



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 7, 2005

Ms. Lydia L. Perry
Law Offices of Robert E. Luna
4411 North Central Expressway
Dallas, Texas 75205

OR2005-11001

Dear Ms. Perry:

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# 237432.

The Lewisville Independent School District (the "district"), which you represent, received four requests for related information. Two of the requests are from the same requestor and ask for the personnel file of a named employee, all emails sent and received by the named employee since Aug 15, any other correspondence between any district employees discussing the named employee or a certain incident, and all statements provided by students regarding a certain incident. A third request asks for all information related to the same incident. The fourth request is for all statements regarding the same incident. You state that you will release the personnel file of the named employee to the employee's attorney and the student's statements to his attorney, with other students' identifying information redacted. *See* 20 U.S.C. § 1232g(a)(1)(A) (parents have a right of access to their child's educational records); 34 C.F.R. § 99.3; *see also* 34 C.F.R. § 99.12(a) ("If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student."). You claim that the remaining information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, 552.117, 552.130, 552.135, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

As your claims under section 552.114 of the Government Code are potentially the broadest, we will address them first. The district claims that most of the submitted information is protected from disclosure under section 552.114 of the Government Code. Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Gov't Code § 552.114. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. The Family Educational Rights and Privacy Act of 1974 ("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). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

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. In this instance, however, you have submitted the requested information to this office for our review. Therefore, we will consider whether this information is protected by FERPA.

First, you claim that, due to the extensive media coverage of this incident, simply redacting the students' names will not be sufficient to protect their identities. Thus you assert that much of the submitted information is confidential in its entirety under FERPA. Under FERPA, an educational agency must withhold information identifying a particular student or information that if released, would allow the student's identity to be easily traced. *See* Open Records Decision No. 224 (1979) (finding student's handwritten comments protected under FERPA because they make identity of student easily traceable through handwriting, style of expression, or particular incidents related). Pursuant to Open Records Decision No. 224, all handwritten student statements must be withheld in their entirety. After reviewing your arguments and the submitted documents, we find that the students' identities can be adequately protected without withholding the records in their entirety. We therefore determine that the remaining information is not confidential in its entirety under FERPA and may not be withheld under section 552.101 on that basis. However, the typed student statements and much of the remaining information contains student-identifying information subject to FERPA. We have marked the student-identifying information that is subject to FERPA and must be withheld under section 552.101. We note that you also seek to withhold emails and communications from former students. FERPA does not apply to

information acquired after someone is no longer a student. *See* 34 C.F.R. § 99.3 (2005). As such, emails and communications from and regarding former students are generally not subject to FERPA unless they contain information that identifies a current student.

Next, the district claims that the identifying information of certain employees is excepted from disclosure under section 552.135 of the Government Code. This section provides in relevant part:

(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 [required public disclosure].

Gov't Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under this 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). The district contends that the statements contain the identifying information of employees who reported possible violations of sections 22.01 and 22.02 of the Texas Penal Code, and section 37.152 of the Texas Education Code. The documents reflect, however, that the employees at issue did not report the alleged violations, but merely assisted the principal with the ongoing investigation. Accordingly, the employees' identifying information may not be withheld under section 552.135.

The district claims that Exhibit I consists of teacher evaluations made confidential by section 21.355 of the Education Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides, "A document evaluating the performance of a teacher or administrator is confidential." This office has 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, we 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, we concluded that 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.* We agree that the documents in Exhibit I evaluate an individual's performance as a teacher. Accordingly, we conclude that Exhibit I is confidential under section 21.355 and it must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses section 1324a of title 8 of the United States Code. Section 1324a provides that an Employment Eligibility Verification Form I-9 “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). In this instance, the release of the submitted Form I-9 in Exhibit H would be “for purposes other than for enforcement” of the referenced federal statutes. A Form I-9 may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system. Therefore, the district must withhold the submitted Form I-9 in Exhibit H under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

Exhibit H contains other personnel documents of the named employee. 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). This section further provides, however, that the degree obtained and the curriculum on a transcript in the personnel file of the employee are not excepted from disclosure. Therefore, with the exception of the degree obtained and the courses taken, the district must withhold the submitted college transcripts under section 552.102(b).

Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). We note that section 552.117 also encompasses a personal cellular telephone number, provided that the cellular phone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). In this instance, the employee whose personnel records are being requested chose to release his home address to the public. Therefore, the district must withhold only the named employee’s telephone number, social security number, and family member information in Exhibit H under section 552.117. The district must withhold the home address, telephone number, social security number, and family member information of any other employees if they chose to withhold that information under section 552.024. Additionally, we have marked a cellular phone number. If the district does not pay the cellular phone service for this number, that number must be withheld under section 552.117(a)(2); otherwise, the cellular number must be released.

The district claims that some of the remaining information is protected by the attorney-client privilege. Section 552.107 of the Government Code 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 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. You indicate that all of Exhibit G and certain information in other exhibits are either attorney-client communications or document an attorney-client communication. You also state that the information at issue was made in connection with the rendition of professional legal services and has remained confidential. Based on these arguments, we conclude that the district may withhold this information under section 552.107(1).

Exhibit H and some of the submitted statements contain Texas driver’s license numbers. Section 552.130 of the Government Code excepts from disclosure information that “relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state.” Gov’t Code § 552.130. In accordance with section 552.130 of the Government Code, the district must withhold the Texas driver’s license numbers we have marked.

Finally, the submitted information contains e-mail addresses of members of the public. Section 552.137 of the Government Code 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). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public” but

is instead the address of the individual as a government employee. The district indicates that it has not received consent to release the e-mail addresses at issue. Therefore, in accordance with section 552.137, the school district must withhold the marked e-mail addresses.

In summary, all handwritten student statements must be withheld in their entirety under FERPA. We have also marked the remaining student-identifying information that is subject to FERPA. Exhibit I is confidential under section 21.355 and must be withheld under section 552.101 of the Government Code. The district must withhold the submitted Form I-9 in Exhibit H under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code. Except for the degree obtained and the courses taken, the district must withhold the submitted college transcripts in Exhibit H under section 552.102(b). The district must withhold the named employee's telephone number, social security number, and family member information in Exhibit H under section 552.117, and the home address, telephone number, social security number, and family member information of any other employee that chose to withhold this information under section 552.024. The district may withhold Exhibit G and the other information you have marked under section 552.107(1). The district must withhold the Texas driver's license numbers we have marked. Lastly, in accordance with section 552.137, the school district must withhold the marked e-mail addresses. The remaining 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, 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 Office of the Attorney General 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

JV/krl

Ref: ID# 237432

Enc. Submitted documents

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