



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 18, 2004

Ms. Lisa B. Silvia
Paralegal
Fort Worth Independent School District
100 North University Drive
Fort Worth, Texas 76107

OR2004-7018

Dear Ms. Silvia:

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# 207376.

The Fort Worth Independent School District (the "district") received a request for diplomas and other information relating to the Department of Improvement of Discipline and the Learning Environment ("ID&LE"), ID&LE employees, a named current or former employee of the district, and Intervention and Prevention Education Specialists. Your letter to the requestor reflects that there are no responsive diplomas. The Act does not require the district to release information that did not exist when it received this request or to create responsive information.¹ You have submitted information that you claim is excepted from disclosure

¹ See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

under sections 552.101, 552.107, and 552.116 of the Government Code.² We have considered your arguments and have reviewed the submitted information.³

We first note that this request for information consists partially of questions. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). Likewise, the Act does not require a governmental body to take affirmative steps to create or obtain information that is not in its possession, so long as no other individual or entity holds the information on behalf of the governmental body that receives the request. *See* Gov't Code § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989). However, a governmental body must make a good-faith effort to relate a request to information that is within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). We assume that the district has made the required good-faith effort to relate this request to responsive information that is within the district's possession or control.

Next, we address the district's obligations under section 552.301 of the Act. This section prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See id.* § 552.301(e)(1)(A)-(D). If a governmental body does not request an attorney general

²You also assert that the submitted information is "excepted from disclosure under the 'other law' exception within [section] 552.022 of the [Act]." Section 552.022 specifies 18 categories of information that are subject to required public disclosure, unless the information is expressly made confidential under other law or, under section 552.022(a)(1), is excepted from disclosure under section 552.108. *See* Gov't Code § 552.022(a)(1)-(18). The Texas Supreme Court has held that the Texas Rules of Evidence and Texas Rules of Civil Procedure are other law that makes information confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Because none of the information that the district seeks to withhold is subject to section 552.022, we need not consider whether any of the information would be confidential under other law on the basis of *City of Georgetown*.

³This letter ruling assumes that the submitted "sample copy" of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

decision as prescribed by section 552.301, the information requested in writing is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302.

In this instance, you have not submitted any explanation of how or why section 552.116 would be applicable to any of the submitted information.⁴ Thus, the district has not complied with section 552.301 in raising section 552.116. This section is a discretionary exception that may be waived. *See* Gov't Code § 552.007; Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally). A claim under section 552.116 does not provide a compelling reason for non-disclosure under section 552.302. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ) Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). In failing to comply with section 552.301, the district has waived section 552.116 and may not withhold any of the information at issue under this exception. *See* Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions).

Next, we address section 552.107, as it is the more inclusive of your remaining claims. Section 552.107(1) protects information that comes 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 that the information constitutes or documents a communication. *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, *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

⁴Section 552.116 excepts from disclosure “[a]n 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, or a municipality[.]” Gov't Code § 552.116(a).

of 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, 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).

In this instance, the district has not demonstrated that any of the information at issue contains, consists of, or documents an attorney-client communication. *See Open Records Decision No. 676* at 6-10. Therefore, the district may not withhold any of the submitted information under section 552.107(1).

We note, however, that section 552.117 may be applicable to some of the information at issue.⁵ Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential in accordance with section 552.024. The determination of whether a particular item of information is protected by section 552.117(a)(1) must be made at the time of the governmental body’s receipt of the request for the information. *See Open Records Decision No. 530* at 5 (1989). Therefore, the district may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who requested confidentiality for the information prior to the date of the district’s receipt of this request for information. The district may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely request for confidentiality under section 552.024. We have marked the information that the district may be required to withhold under section 552.117(a)(1).

The district may also be required to withhold the social security numbers in the submitted documents under section 552.101. This section excepts from required 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 that another statute makes confidential. A social security number is confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act if a governmental body obtained or maintains the social security number under any provision of law enacted on or after October 1, 1990. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I); *Open Records Decision No. 622* at 2-4 (1994). It is not apparent to this office that the social

⁵Unlike other exceptions to disclosure, this office will raise section 552.117 on behalf of a governmental body, as it is a mandatory exception to disclosure that may not be waived. *See* Gov’t Code §§ 552.007, .352; *Open Records Decision No. 674* at 3 n.4 (2001).

security numbers contained in the submitted documents are confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that requires or authorizes the district to obtain or maintain a social security number. Thus, we have no basis for concluding that the social security numbers contained in the submitted documents were obtained or are maintained under such a law and are therefore confidential under the federal law. We caution you, however, that the Act imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing these social security numbers, the district should ensure that they were not obtained and are not maintained under any provision of law enacted on or after October 1, 1990.

We also note that the submitted information includes a transcript from an institution of higher education. Section 552.102(b) excepts from disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee." Gov't Code § 552.102(b).⁶ This section further provides, however, that "the degree obtained or the curriculum on a transcript in the personnel file of the employee" are not excepted from disclosure. Thus, except for the information that reveals the degree obtained and the courses taken, you must withhold the transcript that we have marked under section 552.102(b).

In summary: (1) the home address and telephone number, social security number, and family member information of a current or former district employee is excepted from disclosure under section 552.117(a)(1) if the current or former employee timely elected confidentiality for the information under section 552.024; (2) the district may be required to withhold social security numbers under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code; and (3) except for the information that reveals the degree obtained and the courses taken, the marked educational transcript must be withheld under section 552.102(b). The district must release the rest of the submitted information.

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

⁶Section 552.102 also is a mandatory exception that may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001).

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).

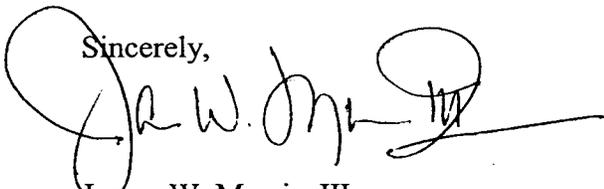
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is fluid and cursive, with a large initial "J" and a long horizontal stroke at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 207376

Enc: Submitted documents

c: Mr. Raul Duran
2701 McKinley Avenue
Fort Worth, Texas 76106-6834
(w/o enclosures)