



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 11, 2020

Mr. W. Montgomery Meitler
Senior Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2020-19970

Dear Mr. Meitler:

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# 840164 (Reference No. 42630)

The Texas Education Agency (the "TEA") received a request for information pertaining to two cases. You state the TEA will release some of the requested information. You also state the TEA is withholding student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ Further, you state the TEA will redact personal e-mail addresses pursuant to Open Records Decision No. 684 (2009).² You claim the submitted information is excepted from disclosure under sections 552.107 and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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

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/files/og/20060725usdoe.pdf>.

² Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including e-mail addresses of members of the public subject to section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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 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 marked consists of communications involving attorneys for the TEA and TEA staff in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the TEA. You state the communications were intended to be, and 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 at issue. Accordingly, the TEA may withhold the information you marked under section 552.107(1) of the Government Code.

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. You state the remaining information consists of audit working papers that were prepared or are maintained by the TEA's Division of Governance and Investigations. You state the audits at issue are authorized by section 39.057(a)(16) of the Education Code, which permits special accreditation investigations to be conducted. Educ. Code § 39.057 (listing circumstances in which agency commissioner shall authorize investigations). Based on these representations and our review, we agree the remaining information constitutes audit working papers. Therefore, the TEA may withhold the remaining information under section 552.116 of the Government Code.

In summary, the TEA may withhold the information you marked under section 552.107(1) of the Government Code. The TEA may withhold the remaining information under section 552.116 of the Government Code.

You ask this office to issue a previous determination permitting the TEA to withhold certain information under section 552.116 of the Government Code without the necessity of requesting a decision under section 552.301 of the Government Code. *See* Gov't Code § 552.301(a) (allowing a governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001) (listing elements of second type of previous determination under section 552.301(a) of the Government Code). We decline to issue such a previous determination at this time. Accordingly, 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,

Jahna Ward
Assistant Attorney General
Open Records Division

JW/rm

Ref: ID# 840164

Enc. Submitted documents

c: Requestor
(w/o enclosures)