



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 6, 2019

Ms. Sarah S. Flournoy
Attorney for Hurst-Euless-Bedford ISD
Brackett & Ellis, P.C.
100 Main Street
Fort Worth, Texas 76102-3090

OR2019-31301

Dear Ms. Flournoy:

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# 797942.

The Hurst-Euless-Bedford Independent School District (the "district"), which you represent, received a request for three categories of information pertaining to a named former employee. The district informs us it will release some information to the requestor. The district states it has redacted student-identifying information from the submitted documents pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ The district claims the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.135 of the Government Code. Additionally, the district states, and provides documentation showing, it notified the Texas Education Agency ("TEA") of its right to submit comments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from TEA. We have considered the

¹ 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-USDO-E-FERPA.pdf>.

submitted arguments and reviewed the submitted information, some of which consists of a representative sample.²

Initially, we note some of the submitted information is not responsive to the instant request for information because it was created after the date the district received the request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the district is not required to release such information in response to this request.

TEA seeks to withhold a portion of the submitted information, which you have indicated, under section 552.116 of the Government Code. Section 552.116 provides,

(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 [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] 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 by laws 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.

² We 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.

Id. § 552.116. TEA states the information at issue consists of audit working papers maintained by its Division of Educator Investigations in conjunction with a pending investigation of alleged educator misconduct. TEA informs us the investigation is authorized by sections 21.031 and 21.041 of the Education Code and section 249.14 of title 19 of the Texas Administrative Code. *See* Educ. Code §§ 21.031(a) (TEA shall regulate and oversee standards of conduct of public school educators), .041(b) (TEA shall propose rules providing for disciplinary proceedings); 19 T.A.C. § 249.14(a) (TEA may obtain and investigate information concerning an educator’s alleged improper conduct). Based on TEA’s representations and our review, we agree the responsive information at issue consists of audit working papers for purposes of section 552.116. Accordingly, the district may withhold the responsive information you indicated under section 552.116 of the Government Code on behalf of TEA.³

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov’t Code § 552.107(1). 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). 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

³ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

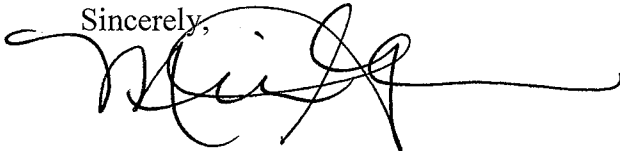
You state the information you have marked consist of communications involving attorneys for the district and district employees in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the district. You state these communications were intended to be, and have remained, confidential. Based on these representations and our review, we find the district has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the district may withhold the responsive information you marked under section 552.107(1) of the Government Code.⁴

In summary, the district may withhold the responsive information you indicated under section 552.116 of the Government Code on behalf of TEA. The district may withhold the responsive information you marked 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Michelle Garza
Assistant Attorney General
Open Records Division

MG/mo

Ref: ID# 797942

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.