



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 6, 2017

Ms. Ylise Janssen
General Counsel
Austin Independent School District
1111 West Sixth Street, Suite A-240
Austin, Texas 78703

OR2017-07228

Dear Ms. Janssen:

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# 652038.

The Austin Independent School District (the "district") received a request for all records related to a named individual. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, 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.¹ 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

¹A copy of this letter may be found on the Office of the Attorney General's website at <http://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

submitted 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, except to note parents have a right of access under FERPA to their children's education records. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. This statutory federal right of access prevails over a conflicting state law. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; *see also Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (FERPA prevails over inconsistent provision of state law). The Department of Education has informed us, however, that a parent's right of access under FERPA to information about the parent's child does not prevail over an educational institution's right to assert the attorney-client privilege. Therefore, we will address the district's assertion of this privilege under section 552.107 of the Government Code.

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. Open Records Decision No. 676 at 6-7 (2002). 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 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.*, 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).

You state the submitted information consists of communications between district employees and attorneys for the district. You also state the communications were made in confidence for the purpose of facilitating the rendition of professional legal services to the district and these communications have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the submitted information. Therefore, the district may generally withhold the submitted information under section 552.107(1) of the Government Code. However, we note some of the otherwise privileged e-mail strings include e-mails sent to non-privileged parties, including the requestor. Furthermore, if these e-mails are removed from the e-mail strings and stand alone, they are responsive to the instant request. Therefore, if the district maintains these non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code.

To the extent the non-privileged e-mails exist separate and apart from the otherwise privileged e-mail strings in which they appear, we note a portion of this information is subject to section 552.137 of the Government Code.² Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). We note the information at issue includes the requestor’s e-mail address, to which the requestor has a right of access pursuant to section 552.137(b). *See id.* § 552.137(b). Accordingly, the district may not withhold the requestor’s e-mail address from her under section 552.137 of the Government Code. However, the district must withhold the e-mail address we have marked, which is not subject to section 552.137(c), under section 552.137 of the Government Code, unless its owner affirmatively consents to its public disclosure.

In summary, the district may generally withhold the submitted information under section 552.107(1) of the Government Code. However, if the district maintains these non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. To the extent the non-privileged e-mails exist separate and apart from the otherwise privileged e-mail strings in which they appear, the district must withhold the e-mail address we have marked under

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

section 552.137 of the Government Code, unless its owner affirmatively consents to its public disclosure, and release the non-privileged information.³

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,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/sb

Ref: ID# 652038

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the requestor has a right of access beyond that of the general public to some of the information being released. See Gov't Code §§ 552.137(b), .023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide him with information concerning himself).