



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 4, 2008

Ms. Amanda M. Bigbee  
Henslee Schwartz, L.L.P.  
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Fort Worth, Texas 76102

OR2008-07653

Dear Ms. Bigbee:

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# 311680.

The Carroll Independent School District (the "district"), which you represent, received three requests for four categories of information pertaining to Dr. Andra Barton and the decision not to extend her contract. You have submitted two sets of documents. The first set of documents is labeled Exhibits A through D. The second set of documents is labeled Exhibits A, A1, and B through I. You state that the district has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a).<sup>1</sup> You claim that the submitted 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.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the district's obligations under section 552.301 of the Government Code. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e) states, within fifteen business days of receiving the request, the governmental body must submit to this office (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy

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<sup>1</sup>We note that the United States Department of Education Family Policy Compliance Office (the "DOE") has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: [http://www.oag.state.tx.us/opinopen/og\\_resources.shtml](http://www.oag.state.tx.us/opinopen/og_resources.shtml).

<sup>2</sup>Although you raise section 552.101 in conjunction with the attorney-client privilege, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D). The district timely submitted the first set of documents in response to the first request. In response to the second and third requests, the district submitted a second set of documents. Upon reviewing the requests and the documents, we find that the second set of documents is responsive to the first request. Accordingly, the second set of documents should have been submitted by April 7, 2008. You did not submit the second set of documents until April 21, 2008, well beyond the fifteen-day deadline for submitting this information. Consequently, we conclude that the district failed to comply with the requirements of section 552.301 of the Government Code with respect to the second set of documents and comments.

By failing to timely submit the second set of documents, the district waived its claim under section 552.111, a discretionary exception to disclosure. *See* Open Records Decision Nos. 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). As you raise no other exceptions for Exhibits H and I, they must be released to the requestors. However, we will consider your arguments under sections 552.101, 552.102, 552.117, and 552.130 of the Government Code for the remaining exhibits in the second set of documents, as these exceptions cannot be waived by a governmental body's section 552.301 violation. *See* Gov't Code § 552.302; *Hancock v. State Bd. Of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision Nos. 319 (1982). In addition, we will consider your arguments for the timely submitted information.

Next, we note that you have submitted a W-4 form as Exhibit E which is subject to section 552.101 of the Government 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. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274(1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return . . . or the determination of the existence, or possible existence, of liability . . . for any tax, . . . penalty, . . . , or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993).

Subsections (c) and (e) of section 6103 are exceptions to the confidentiality provisions of section 6103(a) and provide for disclosure of tax information to the taxpayer or the taxpayer's designee. *See* 26 U.S.C. § 6103(c), (e)(1)(A)(i) (tax return information may be disclosed to taxpayer), (e)(7) (information may be disclosed to any person authorized by subsection(e) to obtain such information if Secretary of Treasury determines such disclosure would not seriously impair tax administration); *see also Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1998) (26 U.S.C. § 6103 represents exclusive statutory route for taxpayer to gain access to own return information and overrides individual's right of access under the federal Freedom of Information Act). Section 6103(c) provides that, unless the Secretary of Treasury determines that disclosure would seriously impair tax administration, tax record information may be released to any person or persons as the taxpayer may designate in a consent to such disclosure. *See* 26 U.S.C. § 6103(c). We note that Mr. Kevin Lungwitz represents the individual whose tax information is at issue. Therefore, pursuant to section 6103(c) of title 26 of the United States Code, the district must release the marked W-4 form to Mr. Lungwitz if his client has consented to the disclosure of her tax record information to him and the Secretary of Treasury determines that such disclosure would not seriously impair federal tax administration. Otherwise, the submitted W-4 form is confidential under section 6103 of title 26 of the United States Code. The district must withhold Exhibit E from the remaining two requestors pursuant to section 552.101 in conjunction with federal law.

Section 552.101 also encompasses section 21.355 of the Education Code. Section 21.355 provides that, "[any] document evaluating the performance of a teacher or administrator is confidential." 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 Open Records Decision No. 643, this office also 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* at 4. The submitted information demonstrates that the individual who is the subject of the submitted evaluations held an administrator certificate under subchapter B of chapter 21 of the Education Code and was performing the functions of an administrator at the time of the evaluations. You contend that Exhibits A, A1, and F in the second set of documents constitute evaluations for the purpose of section 21.355 of the Education Code. We agree that the information in Exhibit A constitutes evaluations of the performance of an administrator for the purpose of section 21.355. Therefore, Exhibit A is confidential under section 21.355 and must be withheld under section 552.101 of the Government Code. However, you do not provide any arguments explaining how the documents in Exhibit A-1 or Exhibit F constitute evaluations of the performance of an administrator for the purpose of section 21.355. Therefore, the district may not withhold Exhibit A-1 and Exhibit F under this section. As you raise no further exceptions for Exhibit A-1 this information must be released. We will, however, consider your additional argument for Exhibit F.

