



March 22, 2001

Ms. Mari M. McGowan
Abernathy, Roder, Boyd & Joplin P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2001-1140

Dear Ms. McGowan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145207.

The Northwest Independent School District (the "district"), which you represent, received a request for information related to a former district band director. You indicate that you have released information responsive to a portion of this request, and that another requested portion does not exist, but that you seek to withhold responsive internal district communications related to this band director's termination of employment. You claim that the information responsive to this portion of the request is excepted from disclosure under sections 552.101, 552.114, 552.107, and 552.131 of the Government Code and that release of some of the requested information is prohibited by the Family Education Rights and Privacy Act ("FERPA") 20 U.S.C. § 1232g. We have considered the exceptions you claim and reviewed the submitted information.

We first note that much of the submitted materials are part of a completed investigation. Information in a completed investigation is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. These documents must therefore be released under section 552.022 unless the information is expressly made confidential under other law.

You indicate that you have redacted “student identifiable information” from the responsive materials, under FERPA. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student’s education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student’s parent. *See* 20 U.S.C. § 1232g(b)(1). “Education records” means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A).

Government Code section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 of the Government Code states that information contained in education records of an educational agency or institution are not subject to public disclosure except in conformity with FERPA. This office generally applies the same analysis under FERPA, sections 552.026 and section 552.114. *See e.g.* Open Records Decision No. 539 (1990).

Information must be withheld from required public disclosure under FERPA only to the extent “reasonable and necessary to avoid personally identifying a particular student.” *See* Open Records Decision Nos. 332 (1982), 206 (1978).

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a “student record,” insofar as the “student record” is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. The district may rely on Open Records Decision No. 634 and may withhold the student identifying information that is responsive to this request in accordance with that decision. *See* Open Records Decision No 673 (2001).

You assert that certain information that you have designated in exhibit C is protected from disclosure under section 552.107 of the Government Code. As noted above, the portion of this information that relates to the completed investigation is subject to section 552.022(a)(1) of the Government Code. Section 552.107 of the Government Code, which excepts information within the attorney-client privilege, is a discretionary exception under the Public Information Act and does not constitute “other law” for purposes of section 552.022. Open Records Decision No. 630 at 4 (1994) (governmental body may waive section 552.107(1)).

However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that “[t]he Texas Rules of Civil

Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the information in exhibit C is confidential under Rule 503.

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the layer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503 provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Based on our review of exhibit C, we conclude that a portion, but not all, of the information that you have designated as excepted from disclosure in this exhibit is protected by Rule 503 of the Texas Rules of Evidence. We have marked this information accordingly.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Information is protected by common law privacy if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). You cite *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied) in support of your argument that the information which you have submitted as exhibit D is made confidential by the common law right of privacy. In *Ellen* the court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment. From our review of exhibit D we find that these materials do not concern a sexual harassment investigation. Rather, the subject investigation is into allegations that a superior threatened a subordinate with retaliation for the subordinate's refusal to administratively support the superior. The gender of the individuals involved is not germane to this investigation. We find that the holding in *Ellen* is not applicable to these materials. Further, the scope of public employee privacy is narrow. Open Records Decision No. 423 at 2 (1984). Because the work behavior of a public employee and the conditions for his or her continued employment are matters of legitimate public interest, the common law right of privacy does not protect facts about a public employee's misconduct on the job or complaints made about the employee's performance. Open Records Decision Nos. 438 (1986). From our review of the materials submitted as exhibit D, we conclude that this information is not protected by the common law right of privacy. Therefore, this information may not be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses information protected by other statutes. Section 21.355 of the Education Code makes a "document evaluating the performance of a teacher or administrator" confidential. You suggest that release of information subject to this statute constitutes a waiver of this confidentiality. You do not cite an authority for this position and we are aware of none. Therefore, we do not find that the confidentiality of this statute as it relates to information responsive to this request has been waived. This office has interpreted section 21.355 of the Education Code to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). This office has also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* Similarly, an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id.* The "Professional Action Planning Document" submitted as part of exhibits C and F

includes several "goals," and discussion of the subject band director's job performance in respect to those goals. District correspondence to the subject band director regarding this document notes that these goals "are expectations and requirements of all teachers in Northwest Independent School District." Therefore, we assume that the subject band director holds a certificate or permit required under chapter 21 of the Education Code. We find that this document is an "evaluation" as that term is contemplated by the Education Code. Therefore, the "Professional Action Planning Document" submitted in exhibits C and F must be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

You contend that the materials submitted as exhibit E are excepted from disclosure under section 552.131 of the Government Code. This section excepts certain information held by school districts from public disclosure. It reads as follows:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from the requirements of Section 552.021.

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional,

statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Because the legislature limited the protection of this section to the identity of a person who reports a possible violation of “law,” a school district that seeks to withhold information under that exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov’t Code § 552.301(e)(1)(A). You assert “information maintained by the District regarding harassment investigations includes names of individuals, both employees, and students, who have provided information or reports of possible violations of criminal, civil or regulator law by employees and students.” You also relate that the submitted materials identify one witness who has asserted claims of harassment and retaliation. However, you do not indicate what specific civil, criminal, or regulatory law you allege was reported to have been violated. After reviewing your arguments and the information you provided this office, we find that the district has not established that the information submitted as exhibit E may be withheld under section 552.131 of the Government Code.

In summary, you must withhold the “Professional Action Planning Document” in exhibits C and F, and the portions of exhibit C that we have identified as protected by the attorney client privilege. All other submitted information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body

fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General
Open Records Division

MJB/seg

Ref: ID# 145207

Encl: Submitted documents

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