



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 3, 2022

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

OR2022-16028

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# 949497 [PIR# 52603].

The Texas Education Agency (the "agency") received a request for investigation information of a specified school district.<sup>1</sup> You state some information will be released. You also state you are withholding student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>2</sup> You claim the submitted information is excepted from disclosure under

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<sup>1</sup> The agency states it sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup> 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/sites/default/files/files/divisions/open-government/20060725-USDOE-FERPA.pdf>.

sections 552.101, 552.107, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, you state some of the requested information was the subject of previous requests for rulings. You state the law, facts, or circumstances on which the prior rulings were based have not changed. Thus, the agency must continue to rely on those rulings as previous determinations and withhold or release the information at issue in accordance with those rulings. *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).

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

(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 Chapter 552, Government Code, 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.

Educ. Code § 39.004(e). The agency states the information at issue was collected and prepared by the agency’s Division of Compliance and Inquiries in conjunction with a pending special investigation. The agency also states the special investigation was authorized by section 39.003(a)(16) of the Education Code. *See id.* § 39.003 (listing circumstances in which the commissioner shall authorize investigations). Based on these representations and our review, 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 marked under section 552.101 of the Government Code in conjunction with section 39.004(e) of the Education Code.<sup>4</sup>

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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.

<sup>4</sup> As our ruling is dispositive, we need not address the remaining argument against disclosure of this 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 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 agency states the information at issue consists of communications involving attorneys for the agency and agency employees and officials in their capacities as clients. The agency also states these communications were made in furtherance of the rendition of professional legal services to the agency. The agency further states these communications were intended to be, and have remained, confidential. Based on these representations and our review, we find the agency has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the agency may withhold the information you have 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 includes audit working papers prepared or maintained by the agency’s Division of Monitoring, Review, and Support in conjunction with investigations of complaints under the federal Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400-1482, and inform us the audits at issue are authorized by sections 300.151 through 300.153 of title 34 of the Code of Federal Regulations, which require the agency to conduct audits of school districts as part of the state complaint procedures under IDEA. You state the remaining information is maintained by the agency’s Division of Investigations and inform us the audits at issue were authorized by former section 39.057(a) of the Education Code. *See* Act of May 31, 2021, 87th Leg., R.S., S.B. 1365, § 2.04 (transferring section 39.057 to section 39.003 and listing circumstances in which the commissioner shall authorize investigations); *see also* Educ. Code § 39.003(a). Based on these representations and our review, we agree the information at issue consists of audit working papers for purposes of section 552.116. Therefore, the agency may withhold the remaining information under section 552.116 of the Government Code.

In summary, the agency must continue to rely on the previous rulings as previous determinations and withhold or release the information at issue in accordance with those rulings. The agency must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 39.004(e) of the Education Code. The agency may withhold the information you have marked under section 552.107 of the

Government Code. The agency may withhold the remaining information under section 552.116 of the Government Code.

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,

Paige Lay  
Assistant Attorney General  
Open Records Division

PL/mo

Ref: ID# 949497

c: Requestor