



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 29, 2004

Mr. Bob Ramirez  
Escamilla & Poneck, Inc.  
P.O. Box 200  
San Antonio, Texas 78291-0200

OR2004-6369

Dear Mr. Ramirez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 206441.

The United Independent School District (the "district"), which you represent, received a request for three categories of information pertaining to a specified district employee and district board policy and/or employee manual. You state that the district is providing the requestor with some of the requested information. You claim that the remaining requested information is excepted from disclosure pursuant to sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information. We have also considered comments submitted by an interested third party. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

You claim that the information that you submitted to us for review as Exhibit B, or portions thereof, is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.<sup>1</sup> Section 21.355 provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted section 21.355 to apply to any document that

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<sup>1</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined that the word “teacher” for purposes of section 21.355 means a person who (1) is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and (2) is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. We also determined the word “administrator” for purposes of section 21.355 means a person who (1) is required to and does in fact hold an administrator’s certificate under subchapter B of chapter 21 of the Education Code and (2) is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *See id.*

You do not state, or provide adequate evidence, that the employee who is the subject of Exhibit B held a teacher’s certificate or permit or administrator’s certificate under subchapter B of chapter 21 of the Education Code and was performing the functions of a teacher or administrator at the time that the information in Exhibit B was created. Thus, we are unable to conclude that section 21.355 is applicable in this instance. Accordingly, we must rule in the alternative. If this employee held a teacher’s certificate or permit or an administrator’s certificate and was performing the functions of a teacher or administrator at the time that the information in Exhibit B was created, then the information that we have marked within Exhibit B is confidential under section 21.355 and, thus, must be withheld from disclosure pursuant to section 552.101 of the Government Code. However, to the extent that the employee does not satisfy these criteria, then this marked information is not confidential under section 21.355 and, thus, may not be withheld from disclosure under section 552.101 of the Government Code. In that event, the entirety of Exhibit B must be released to the requestor.

You claim that the information that you submitted to us for review as Exhibit C is excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) protects information that is encompassed by the attorney-client privilege. *See* Gov’t Code § 552.107(1). When asserting the attorney-client privilege, a governmental body maintains 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 that the information constitutes or documents a communication. *See id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* 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. *See In re Texas 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. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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, *see id.* 503(b)(1), meaning it was "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." *See 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, no writ). 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).

Based on your representations and our review of Exhibit C, we agree that this information constitutes confidential communications exchanged between privileged parties in furtherance of the rendition of legal services to a client. Accordingly, we conclude that the district may withhold Exhibit C pursuant to section 552.107(1) of the Government Code.

In summary, if the employee who is the subject of this request held a teacher's certificate or permit or an administrator's certificate and was performing the functions of a teacher or administrator at the time that the information in Exhibit B was created, then the information that we have marked within Exhibit B is confidential under section 21.355 and, thus, must be withheld from disclosure pursuant to section 552.101 of the Government Code. To the extent that this employee does not satisfy these criteria, then the information that we have marked in Exhibit B is not confidential under section 21.355 and, thus, may not be withheld from disclosure under section 552.101 of the Government Code. In that event, the entirety of Exhibit B must be released to the requestor. The district may withhold Exhibit C pursuant to section 552.107(1) of the Government Code.

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 Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/jh

Ref: ID# 206441

Enc. Marked documents

c: Ms. Tricia Cortez  
Laredo Morning Times  
111 Esperanza Drive  
Laredo, Texas 78041  
(w/o enclosures)

Mr. Armando X. Lopez  
Attorney at Law  
1208 Laredo Street  
Laredo, Texas 78040  
(w/o enclosures)