



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 2, 2007

Mr. Thomas P. Brandt  
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OR2007-12858

Dear Mr. Brandt:

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# 290503.

The Carroll Independent School District (the "district"), which you represent, received a request for thirteen categories of information related to a specified lawsuit, attorney billings, and two named individuals. You state that the district does not have any information responsive to categories four, six, eleven, thirteen, and part of category two of the request.<sup>1</sup> The district has redacted social security numbers under section 552.147 of the Government Code.<sup>2</sup> You claim that the remaining requested information is excepted from disclosure under sections 552.103, 552.107, 552.117, 552.136, and 552.137 of the Government Code.<sup>3</sup>

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>Section 552.147(b) authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

<sup>3</sup>Although you assert the attorney-client privilege under section 552.101 of the Government Code, we note that section 552.107 is the proper exception to raise for your attorney-client privilege claim in this instance. *See* Open Records Decision No. 676 (1988). You also raise sections 552.102 and 552.111 of the Government Code as exceptions to disclosure of the requested information but have provided no arguments regarding the applicability of those exceptions; we therefore assume that you no longer urge these exceptions. *See* Gov't Code §§ 552.301(b), (e), .302. Although you did not raise section 552.136 as an exception to disclosure within ten business days of the date the district received the present request, section 552.136 is a mandatory exception that can provide a compelling reason to withhold information from disclosure; we will therefore address your claim under section 552.136. *See id.* §§ 552.301(b), .302; *see also* Open Records Decision Nos. 319 (1982), 150 at 2 (1977).

We have considered the exceptions you claim and reviewed the submitted information, some of which consists of representative samples.<sup>4</sup>

You inform us that the documents contained in Exhibit 4 contain information that is both responsive and nonresponsive to the request. You have marked the information you claim is nonresponsive, which the district intends to withhold. Because you have determined that the information is nonresponsive, we do not address the required public disclosure of such information in this ruling.

We note that a portion of the submitted information consists of minutes of open meetings. Section 551.022 of the Open Meetings Act, chapter 551 of the Government Code, expressly provides that the “minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body’s chief administrative officer or the officer’s designee.” Gov’t Code § 551.022. As a general rule, the exceptions to disclosure found in the Act do not apply to information that is made public by other statutes. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the minutes that we have marked may not be withheld under any of the claimed exceptions and must be released to the requestor.

We next note, and you acknowledge, that some of the submitted information is subject to required public disclosure under section 552.022 of the Government Code. Section 552.022(a)(1) provides for the disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a government body[.]” Gov’t Code § 552.022(a)(1). Section 552.022(a)(3) provides for the disclosure of “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]” *Id.* § 552.022(a)(3). Section 552.022(a)(16) provides for the disclosure of “information that is in a bill for attorney’s fees and that is not privileged under the attorney-client privilege.” *Id.* § 552.022(a)(16). All of the records in Exhibits 4 and 5, along with the records we have marked in Exhibit 6, are subject to section 552.022 and must be released, unless the information is expressly confidential under other law or unless the information encompassed by section 552.022(a)(1) is excepted from disclosure under section 552.108 of the Government Code.<sup>5</sup>

The district raises sections 552.103 and 552.107 for the submitted information that is subject to section 552.022. Sections 552.103 and 552.107 are discretionary exceptions to disclosure that protect the governmental body’s interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 676

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<sup>4</sup>We assume that the “representative 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 records to the extent that those records contain substantially different types of information than that submitted to this office.

<sup>5</sup>We note that the district does not claim an exception to disclosure under section 552.108.

at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, sections 552.103 and 552.107 are not other law that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any of the submitted information that is subject to section 552.022 under section 552.103 or section 552.107.

However, the Texas Supreme Court has held that the Texas Rules of Evidence are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege also is found at Texas Rule of Evidence 503. Accordingly, we will consider your assertion of this privilege under rule 503 with respect to the information in Exhibits 4 and 5. You also raise sections 552.117 and 552.137 which are “other law” for purposes of section 552.022; therefore, we will address your arguments under these sections for the information subject to section 552.022 as well as for the remaining submitted information. Further, with respect to the remaining information in Exhibit 6, we will address your claim under section 552.103.

You assert that the attorney billing information in Exhibits 4 and 5 is excepted from disclosure under rule 503 of the Texas Rules of Evidence, which enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

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 lawyer 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.

Tex. R. Evid. 503(b)(1). 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. *Id.* 503(a)(5).

Thus, 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 information is privileged and 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 your representations and our review of the submitted information, we find that the information we have marked in Exhibit 4 may be withheld on the basis of the attorney-client privilege under rule 503. You have not demonstrated, however, that the remaining information at issue satisfies the requirements of the attorney-client privilege. *See* Tex. R. Evid. 503; Open Records Decision No. 676 at 6-11 (2002). We note that you have failed to identify the parties to the remaining communications in Exhibit 4 as being clients, client representatives, lawyers, or lawyer representatives to whom the attorney-client privilege would apply. *See* Tex. R. Evid. 503(b)(1)(A), (B), (C), (D), (E). Further, you have failed to demonstrate that the billing statements in Exhibit 5 constitute privileged communications made for the purpose of facilitating the rendition of professional legal services to the district. We therefore conclude that the district may not withhold any of the remaining information in Exhibits 4 and 5 under rule 503.

