



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 15, 2019

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

OR2019-04419

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# 750417 (File No. Rojas KXLN101518).

The Houston Independent School District (the "district") received a request for e-mails involving named individuals during a specified time period and information pertaining to employee salaries during a specified year.¹ You state the district will release some information. You claim the submitted information is excepted from disclosure under sections 552.107, 552.116, and 552.126 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹You state the district sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code, in response to which the requestor modified his request. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the district received the required deposit on November 16, 2018. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

²We 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.

Initially, you inform us some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2018-30465 (2018), 2019-01421 (2019), and 2019-03176 (2019). We have no indication the law, facts, or circumstances on which these rulings were based have changed. Accordingly, with respect to the requested information that is identical to the information previously requested and ruled upon by this office in the prior rulings, we conclude the district must continue to rely on Open Records Letter Nos. 2018-30465, 2019-01421, and 2019-03176 as previous determinations and withhold or release the previously ruled upon information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was 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 information is or is not excepted from disclosure). To the extent the information at issue is not encompassed by the prior rulings, we will address your arguments against its release.

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. *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. 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 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.* 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 Exhibit 3 consists of communications between attorneys for the district, including outside counsel, and district officials and employees that were made for the purpose of providing legal services to the district. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have established the information at issue consists of privileged attorney-client communications. Therefore, the district may withhold Exhibit 3 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 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. You assert Exhibit 5 consists of audit working papers. You state the information at issue pertains to an ongoing external audit being conducted by the Legislative

Budget Board. You inform us the audit at issue was authorized by a resolution of the district's board of trustees, which you have submitted for our review. Based on your representations and our review, we agree the information at issue constitutes audit working papers. Therefore, the district may withhold Exhibit 5 under section 552.116 of the Government Code.

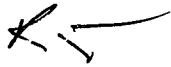
Section 552.126 excepts from disclosure the "name of an applicant for the position of superintendent of a public school district . . . except that the board of trustees must give public notice of the name or names of the finalists being considered for the position at least 21 days" before a vote or final action is taken. *Id.* § 552.126. Furthermore, this protection from disclosure extends not only to the name of the individual, but also to any information tending to identify the individual. *See* Open Records Decision No. 540 (1990) (interpreting section 552.123—which, in language similar to section 552.126, protects identities of applicants for chief executive officer of institution of higher education—as applying to identities, rather than just names of applicants). This office has previously held the type of information that identifies individuals in such cases includes, but is not limited to, resumes, professional qualifications, membership in professional organizations, dates of birth, current positions, publications, letters of recommendation, or any other information that can be uniquely associated with a particular applicant. *Id.* You state Exhibit 7 reveals the identity of an applicant for the position of superintendent of the district. Accordingly, you seek to withhold Exhibit 7 in its entirety under section 552.126. We understand, prior to the date of the instant request, the district's board hired a superintendent from a pool of applicants, and that individual's information may not be withheld under section 552.126. Nor may the district withhold the information of any applicants who were named as finalists for the superintendent position. Upon review, we agree portions of the information at issue identify or tend to identify a candidate for the position of superintendent. However, you do not inform us whether the individual whose information is at issue was named as a finalist for the superintendent position. Thus, we must rule conditionally. Accordingly, to the extent the individual at issue was named a finalist for the superintendent position, the district may not withhold any portion of Exhibit 7 under section 552.126 of the Government Code. To the extent the individual at issue was not named a finalist for the superintendent position, the district may withhold the information we marked in Exhibit 7 under section 552.126 of the Government Code. However, we find you have failed to demonstrate any of the remaining information at issue identifies or tends to identify any particular candidate for the position of superintendent. Accordingly, the district may not withhold any of the remaining information under section 552.126.

In summary, the district may withhold the information you marked under section 552.107(1) of the Government Code. The district may withhold Exhibit 5 under section 552.116 of the Government Code. To the extent the individual at issue was not named a finalist for the superintendent position, the district may withhold the information we marked in Exhibit 7 under section 552.126 of the Government Code. The district must release the remaining information.

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,



Kelly McWethy
Assistant Attorney General
Open Records Division

KSM/mo

Ref: ID# 750417

Enc. Submitted documents

c: Requestor
(w/o enclosures)