



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 28, 2022

Ms. Amanda M. Bigbee
General Counsel
Keller Independent School District
350 Keller Parkway
Keller, Texas 76248

OR2022-05992

Dear Ms. Bigbee:

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# 931155 (PIR0001929).

The Keller Independent School District (the "district") received a request for communications between named individuals during certain date ranges containing specified key words. You state the district will release some of the requested information to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state some of the requested information was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2022-02602 (2022). In that ruling, we determined the district (1) may generally withhold the information you marked under section 552.107(1) of the Government Code; however, the district may not withhold the marked non-privileged e-mail if it is maintained separate and apart from the otherwise privileged e-mail string in which it appears, (2) may withhold Exhibit 3 under section 552.111 of the Government Code, (3) must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners of

¹ Although you also raise Texas Disciplinary Rule of Professional Conduct 1.05 and 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. *See* Open Records Decision No. 676 (2002).

the e-mail addresses affirmatively consent to their disclosure, and (4) must release the remaining information. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, the district must continue to rely on Open Records Letter No. 2022-02602 as a previous determination and withhold or release the 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). However, we will consider your arguments for the submitted information, which is not subject to the previous ruling.

Next, we must address the district's procedural obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). In this instance, you state the district received the request for information on November 29, 2021. We understand the district was closed from December 20, 2021, through December 31, 2021. This office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. Thus, the district was required to provide the information required by section 552.301(e) by January 3, 2022. However, you did not submit a copy of the specific information requested to our office until January 28, 2022. *See id.* § 552.309(a) (requirement to submit information within specified time period under the Act is met in timely fashion if it is submitted through attorney general's designated electronic filing system within that period). Consequently, we conclude the district failed to comply with the procedural requirements mandated by section 552.301(e) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). You claim sections 552.107 and 552.111 of the Government Code for the submitted information. Because section 552.107 can provide a compelling reason to overcome the presumption of openness, we will address your argument under this exception against release of the information at issue. However, we find you have failed to establish a compelling reason to address the remaining claimed exception.

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. *See* 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. 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 Exhibit 2 consists of communications between attorneys for the district and district officials and staff that were made for the purpose of facilitating the rendition of professional legal services to the district. You also state the communications were intended to be, and have remained, confidential. Based upon your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the district may withhold Exhibit 2 under section 552.107(1) of the Government Code. The district must release the remaining information.

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,

Erin Groff
Assistant Attorney General
Open Records Division

EMG/jm

Ref: ID# 931155

c: Requestor