KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 23, 2022

Ms. Carrie Galatas
General Counsel
Conroe Independent School District
3205 West Davis Street
Conroe, Texas 77304-2098

OR2022-25377

Dear Ms. Galatas:

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# 967492.

The Conroe Independent School District (the "district") received a request for (1) all emails sent to or from three named individuals containing specified key terms during a stated time period and (2) all e-mails sent to or from any district employee to two stated e-mail addresses during a stated time period. We understand the district has redacted student-identifying information from the submitted documents pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.[1] You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil

[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/sites/default/files/files/divisions/open-government/20060725-USDOE-FERPA.pdf.

Procedure. We have considered the submitted arguments and reviewed the submitted representative sample of information.[2]

Initially, we note the requestor seeks information created through the date of the request, as well as information created after the date of the request. It is implicit in several provisions of the Act that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 87 (1975). Consequently, a governmental body is not required to comply with a standing request to supply information prepared in the future. *See* Attorney General Opinion JM-48 at 2 (1983); *see also* Open Records Decision Nos. 476 at 1 (1987), 465 at 1 (1987). Thus, the only information encompassed by the present request consists of information the district maintained or had a right of access to as of the date it received the request.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides, in relevant part:

> (a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:
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> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted fire inspection reports are completed reports subject to section 552.022(a)(1). The district must release the completed inspection reports pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* Although you assert the information subject to section 552.022(a)(1) is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code, these sections are discretionary and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Therefore, none of the information subject to section

[2] 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 that those records contain substantially different types of information than that submitted to this office.

552.022(a)(1), which we marked, may be withheld under section 552.103, section 552.107, or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 and the attorney work product privilege under Texas Rule of Civil Procedure 192.5 for the information subject to section 552.022(a)(1). Additionally, as section 552.101 of the Government Code makes information confidential, we will consider your arguments under section 552.101 for the information at issue. We will also address your arguments for the information not subject to section 552.022(a)(1).

Section 552.103 of the Government Code provides, in part, the following:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> . . .
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> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4. To establish litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the

governmental body from an attorney for a potential opposing party.[3] *See* ORD 555; *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You contend the submitted information not subject to section 552.022 of the Government Code relates to anticipated litigation against the district. You state the district anticipates the requestor "has or will file a complaint" against the district with the Texas Education Agency. You also state the requestor "threatened litigation against the [d]istrict on the same day he submitted his request[.]" However, upon review, we find you have failed to demonstrate anyone had taken any concrete steps toward the initiation of litigation against the district prior to its receipt of the instant request. Thus, we conclude you have failed to establish litigation was reasonably anticipated when the district received the request for information. Therefore, the district may not withhold any of the information at issue under section 552.103(a) of the Government Code.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. Rule 192.5 defines work product as:

> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
>
> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id*. 192.5; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied that:

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[3] In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

> a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORR 677 at 7. You claim the information you marked that is subject to section 552.022 of the Government Code consists of privileged attorney work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. However, upon review, we find you have failed to demonstrate the information at issue contains the mental impressions, opinions, conclusions, or legal theories of an attorney or the attorney's representative that was developed in anticipation of litigation or for trial. Therefore, the district may not withhold any portion of the information at issue as attorney work product under Texas Rule of Civil Procedure 192.5.

Section 552.111 of the Government Code excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677. The elements of and test for the attorney work product privilege under section 552.111 are the same as those outlined above for rule 192.5. You claim the information you marked that is not subject to section 552.022 of the Government Code consists of privileged attorney work product. However, upon review, we find you have failed to demonstrate the information at issue contains the mental impressions, opinions, conclusions, or legal theories of an attorney or the attorney's representative that was developed in anticipation of litigation or for trial. Therefore, the district may not withhold any portion of the information at issue as attorney work product under section 552.111 of the Government 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. *See* ORD 676 at 6-7. 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 section 552.107 of the Government Code for the submitted information not subject to section 552.022 of the Government Code. You state the information at issue consists of communications between an attorney for the district and district employees and officials that were made for the purpose of facilitating the rendition of professional legal services to the district. You also state these communications have remained confidential. Based upon your representations and our review, we find some of the information at issue consists of privileged attorney-client communications. Accordingly, the district may withhold the information we marked under section 552.107(1) of the Government Code.[4] However, we note the remaining information at issue consists of communications sent to or received from individuals you have not identified as privileged. Thus, we find you have failed to demonstrate the applicability of the attorney-client privilege to the remaining information at issue. Therefore, the district may not withhold any of the remaining information at issue under section 552.107(1) of the Government Code.

