



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 9, 2016

Mr. C. Cory Rush
Counsel for Fort Bend Independent School District
Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2016-27365

Dear Mr. Rush:

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# 637115 (RMG ID #2016-17-146).

The Fort Bend Independent School District (the "district"), which you represent, received a request for all information relating to the investigation of a named district employee. You state some information has been released to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.108 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

Initially, we note the district has redacted some of the submitted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. The United States Department of Education Family Policy Compliance Office has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in

¹We 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.

education records for the purpose of our review in the open records ruling process under the Act.² Some of the information the district submitted was created by the district's police department. We note FERPA is not applicable to records that were created by a law enforcement unit of an educational agency or institution for a law enforcement purpose and that are maintained by the law enforcement unit. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8. You have also submitted redacted 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 these records. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the district; therefore, we will not address the applicability of FERPA to this information. However, we will consider the district's arguments against disclosure of the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes, such as section 58.007 of the Family Code. Section 58.007 provides, in relevant part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). For purposes of section 58.007(c), a "child" is a person who was ten years of age or older and under seventeen years of age at the time of the conduct. *See id.* § 51.02(2). Thus, under section 58.007, law enforcement records relating to a juvenile engaged in delinquent conduct or conduct indicating a need for supervision on or after September 1, 1997 are confidential. *See id.* § 51.03(a), (b) (defining "delinquent conduct" and "conduct indicating a need for supervision"). Upon review, we find the information

²A copy of this letter may be found on the Office of the Attorney General's website: <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

submitted as Exhibit B involves a juvenile engaged in delinquent conduct on or after September 1, 1997. It does not appear that any of the exceptions to confidentiality under section 58.007 of the Family Code apply to this information. Thus, Exhibit B is confidential under section 58.007(c) of the Family Code, and the district must withhold it under section 552.101 of the Government Code.³

Next, we note some of the remaining information consists of completed reports 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 reports subject to section 552.022(a)(1). Further, as section 552.102 of the Government Code makes information confidential, we will consider the applicability of this section for the completed reports. Additionally, we will consider your arguments under sections 552.102 and 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:

- (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

³As our ruling is dispositive, we need not address the district’s remaining arguments against disclosure for the information at issue.

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 indicate the completed reports subject to section 552.022(a)(1) were attachments to an e-mail communication between district attorneys and employees made for the purpose of facilitating the rendition of professional legal services to the district. You state the communication was intended to be confidential and was not disclosed to non-privileged parties. Upon review, we find you have demonstrated the completed reports are part of a privileged communication for purposes of rule 503 of the Texas Rules of Evidence. Thus, the district may generally withhold the information subject to section 552.022(a)(1) under rule 503 of the Texas Rules of Evidence. However, if these reports are removed from the privileged e-mail string and stand alone, they are responsive to the request for information. Therefore, if these reports, which we marked, are maintained by the district separate and apart from the otherwise privileged e-mail string in which they appear, then the district may not withhold the reports under rule 503. However, if these reports are not maintained separate and apart from the otherwise privileged e-mail string, then the district may withhold them under rule 503 of the Texas Rules of Evidence.

Next, we address your argument under section 552.107 of the Government Code for the information in Exhibit C that is 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. *See* Gov't Code § 552.107(1). The elements of privilege under section 552.107 are the same as those discussed 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 No. 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 state Exhibit C consists of communications between attorneys for the district and employees of the district. You state these communications were made in furtherance of the rendition of professional legal advice. You state 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 the information at issue in Exhibit C. Accordingly, the district may withhold the information in Exhibit C that is not subject to section 552.022 under section 552.107(1) of the Government Code.⁴

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov't Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find, if the completed reports are not privileged under Texas Rules of Evidence 503, the district must withhold the information it marked in the completed reports under section 552.102(a) of the Government Code.

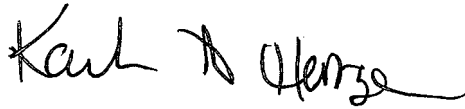
In summary, the district must withhold Exhibit B section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code. The district may generally withhold the completed reports we have marked under Texas Rule of Evidence 503; however, the district must release these reports if it maintains them separate and apart from the otherwise privileged e-mail string in which they appear. The district may withhold the information in Exhibit C that is not subject to section 552.022(a)(1) under section 552.107(1) of the Government Code. If the district releases the completed reports we marked, it must withhold the information it marked under section 552.102(a) of the Government Code.

⁴As our ruling is dispositive, we need not address the district's remaining argument against disclosure for the information at issue.

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,



Kaelan A. Henze
Assistant Attorney General
Open Records Division

KAH/eb

Ref: ID# 637115

Enc. Submitted documents

c: Requestor
(w/o enclosures)