



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 18, 2019

Mr. Chad Timmons  
Counsel for Prosper Independent School District  
Abernathy, Roeder, Boyd & Hullett, P.C.  
P.O. Box 1210  
McKinney, Texas 75070

OR2019-10509

Dear Mr. Timmons:

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# 760284 (File No. DT-120318).

The Prosper Independent School District (the "district"), which you represent, received a request for information regarding a specified Texas Education Agency investigation.<sup>1</sup> The district states it provided some information to the requestor. The district also states it has redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>2</sup> The district claims the submitted

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<sup>1</sup>We note, and the district provides documentation showing, the district sought and received clarifications of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup>The 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 student 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 education records. A 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>.

information is excepted from disclosure under section 552.107 of the Government Code.<sup>3</sup> We have considered the claimed exception and reviewed the submitted information. We have also received and considered comments submitted by the requestor.<sup>4</sup> *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

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* ORD 676 at 6-7. 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). 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.

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<sup>3</sup>Although the district also raises section 552.101 of the Government Code, and generally raises the Texas Rules of Civil Procedure, the district provides no arguments explaining how this exception and these rules are applicable to the information at issue. Therefore, we assume the district no longer asserts this exception and these rules. *See* Gov't Code §§ 552.301, .302. Additionally, although 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, as in this case, is section 552.107 of the Government Code. *See* Open Records Decision Nos. 676 at 1 (2002).

<sup>4</sup>We note the requestor argues the district failed to comply with the requirements of section 552.301 of the Government Code regarding this request. *See* Gov't Code § 552.301(b), (e). Regardless of whether there was a section 552.301 violation, we note section 552.107 of the Government Code can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301 of the Government Code.

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).

The district states the submitted information consists of communications between attorneys for the district and district representatives that were made for the purpose of facilitating the rendition of professional legal services to the district. The district also states these communications were intended to be confidential and have remained confidential. Based upon your representations and our review, we find the information at issue consists of privileged attorney-client communications. Accordingly, the district may withhold the submitted information under section 552.107(1) of the Government Code.

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](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,



James M. Graham  
Assistant Attorney General  
Open Records Division

JMG/gw

Ref: ID# 760284

Enc. Submitted documents

c: Requestor  
(w/o enclosures)