Texas Rule of Evidence 503 enacts the attorney-client privilege. The elements of the privilege under rule 503 of the Texas Rules of Evidence are the same as those discussed above for section 552.107(1) of the Government Code. 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. Rule 503 of the Texas Rules of Evidence 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*, 922 S.W.2d at 923.

[4] As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

You claim the information subject to section 552.022 of the Government Code is protected by the attorney-client privilege. However, we note the information at issue consists of attachments sent to or received from individuals you have not identified as privileged. Thus, we find you have failed to demonstrate the applicability of the attorney-client privilege to the information at issue. Therefore, district may not withhold any of the remaining information at issue on the basis of the attorney-client privilege in rule 503 of the Texas Rules of Evidence.

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. Section 552.101 encompasses information protected by other statutes, such as section 37.108 of the Education Code, which provides, in part:

> (a) Each school district or public junior college district shall adopt and implement a multihazard emergency operations plan for use in the district's facilities. The plan must address prevention, mitigation, preparedness, response, and recovery as defined by the Texas School Safety Center in conjunction with the governor's office of homeland security and the commissioner of education or commissioner of higher education, as applicable. The plan must provide for:
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> > (1) training in responding to an emergency for district employees, including substitute teachers;
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> > (2) measures to ensure district employees, including substitute teachers, have classroom access to a telephone, including a cellular telephone, or another electronic communication device allowing for immediate contact with district emergency services or emergency services agencies, law enforcement agencies, health departments, and fire departments;
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> > (3) measures to ensure district communications technology and infrastructure are adequate to allow for communication during an emergency;
> >
> > (4) if the plan applies to a school district, mandatory school drills and exercises, including drills required under Section 37.114, to prepare district students and employees for responding to an emergency;
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> > (5) measures to ensure coordination with the Department of State Health Services and local emergency management agencies, law enforcement, health departments, and fire departments in the event of an emergency; and

> (6) the implementation of a safety and security audit as required by Subsection (b).
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> (b) At least once every three years, each school district or public junior college district shall conduct a safety and security audit of the district's facilities. To the extent possible, a district shall follow safety and security audit procedures developed by the Texas School Safety Center or a person included in the registry established by the Texas School Safety Center under Section 37.2091.
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> . . .
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> (c-1) Except as provided by Subsection (c-2), any document or information collected, developed, or produced during a safety and security audit conducted under Subsection (b) is not subject to disclosure under [the Act].
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> (c-2) A document relating to a school district's or public junior college district's multihazard emergency operations plan is subject to disclosure if the document enables a person to:
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> > . . .
> >
> > (3) verify that the plan addresses the four phases of emergency management under Subsection (a);
> >
> > (5) verify that each campus in the district has conducted mandatory emergency drills and exercises in accordance with the plan and determine the frequency of the drills[.]

