



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 26, 2022

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

OR2022-15268

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# 947201 (TEA PIR# 51348).

The Texas Education Agency (the "agency") received a request for correspondence involving specified individuals. You claim a portion of the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, you state release of some of the submitted information may implicate the interests of the Round Rock Independent School District (the "district"). Accordingly, you state, and provide documentation showing, you notified the district of the request for information and of its right to submit arguments to this office. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered comments submitted by the district.<sup>1</sup> We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup> We note, and you acknowledge, the agency did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See* Gov't Code § 552.301(b), (e). Nonetheless, because section 552.101 of the Government Code and the interest of a third party can provide compelling reasons to overcome the presumption of openness, we will consider the arguments against disclosure of the submitted information. *See id.* §§ 552.007, .302, .352.

<sup>2</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.

Initially, you state some of the responsive information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2022-02217 (2022). In addition, we note some of the responsive information may have been the subject of another previous request for information, as a result of which this office issued Open Records Letter No. 2022-11271 (2022). In Open Records Letter No. 2022-02217, we determined the agency may withhold certain information under section 552.103 of the Government Code. In Open Records Letter No. 2022-11271, we determined the agency: (1) may withhold certain information under section 552.107(1) of the Government Code; however, if the agency maintains the non-privileged e-mail we marked separate and apart from the otherwise privileged e-mail string in which it appears, then the agency may not withhold such information under section 552.107(1) of the Government Code; and (2) may withhold the remaining information under section 552.116 of the Government Code. We have no indication there has been any change in the law, facts, or circumstances on which the previous rulings were based. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon by this office, the agency may rely on Open Records Letter Nos. 2022-02217 and 2022-11271 as previous determinations and withhold or release the identical information in accordance with those rulings.<sup>3</sup> 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 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 not encompassed by the previous rulings, we will address the arguments against its disclosure.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses section 39.004(e) of the Education Code which provides the following:

(e) Unless otherwise provided by law, all evidence collected by the agency in connection with a special investigation, including witness statements and videos of agency interviews, are confidential and not subject to disclosure under [the Act], except that evidence described by this section may be disclosed:

(1) to a person with a legitimate interest in the investigation; or

(2) in connection with an administrative or other legal proceeding brought under this title.

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<sup>3</sup> In this instance, as we are able to make this determination, we need not address the remaining arguments against disclosure of this information.

Educ. Code § 39.004(e). You state the information you have indicated was collected and prepared by the agency's Divisions of Investigations and Compliance and Inquiries in conjunction with a pending special investigation. You also state the special investigation at issue was authorized by section 39.003(a)(17) of the Education Code. *See id.* § 39.003 (listing circumstances in which the commissioner shall authorize investigations). Based on these representations, we agree the information at issue constitutes evidence collected by the agency in connection with a special investigation. Accordingly, the agency must withhold the information you have indicated under section 552.101 of the Government Code in conjunction with section 39.004(e) of the Education Code.

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

The district asserts some of the remaining information consists of privileged communications between attorneys for the district and district employees and officials in their capacities as clients. They state these communications were made in furtherance of the rendition of professional legal services to the district. Further, they 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 agency may withhold the information we have marked under section 552.107 of the Government Code on behalf of the district.<sup>4</sup>

In summary: (1) to the extent the requested information is identical to the information previously requested and ruled upon by this office, the agency may rely on Open Records Letter Nos. 2022-02217 and 2022-11271 as previous determinations and withhold or release the identical information in accordance with those rulings; (2) the agency must withhold the information you have indicated under section 552.101 of the Government Code in conjunction with section 39.004(e) of the Education Code; (3) the agency may withhold the information we have marked under section 552.107 of the Government Code on behalf of the district; and (4) the agency 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,

Tim Neal  
Assistant Attorney General  
Open Records Division

TN/be

Ref: ID# 947201

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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