



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 1, 2005

Mr. Marc Barenblat
Staff Attorney
State Board for Educator Certification
1701 North Congress Avenue
Austin, Texas 78701

OR2005-06903

Dear Mr. Barenblat:

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# 229246.

The State Board for Educator Certification (the "board") received a request for "any and all documentation in [the board's] files regarding" a named individual. You state that you will release some of the requested information, but claim that some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, 552.114, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we note that the board raises section 552.101 of the Government Code in conjunction with the Family Educational Rights and Privacy Act of 1974 ("FERPA") for some of the submitted records.² The submitted information also contains a teacher's

¹We assume that the 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 documents to the extent that those records contain substantially different types of information than that submitted to this office.

²We note that section 552.026 of the Government Code incorporates FERPA into the Act, and section 552.114 excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue. This office generally has treated "student record" information excepted under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 6-8 (1995).

transcripts for which the board raises section 552.102 of the Government Code. The board currently has a lawsuit pending against the Office of the Attorney General over the release of similar types of information, *State Board for Educator Certification v. Abbott*, Cause No. GV502481, 53rd District Court of Travis County, Texas. The board's arguments in the instant request for a decision are similar to the board's arguments in the pending litigation. Accordingly, we are closing our file with regard to the records for which the board raises FERPA, as well as the teacher's transcripts for which the board raises section 552.102, without issuing a decision and will allow the trial court to determine whether the types of information at issue must be released to the public.

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 552.101 encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. The MPA governs the public disclosure of medical records. Section 159.002 of the MPA provides in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). Medical records must be released on the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). You indicate that the submitted medical records were prepared under the supervision of a physician. Based on your representation and our review of the information in question, we conclude that the information you have marked under the MPA is confidential under that provision. The

board must not release this information unless it has authorization under the MPA to do so. *See Open Records Decision No. 598 (1991).*

The board also raises section 552.101 in conjunction with section 261.201 of the Family Code. You indicate that some of the submitted information relates to an investigation of alleged child abuse conducted by the Texas Department of Family and Protective Services (the "department"). Information relating to child abuse investigations is subject to Chapter 261 of the Family Code. Section 261.201(a) provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

After reviewing the information at issue, we find that the information you have marked falls within the scope of section 261.201. We note that, under section 261.406 of the Family Code, the board is authorized to receive these types of records. *See Fam. Code § 261.406(b)* (providing that department shall send written report of its investigation to agency responsible for teacher certification and release of such information is governed by section 261.201). Furthermore, an entity that is authorized to receive confidential information from the department is required to maintain the confidentiality of such records and prevent disclosure to any unauthorized person. *See Hum. Res. Code § 40.005(d)*. It does not appear that the requestor is an entity authorized to receive the submitted documents. *See generally Fam. Code § 261.201(a)* (providing that records subject to section 261.201 may be disclosed only for purposes consistent with Family Code and applicable federal or state law or under rules adopted by investigating agency). Accordingly, the board must withhold the information you have marked under section 552.101 in conjunction with section 261.201.

The information submitted by the board contains an I-9 form (Employment Eligibility Verification), which is governed by section 1324a of Title 8 of the United States Code. This section provides that an I-9 form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See 8 U.S.C. § 1324a(b)(5); see also 8 C.F.R. § 274a.2(b)(4)*. Release of the form in this instance would be "for purposes other than for enforcement" of the referenced federal statutes.

Accordingly, we conclude that the I-9 form is confidential and must be withheld under section 552.101 of the Government Code.

The information submitted by the board also contains a W-4 form. Section 6103(a) of Title 26 of the United States Code provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Accordingly, the board must withhold the submitted W-4 form pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of Title 26 of the United States Code.

Section 552.101 also encompasses section 58.001 of the Occupations Code, which provides that:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

Occ. Code § 58.001. The social security number you have marked belongs to a former applicant for certification from the board. Therefore, pursuant to section 552.101 of the Government Code, the board must withhold this marked social security number.

Next, we address your claim under section 552.101 in conjunction with section 21.355 of the Education Code. This section provides, "A document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office interpreted this section 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). In that opinion, this office 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.* You state that the submitted information contains a performance evaluation of a former teacher. Based on your representations and the reasoning set out in Open Records Decision No. 643, we conclude that the document you have marked is confidential under section 21.355 of the Education Code. Therefore, pursuant to section 552.101 of the Government Code, the board must withhold this evaluation.

Section 552.101 also encompasses the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

The common-law right to privacy protects certain types of personal financial information. This office has determined that financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of state employees' personnel records), 545 at 4 (1990) ("In general, we have found the kinds of financial information not excepted from public disclosure by common-law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities"), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). Accordingly, the financial information we have marked must be withheld under section 552.101 in conjunction with common-law privacy.

We next address your claim regarding section 552.107 of the Government Code. Section 552.107(1) 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. 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. 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 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 a 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)(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 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. *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).

You assert that the documents you have marked under section 552.107 “consist of confidential communications between [board] representatives and its attorneys made for the purpose of the rendition of professional legal services, with the intent that confidentiality would be maintained.” Therefore, based on your representations and our review of the documents at issue, we conclude that you may withhold the information you have marked under section 552.107.

Finally, we address your claim under section 552.137 of the Government Code. This section excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov’t Code § 552.137(a)-(c)*. The e-mail address you have marked does not appear to be of a type specifically excluded by section 552.137(c). Therefore, the board must withhold the marked e-mail address in accordance with section 552.137 unless the board receives consent for its release.

In summary, we are closing our file with regard to the records for which the board raises FERPA, as well as the teacher’s transcripts for which the board raises section 552.102, without issuing a decision and will allow the trial court to determine whether this information must be released to the public. The board must not release the marked medical records unless it has authorization under the MPA to do so. The board must withhold the information you have marked under section 552.101 in conjunction with section 261.201 of the Family Code. The board must withhold the submitted I-9 and W-4 forms pursuant to section 552.101 in conjunction with federal law. The social security number you have marked must be withheld under section 552.101 in conjunction section 58.001 of the Occupations Code. The submitted teacher evaluation must be withheld under section 552.101 in conjunction with section 21.355 of the Education Code. The financial information we have marked under section 552.101 in conjunction with common-law privacy must be withheld. The e-mail address you have marked must be withheld under section 552.137 of the Government Code. The board may withhold the information you have marked under section 552.107. The remaining information must be released to the requestor.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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,



James A. Person III
Assistant Attorney General
Open Records Division

JAP/sdk

Ref: ID# 229246

Enc. Submitted documents

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(w/o enclosures)