You assert that the remaining information in Exhibit 6 is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a

particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that the district is currently a party to two pending lawsuits: *Harrison v. Carroll Indep. Sch. Dist.* (“*Harrison*”), Cause No. 4-06-CV-424-A, in the United States District Court for the Northern District of Texas, Fort Worth Division; and *Kaminski v. Carroll Indep. Sch. Dist.* (“*Kaminski*”), Cause No. 342-206184-04, in the 342<sup>nd</sup> District Court, Tarrant County, Texas. You indicate that these cases were both filed prior to the date the district received the request for information. As such, we find that litigation was pending in both cases on the date the district received the request for information.

You seek to withhold the remaining information in Exhibit 6 from the requestor, who is the attorney for the plaintiff in the *Kaminski* case. You state that the information “was received from the plaintiff in the *Harrison* case . . . is available to all the parties in the *Harrison* case . . . or has been made available to the parties through discovery in the *Harrison* case[.]” Based upon your representations, we find that the information at issue is related to the *Harrison* case. However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). You claim that the information at issue is also related to the *Kaminski* case, and explain that it has not been made available to the parties in that case. Upon review, however, we find that the district has failed to demonstrate that the information at issue is related to the *Kaminski* case. Therefore, the district may not withhold any portion of the remaining information in Exhibit 6 under section 552.103 of the Government Code.

You assert that the remaining records include personal information belonging to district employees. Section 552.117(a)(1) of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024 of the Government Code. Additionally, section 552.117 also encompasses personal cellular telephone numbers, provided that the cellular phone service is paid for by the employee with his or her own funds. See Open Records Decision No. 670 at 6 (2001) (extending section 552.117(a)(1) exception to personal cellular phone number and personal pager number of employee who elects to withhold home phone number in accordance with section 552.024). We note that an individual’s work telephone number is not excepted from disclosure on this basis. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). You state, and provide documentation showing, that the employees at issue elected to keep their information confidential. Therefore, with the

exception of the information we have marked for release, the district must withhold the information you have marked under section 552.117 of the Government Code. We have marked some additional information that must be withheld under section 552.117.

You also claim that some of the submitted information is subject to section 552.136 of the Government Code, which states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. You have failed to explain, and the documents do not reflect, what type of account the numbers you have marked refer to or how the numbers can be used to obtain goods or services. Thus, none of the account numbers you have marked may be withheld under section 552.136 of the Government Code.

The district also seeks to withhold e-mail addresses contained in Exhibit 6 under section 552.137 of the Government Code. Section 552.137 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 id.* § 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. You do not inform us that the individuals at issue have affirmatively consented to the release of their e-mail addresses. With the exception of the governmental e-mail addresses we have marked for release, the district must withhold the e-mail addresses it has marked pursuant to section 552.137 of the Government Code.

Finally, we note that the evaluations in Exhibit 6 may be excepted from public disclosure under section 552.101 of the Government Code. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses information protected by other statutes, such as section 21.355 of the Education Code. Section 21.355 provides, “A document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. 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). This office has determined 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 the evaluation. Open Records Decision No. 643. We also determined that the word “administrator” in section 21.355 means a person who is required to and does in fact hold an administrator’s certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

You do not indicate whether the individual whose evaluations are at issue held a teacher’s or administrator’s certificate or permit under chapter 21 of the Education Code and was

performing the functions of a teacher or administrator at the time of the evaluation. Therefore we must rule conditionally. To the extent the individual in question did hold a teacher's or administrator's certificate or permit and was functioning as a teacher or administrator at the time of the evaluation, then the district must withhold the evaluations under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. To the extent the individual in question did not hold a teacher's or administrator's certificate or permit or was not functioning as a teacher or administrator at the time of the evaluation, then the information at issue is not confidential under section 21.355 of the Education Code and may not be withheld under section 552.101 of the Government Code.

In summary, the district may withhold the information we have marked in Exhibit 4 under rule 503 of the Texas Rules of Evidence. With the exception of the information we have marked for release, the district must withhold the information you have marked under section 552.117 of the Government Code. With the exception of the governmental e-mail addresses we have marked for release, the district must withhold the e-mail addresses it has marked pursuant to section 552.137 of the Government Code. Provided that the individual whose evaluations are at issue did hold a teacher's or administrator's certificate or permit and was functioning as a teacher or administrator at the time of the evaluation, the district must withhold the evaluations under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The remaining responsive 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,

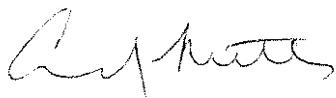
toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/mcf

Ref: ID# 290503

Enc. Submitted documents

c: Mr. Robert Brunig  
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