



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

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Mr. Thomas Clayton Feighny
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OR2008-00750

Dear Mr. Feighny:

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# 299607.

The White Deer Independent School District (the "district"), which you represent, received a request for "a copy of all inbox, sent, and deleted e-mails" on a specified computer. You state that you have released a portion of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.117, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 522.101. This section encompasses the doctrine of common-law privacy. Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 522.102. In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we will address your privacy claims under sections 552.101 and 552.102 together.

Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has also found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, the district must withhold the information that we have marked under common-law privacy.

The district also claims that the telephone numbers contained in Exhibit C and the job applications, resumes, transcripts, and cover letters contained in Exhibit E are subject to common-law privacy. However, this office has also stated on several occasions that certain information regarding individuals, including telephone numbers, is generally not protected by common-law privacy under section 552.101. *See* Open Records Decision Nos. 554 at 3 (1990) (disclosure of a person's telephone number is not an invasion of privacy), 455 at 7 (1987). Further, there is a legitimate public interest in job qualifications and performance of public employees and this office has concluded that information in public employee's resume is not protected by common-law privacy. *See* Open Records Decision Nos. 542 at 5 (1990), 470 at 4 (1987). Therefore, common-law privacy is not applicable to any of the remaining information and no portion of it may be withheld under section 552.101 on this basis.

You also assert that the transcripts submitted in Exhibit E are excepted from disclosure under section 552.102(b), which excepts from public 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 exception further provides that "the degree obtained or the curriculum on a transcript in the personnel file of the employee" are not excepted from disclosure. *Id.*; *see also* Open Records Decision No. 526 (1989). However, in this instance, the transcripts at issue were sent by applicants seeking employment with the district. You do not explain whether any of the applicants were hired by the district as public school employees. Thus, we must rule conditionally. Accordingly, if any of the applicants at issue were hired as professional public school employees, then, except for those portions of the documents that reveal the degree obtained and the courses taken, the district must withhold the transcripts maintained in those individuals' personnel files under section 552.102(b). However, to the extent that the individuals at issue were not hired as

employees of the district, you have failed to establish that section 552.102(b) is applicable to these transcripts, and they may not be withheld on this basis.

Section 552.107(1) of the Government Code 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 Tex. 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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).

In this case, you assert that Exhibit F consists of communications made for the purpose of facilitating the rendition of professional legal services. The communications were between a district employee and attorneys representing the district. You indicate that the communications were intended to be kept confidential among the intended parties, and that the communications have remained confidential. Thus, you may withhold Exhibit F under section 552.107(1) of the Government Code.

You also assert that some of the remaining information is subject to section 552.117(a)(1) of the Government Code, which excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be

kept confidential under section 552.024 of the Government Code. We note that a pager, fax, or cellular telephone number provided to an employee at public expense may not be withheld under section 552.117. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cell phone numbers provided and paid for by governmental body and intended for official use). 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 much of the information pertains to applicants for district job openings. Since you have failed to identify which, if any of these applicants were actually hired as district employees, we must again rule conditionally. The district may only withhold information under section 552.117 on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district may not withhold the information we have marked under section 552.117 for those individuals who were not employees or who did not make a timely election to keep the information confidential.

We note that the submitted information contains a Texas driver's license number.¹ Section 552.130 of the Government Code excepts from disclosure information relating to a Texas motor vehicle driver's license and information relating to a Texas motor vehicle title or registration. Gov't Code § 552.130. We have marked the driver's license number that the district must withhold under section 552.130 of the Government Code.

Next, you assert that Exhibit D is confidential in its entirety under section 552.136. Section 552.136 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." *Id.* § 552.136(b). Upon review, we conclude that the district must withhold the account numbers we have marked under section 552.136 of the Government Code. However, because the remaining account information and itemized billing information do not constitute access device numbers, section 552.136 is not applicable to the remaining information in this exhibit, and thus, the remaining information in Exhibit D must be released to the requestor.

The remaining information also contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code, which requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See* Gov't Code § 552.137 (b). You do not inform us that the owner of the e-mail addresses have

¹The Office of the Attorney General will raise a mandatory exception, such as section 552.130, on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

affirmatively consented to release. Therefore, the district must withhold the e-mail addresses we have marked under section 552.137.

In summary, you must withhold the information that we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent that any of the applicants at issue in Exhibit E were hired as professional public school employees, then, except for those portions of the documents that reveal the degree obtained and the courses taken, the district must withhold the transcripts maintained in those individuals' personnel files under section 552.102(b). However, to the extent that the individuals at issue were not hired as employees of the district, the transcripts must be released to the requestor. You may withhold Exhibit F under section 552.107(1) of the Government Code. The district must withhold the information we have marked under section 552.117(a)(1) only for those employees who timely elected to keep their personal information confidential. The district must withhold the driver's license number that we marked under section 552.130. The district must withhold the account numbers we marked under section 552.136. The district must withhold the e-mail addresses we marked under section 552.137. The remaining information must be released.²

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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

²We note that the submitted information contains social security numbers. Section 552.147(b) of the Government Code 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.

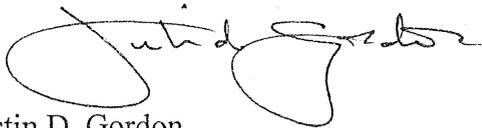
requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge 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,



Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/jh

Ref: ID# 299607

Enc. Submitted documents

c: Mr. Jeff Nicklas
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(w/o enclosures)