Educ. Code § 37.108(a), (b), (c-1), (c-2)(4), (5). The remaining information contains information related to the district's Multi-Hazard Emergency Operations Plan. We understand this information was developed, collected, or produced for multi-hazard emergency operations under section 37.108(b). *See id.* § 37.108(b). Thus, the information at issue is generally confidential under section 37.108(c-1) of the Education Code. We note, however, some of the information at issue would enable a person to verify the information described in section 37.108(c-2). Thus, this information is not subject to section 37.108(c-1) of the Education Code and may not be withheld under section 552.101 of the Government Code on that basis. However, the district must withhold the remaining information we marked section 552.101 of the Government Code in conjunction with section 37.108(c-1) of the Education Code.[5]

[5] As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

The district claims the information subject to section 37.108(c-2) is excepted from disclosure under the Texas Homeland Security Act (the "HSA"). Section 552.101 of the Government Code also encompasses information protected by chapter 418 of the Government Code. As part of the HSA, sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make confidential certain information related to terrorism. Section 418.181 of the Government Code provides the following:

> Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Gov't Code § 418.181; *see also id.* § 421.001(2) (defining "critical infrastructure" to include all public or private assets, systems, and functions vital to security, governance, public health and safety, economy, or morale of state or nation). The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You argue the information subject to section 37.108(c-2) of the Education Code identifies technical details or particular vulnerabilities of critical infrastructure that is critical to the operation of district schools. We agree the district schools are critical infrastructure for purposes of section 418.181 of the Government Code. Upon review, we find the information at issue identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Thus, the district must generally withhold the information subject to section 37.108(c-2) of the Education Code under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.

Thus, there is a conflict between the confidentiality provided under section 418.181 of the Government Code and the information made public by section 37.108(c-2). Where general and specific statutes are in irreconcilable conflict, the specific provision typically prevails as an exception to the general provision unless the general provision was enacted later and there is clear evidence the legislature intended the general provision to prevail. *See id.* § 311.026(b); *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000) ("more specific statute controls over the more general"); *Cuellar v. State*, 521 S.W.2d 211 (Tex. Crim. App. 1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones). Section 418.181 generally pertains to information which would identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. However, sections 37.108(c-2) specifically

provides access to information that would enable a person to verify the information described in this section. Therefore, we find section 37.108(c-2) of the Education Code is more specific than, and prevails over, the general confidentiality provided under section 418.181 of the Government Code. Additionally, we note section 37.108 is the later enacted statute. *See* Gov't Code § 311.025(a) (if statutes enacted at different sessions of legislature are irreconcilable, statute latest in enactment prevails). Thus, the district may not withhold any portion of the information subject to section 37.108(c-2) of the Education Code under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.

Next, you assert the information subject to section 37.108(c-2) of the Education Code is confidential under section 37.2071(i) of the Education Code.[6] Section 552.101 of the Government Code also encompasses section 37.2071 of the Education Code, which provides, in relevant part:

> (a) The [Texas School Safety Center] shall establish a random or need-based cycle for the center's review and verification of school district and public junior college district multihazard emergency operations plans adopted under Section 37.108. The cycle must provide for each district's plan to be reviewed at regular intervals as determined by the center.
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> . . .
>
> (i) Any document or information collected, developed, or produced during the review and verification of multihazard emergency operations plans under this section is not subject to disclosure under [the Act].

Educ. Code § 37.2071(a), (i). Although you assert the information subject to section 37.108(c-2) is confidential pursuant to section 37.2071(i), upon review, we find you have failed to demonstrate this information was collected, developed, or produced during the review and verification of the district's operations plans by the Texas School Safety Center. Therefore, we find section 37.2071(i) of the Education Code is inapplicable to the information at issue and the district may not withhold the information at issue under section 552.101 on that basis.

In summary, the district may withhold the information we marked under section 552.107(1) of the Government Code. With the exception of the information subject to section 37.108(c-2) of the Education Code, which must be released, the district must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 37.108(c-1) of the Education Code. The district must release the remaining information.

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[6] Although the district cites to section 37.207(i) of the Education Code, we note this provision does not exist. However, we understand the district to raise section 552.101 of the Government Code in conjunction with section 37.2071(i) of the Education Code based on the substance of its arguments.

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,

James M. Graham
Assistant Attorney General
Open Records Division

JMG/mo

Ref: ID# 967492

Enc. Submitted documents

c: Requestor
(w/o enclosures)