit 2. Therefore, the district may withhold the information in Exhibit 2 under section 552.107(1) of the Government Code.

Section 552.116 of the Government Code provides as follows:

(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 the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 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. The district states the information in Exhibit 4 consists of audit working papers of an audit that was conducted by the district's Internal Auditor. The district also states the audit was authorized by specified board policies. The district states the information in Exhibit 5 pertains to an ongoing audit currently being conducted by KPMG. The district explains KPMG was selected by the district's Board of Education to conduct a third party, independent audit of the 2012 HISD Bond Program. The district states the information at issue consists of audit working papers of the district's independent auditor. The district further states the final audit report has not been completed. Based on the district's representations and our review, we agree the information at issue consists of audit working papers for purposes of section 552.116. Therefore, the district may withhold the information in Exhibits 4 and 5 under section 552.116 of the Government Code.

To conclude, the district may withhold the information in Exhibit 2 under section 552.107(1) of the Government Code. The district may withhold the information in Exhibits 4 and 5 under section 552.116(a) 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,

A handwritten signature in black ink that reads "Katelyn Blackburn-Rader". The signature is written in a cursive, flowing style.

Katelyn Blackburn-Rader
Assistant Attorney General
Open Records Division

KB-R/dls

Ref: ID# 629100

Enc. Submitted documents

c: Requestor
(w/o enclosures)