



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

March 30, 2020

Ms. Ylise Janssen  
General Counsel  
Austin Independent School District  
4000 South IH-35 Frontage Road  
Austin, Texas 78704

OR2020-09682

Dear Ms. Janssen:

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# 821562.

The Austin Independent School District (the "district") received a request for any and all correspondence pertaining to the requestor and a named individual during a specified time period. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code.<sup>1</sup> We have considered the exception you claim and reviewed the submitted information.

Initially, we note some of the requested information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2020-06512 (2020). We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, to the extent the requested information is identical to the information previously requested and ruled upon, the district must continue to rely on Open Records Letter No. 2020-06512 as a previous determination and withhold or release the identical information at issue in accordance with that ruling. *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the information at issue is

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<sup>1</sup> Although you also raise section 552.101 of the Government Code, you provide no arguments explaining how this exception is applicable to the information at issue. Therefore, we assume the district no longer asserts this exception. *See* Gov't Code §§ 552.301, .302.

not encompassed by the previous ruling, we will address your argument against its disclosure.

Next, we note the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code, does not permit state and local education authorities 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.<sup>2</sup> 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 “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”).

You have submitted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records, other than to note parents and their legal representatives generally have a right of access to their 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); *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 education records. However, the DOE also has informed our office 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. Thus, we will consider your argument under section 552.107 of the Government Code.

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). Thus, a governmental body must inform this

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<sup>2</sup> A copy of this letter may be found on the Office of the Attorney General’s website at <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

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. *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 the submitted information consists of communications between attorneys for the district and district 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 upon your representations and our review, we find you have established the applicability of the attorney-client privilege to the information at issue. Accordingly, the district may generally withhold the submitted information under section 552.107(1) of the Government Code. We note, however, some of these otherwise privileged e-mail strings include e-mails received from or sent to an individual you have not demonstrated to be a privileged party. Furthermore, if the e-mails received from or sent to the non-privileged party are removed from the otherwise privileged e-mail strings in which they appear and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, the district may not withhold these non-privileged e-mails under section 552.107(1). In that case, the district must release these non-privileged e-mails, of which we marked a representative sample.

In summary, to the extent the requested information is identical to the information previously requested and ruled upon, the district must continue to rely on Open Records Letter No. 2020-06512 as a previous determination and withhold or release the identical information at issue in accordance with that ruling. The district may generally withhold the submitted information under section 552.107(1) of the Government Code; however, to the extent the non-privileged e-mail we marked is maintained by the district separate and apart from the otherwise privileged e-mail string in which it appears, the district may not withhold the non-privileged information under section 552.107(1) of the Government Code, but must, instead, release it to the requestor.<sup>3</sup>

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.

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<sup>3</sup> In this instance, the requestor has a right of access to her own personal e-mail address in the information being released. *See Gov't Code § 552.137(b)* (personal e-mail address of member of the public may be disclosed if owner of address affirmatively consents to its disclosure).

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,

Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/rm

Ref: ID# 821562

Enc. Submitted documents

c: Requestor  
(w/o enclosures)