



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 5, 2022

Ms. Holly A. Sherman  
Counsel for the New Caney Independent School District  
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3700 Buffalo Speedway, Suite 560  
Houston, Texas 77098

OR2022-23412

Dear Ms. Sherman:

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# 963940.

The New Caney Independent School District (the "district"), which you represent, received a request for all information pertaining to the requestor's client. You state the district has redacted certain information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.107 and 552.108 of the Government Code.<sup>2</sup> We have considered your arguments and reviewed the submitted representative sample of information.<sup>3</sup>

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<sup>1</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 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. The DOE has determined FERPA determinations must be made by the educational authority in possession of the educational records. We have posted a copy of the letter from the DOE on the Attorney General's website at <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/20060725-USDOE-FERPA.pdf>.

<sup>2</sup> Although you raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege in this instance is section 552.107 of the Government Code. *See* Open Records Decision No. 676 at 1-2 (2002).

<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

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 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 claim Exhibit D is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications involving the district’s attorneys and district employees. You inform us the communications were made for the purpose of facilitating the rendition of professional legal services to the district and that these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to some of the information at issue. Thus, with the exception of the information we have marked for release, the district may generally withhold Exhibit D under section 552.107(1) of the Government Code. We note, however, some of the e-mail strings include e-mails and attachments received from or sent to non-privileged parties. Furthermore, if the attachments received from or sent to non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if

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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.

these non-privileged e-mails and attachments, which we have marked, are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code. Additionally, we find you have failed to establish how the information we marked for release constitutes a privileged attorney-client communication for the purposes of section 552.107(1). Accordingly, the district may not withhold the information we marked for release under section 552.107(1) of the Government Code.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note section 552.108 is generally not applicable to purely administrative records that do not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.). You state that Exhibit B and Exhibit C relate to a pending criminal investigation by the district’s police department. Based on your representation and our review, we find release of Exhibit B and Exhibit C would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to Exhibit B and Exhibit C.

However, section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Section 552.108(c) refers to the basic information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; *see also* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Accordingly, with the exception of basic information, the district may withhold Exhibit B and Exhibit C under section 552.108(a)(1) of the Government Code.

In summary, with the exception of the information we marked for release, the district may generally withhold the information at issue within Exhibit D under section 552.107(1) of the Government Code; however, if the non-privileged e-mails and attachments that we have marked are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code. With the exception of basic information, the district may withhold Exhibit B and Exhibit C under section 552.108(a)(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,

Joseph Hoggatt  
Assistant Attorney General  
Open Records Division

JWH/be

Ref: ID# 963940

Enc. Submitted documents

c: Requestor  
(w/o enclosures)