



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 1, 2016

Ms. Laura Rodriguez McLean
Counsel for the Bonham Independent School District
Walsh Gallegos Trevino Russo & Kyle P.C.
P.O. Box 168046
Irving, Texas 75016

OR2016-24284

Dear Ms. McLean:

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# 632631.

The Bonham Independent School District (the "district"), which you represent, received a request from two requestors for specified records, attorney fee bills, and e-mail correspondence. You state you have released some information to the requestors. You indicate the district does not have information responsive to portions of the request.¹ You state you have redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).² You claim the submitted information is excepted

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²The 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 purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the educational records. We have posted a copy of the letter from the DOE on the Attorney General's website at <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

from disclosure under section 552.107 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.³ We have considered the submitted arguments and reviewed the submitted representative sample of information.⁴ We have also received and considered comments from the requestors. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the requestors' assertion the district did not meet its procedural obligations under section 552.301 of the Government Code. Section 552.301 prescribes the procedures a governmental body must follow in asking this office to determine whether information is excepted from public disclosure under the Act. *See id.* § 552.301(a). Pursuant to section 552.301(b), within ten business days of receipt of the request the governmental body must ask for a decision from this office and state which exceptions apply to the requested information. *Id.* § 552.301(b). Pursuant to section 552.301(e), within fifteen business days of receipt of a request the governmental body must submit to this office, among other items, a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The requestors assert some of the information now at issue was responsive to the requestors' previous requests for "educational records" pertaining to the requestors' child. Thus, the requestors argue the district violated section 552.301 by failing to either release this information in response to the earlier requests or timely seeking decisions from this office. We understand the district to assert the earlier requests did not seek the information responsive to this request, and the information submitted in response to the present request would not have been responsive to the earlier requests. We note a governmental body must make a good-faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). We further note this office is unable to resolve disputes of fact in the open records ruling process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Accordingly, where an issue cannot be resolved as a matter of law, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 at 4. Therefore, based on the district's representations and the information provided to this office, we conclude the district made a good faith effort and released or requested a ruling for all information maintained by the district that was responsive to the previous requests. Thus, we find the district complied with section 552.301 of the Government Code with respect to these requests, and we will consider the district's arguments against disclosure of the submitted information.

³Although you also raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-2 (2002).

⁴We 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.

Next, we note some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2016-13244 (2016). In that ruling, we held, except for the information we marked for release, the district 1) may withhold the information it marked pursuant to rule 503 of the Texas Rules of Evidence, 2) must withhold the partial credit card numbers we marked under section 552.136 of the Government Code, and 3) must release the remaining information. As we have no indication the law, facts, or circumstances upon which the prior ruling was based have changed, the district must continue to rely on Open Records Letter No. 2016-13244 as a previous determination and withhold or release the information at issue in accordance with that ruling.⁵ See Open Records Decision No. 673 (2001) (so long as the law, facts, and circumstances upon which prior ruling is 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).

We now address the information not at issue in the previous determination. We note a portion of the information at issue consists of a completed report subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless it is excepted by section 552.108 of the Government Code or made confidential under the Act or other law. Gov’t Code § 552.022(a)(1). You raise section 552.107 of the Government Code for this information. However, section 552.107 does not make information confidential under the Act. See Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under Gov’t Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, the district may not withhold the information at issue under section 552.107 of the Government Code. Nevertheless, section 552.107 encompasses the attorney-client privilege, which is found at rule 503 of the Texas Rules of Evidence. 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 (Tex. 2001). Therefore, we will consider the applicability of rule 503 for the completed report subject to section 552.022(a)(1). Additionally, we will consider your argument under section 552.107 for the information not subject to section 552.022(a)(1).

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:

⁵As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(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 information subject to section 552.022(a)(1) is excepted from disclosure under rule 503 of the Texas Rules of Evidence. However, we find you have failed to demonstrate the information subject to section 552.022(a)(1) is a privileged attorney-client communication for the purpose of rule 503. Accordingly, the district may not withhold any of the information subject to section 552.022(a)(1) of the Government Code under rule 503 of the Texas Rules of Evidence.

Next, we address the information not subject to section 552.022 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed above for rule 503. 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. 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 assert the remaining information at issue consists of communications involving attorneys for the district and district representatives and staff in their capacities as clients. You claim these communications were made in furtherance of the rendition of professional legal services to the district. You assert these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to portions of the remaining information at issue. However, upon review, we find portions of the information you seek to withhold have been shared with individuals you have not demonstrated are privileged parties. Accordingly, the district may generally withhold the remaining information, except for the information we marked for release, under section 552.107(1) of the Government Code. Additionally, we note some of the remaining e-mail strings include e-mails or attachments received from or sent to non-privileged parties. Furthermore, if the e-mails and attachments received from or sent to non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails and attachments, which we marked, are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code.

In summary, the district must continue to rely on Open Records Letter No. 2016-13244 as a previous determination and withhold or release the information at issue in accordance with that ruling. The district must release the information we marked under section 552.022(a)(1) of the Government Code. With the exception of the non-privileged information we marked for release, the district may generally withhold the remaining information under section 552.107(1) of the Government Code. However, if the non-privileged e-mails and attachments we marked are maintained by the district separate and apart from the otherwise privileged e-mail string in which they appear, the district may not withhold these

non-privileged e-mails and attachments under section 552.107(1) of the Government Code.⁶

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,



Ian Lancaster
Assistant Attorney General
Open Records Division

IML/akg

Ref: ID# 632631

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶We note the requestors have a special right of access to some of the information being released pursuant to section 552.137(b) of the Government Code. *See Gov't Code § 552.137(b)*(personal e-mail address of member of public may be disclosed if owner of address affirmatively consents to its disclosure). Open Records Decision No. 684 (2009) serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. Accordingly, if the district releases the e-mail address at issue, and if the district receives another request for this information from a requestor who does not have such a right of access, Open Records Decision No. 684 authorizes the district to redact the personal e-mail address at issue under section 552.137 of the Government Code without the necessity of requesting a decision under the Act.