



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 19, 2019

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

OR2019-32678

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# 796414 (File No. B08151).

The Houston Independent School District (the "district") received a request for communications between named individuals during a specified period.<sup>1</sup> The district claims the submitted information is excepted from disclosure under sections 552.107 and 552.116 of the Government Code.<sup>2</sup> Additionally, the district states release of some of the submitted information may implicate the proprietary interests of the Texas Education Agency ("TEA"). Accordingly, the district states, and provides documentation showing, it notified TEA of the request for information pursuant to section 552.304 of the Government Code. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have received comments

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<sup>1</sup> The district states it sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *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). The district informs us it received the required deposit on September 3, 2019. *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).

<sup>2</sup> Although the district raises section 552.101 of the Government Code in conjunction with 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; therefore we address the district's claim of the attorney-client privilege under section 552.107. *See* Open Records Decision No. 676 at 6 (2002).

from TEA. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>3</sup>

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 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 information in Exhibit 2 consists of communications involving attorneys for the district, their representatives, members of the district’s board of trustees, and district employees in their capacities as clients. You also state these communications were made in furtherance of the rendition of professional legal services to the district and these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information in Exhibit 2. Accordingly, the district may withhold the information in Exhibit 2 under section 552.107(1) of the Government Code.

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<sup>3</sup> 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.

Section 552.116 of the Government Code 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 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. The district states the information in Exhibit 4 consists of "communications prepared and/or maintained by [the district's] Internal Audit Office in connection with overseeing and coordinating internal and external audits[.]" The district states the audit at issue in Exhibit 4 is authorized by district board policies. *See id.* § 552.116(b)(1). TEA states the information in Exhibit 5 consists of audit working papers "maintained by TEA's Division of Governance and Investigations." TEA states the current audit is authorized by section 39.057(a)(16) of the Education Code, which permits special accreditation investigations to be conducted at as the Commissioner of Education determines necessary. *See Educ. Code § 39.057(a)(16)*. Based on these representations and our review, we agree the information in Exhibits 4 and 5 consists of audit working papers as defined in section 552.116(b)(2). Accordingly, the district may withhold the information in Exhibit 4 under section 552.116 of the Government Code and the information in Exhibit 5 under section 552.116 of the Government Code on behalf of TEA.

In summary, the district may withhold the information in Exhibit 2 under section 552.107(1) of the Government Code. The district may withhold the information in Exhibit 4 under section 552.116 of the Government Code and the information in Exhibit 5 under section 552.116 of the Government Code on behalf of TEA.

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,



Sean McCormick  
Attorney  
Open Records Division

SMC/eb

Ref: ID# 796414.

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)