



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 4, 2019

Mr. Joseph E. Hoffer
Counsel for Imagine International Academy of North Texas
Schulman, Lopez, Hoffer & Adelstein, LLP
845 Proton Road
San Antonio, Texas 78258

OR2019-09165

Dear Mr. Hoffer:

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# 762655.

The Imagine International Academy of North Texas (the "academy"), which you represent, received three requests from two requestors for correspondence and other information pertaining to the requestors' child and a certain matter. You state the academy will release some information to the requestors. You claim the remaining requested information is excepted from disclosure under section 552.107 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted representative sample of information.²

¹Although you also raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* Open Records Decision No. 676 at 1-2 (2002).

²This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

The United States Department of Education Family Policy Compliance Office has informed this office that the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code, does not permit a state educational agency or institution 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.³ Consequently, state and local education 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”). In this instance, you have submitted unredacted education records for our review. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to any of the submitted records, other than to note that parents have a right of access under FERPA to their own child’s education records. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; Open Records Decision No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to Gov’t Code § 552.103); *see also Equal Employment Opportunity Comm’n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (holding FERPA prevails over inconsistent provision of state law). Such determinations under FERPA must be made by the educational authority in possession of the education records. The Department of Education also has informed our office, however, 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 consider your assertion of the attorney-client privilege under section 552.107 of the Government Code for 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 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

³A copy of this letter may be found on the Office of the Attorney General’s website: <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/20060725-USDOE-FERPA.pdf>.

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). 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 constitutes communications between academy staff and the academy’s legal counsel that were made for the purpose of providing legal services to the academy. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the submitted information consists of privileged attorney-client communications the academy may generally withhold under section 552.107(1). We note, however, one of these e-mail strings includes e-mails received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the e-mail string and stand alone, they are responsive to the third request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the academy separate and apart from the otherwise privileged e-mail string in which they appear, the academy may not withhold these non-privileged e-mails under section 552.107(1). In that instance, as you raise no further exceptions to disclosure, the academy must release them.

In summary, the academy may generally withhold the submitted information under section 552.107(1) of the Government Code. However, if the e-mails we have marked are maintained by the academy separate and apart from the otherwise privileged e-mail string in which they appear, the academy must release the marked non-privileged e-mails.⁴

⁴In that instance, we note the requestors have a right of access to some of the information that is being released, including their personal e-mail addresses. *See* Gov’t Code §§ 552.023(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), .137(b) (personal e-mail address of member of public may be disclosed if owner of address affirmatively consents to its disclosure). Accordingly, if the academy receives another request for this information from an individual other than these requestors, the academy must again seek a ruling from this office.

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 "Lindsay E. Hale". The signature is written in a cursive style with a large, looping initial "L".

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/gw

Ref: ID# 762655

Enc. Submitted documents

c: Requestors
(w/o enclosures)