Next, we address your assertion that the information you have marked in Exhibits B, C, and D in the first set of documents and in Exhibits C, D, and F in the second set of

documents is excepted from disclosure under section 552.102(a) of the Government Code. Section 552.102(a) excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). Section 552.102 is applicable to information that relates to public officials and employees. See Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). In *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), the Texas Supreme Court held that information is protected by common-law privacy if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of a legitimate concern to the public. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82.

We understand you to argue that Exhibits C and D from the second set of documents should be withheld in their entirety under section 552.102(a) because they contain medical information. You also argue that portions of Exhibits B, C, and D from the first set of documents, and Exhibit F should be withheld as private medical information under section 552.102(a). In some instances, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are confidential under common-law privacy. However, not all medical information is protected under common-law privacy. In this instance, the information you seek to withhold only tangentially refers to health issues. Instead these exhibits pertain to requests for paid leave and staff coverage, which is of legitimate public interest. See Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, Exhibits C, D, and F from the second set of documents may not be withheld under common-law privacy. In addition, none of the information in Exhibits C and D in the first set of documents may be withheld under common-law privacy.

We note, however, a small portion of the information you have marked as private in Exhibit B from the first set of document is medical information. This information, which we have marked, is intimate and of no legitimate public interest. Accordingly, this information must be withheld under section 552.101 in conjunction with common-law privacy.

Next, you argue that portions of Exhibit G are excepted from disclosure under section 552.102(b) of the Government Code. Section 552.102(b) excepts from disclosure all information from transcripts of professional public school employees other than the employee's name, the courses taken, and the degree obtained. Gov't Code § 552.102(b); Open Records Decision No. 526 (1989). We agree that Exhibit G consists of transcripts that are subject to section 552.102(b). Section 552.102(b) was enacted to protect the privacy interests of public school employees. Mr. Lungwitz represents the employee whose

transcripts are at issue. Section 552.023(a) gives a person or a person's authorized representative a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from disclosure by laws intended to protect that person's privacy interests. *See* Gov't Code § 552.023; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual or authorized representative asks governmental body to provide information concerning that individual). Accordingly, Mr. Lungwitz has a right of access to his client's transcripts and they may not be withheld from him under section 552.102(b). However, with the exception of the employee's name, courses taken, and degree obtained, which must be released, the transcripts must be withheld from the two remaining requestors pursuant to section 552.102(b).<sup>3</sup>

Next, we address your argument that Exhibit A in the first set of documents is excepted from disclosure in its entirety under 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). 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.*, 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

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<sup>3</sup>As our ruling for the information in Exhibit G is dispositive, we do not address your remaining argument against the disclosure of this information.

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 state that Exhibit A reveals communications between the district's attorney and district administrators. You represent that these communications were made for the purpose of facilitating the rendition of professional legal services. You also represent that the confidentiality of these communications has been maintained. Based on your representations and our review, we conclude that section 552.107 is applicable to this exhibit. Thus, the district may withhold Exhibit A under section 552.107 of the Government Code.

Next, we address your contention that Exhibit D in the first set of documents is excepted from disclosure in its entirety under section 552.135 of the Government Code, which provides the following:

(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].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional,

statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.135. Exhibit D consists of complaints against Dr. Barton that appear to have been submitted to the district alleging, in small part, possible violations of regulatory laws. We have marked information in Exhibit D that in this instance must be withheld from disclosure under section 552.135 to protect the identities of the informers. However, you do not argue, nor does it appear, that the majority of these complaints pertain to violations of law. Accordingly, the district has failed to demonstrate the remaining information in Exhibit D is excepted under section 552.135.

We next address your argument that Exhibit B in the first set of documents must be withheld in its entirety under section 552.117 of the Government Code. Section 552.117(a)(1) of the Government Code excepts from 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. Gov't Code § 552.117(a)(1). You have failed to demonstrate that Exhibit B in the first set of documents contains any information that is excepted from disclosure under section 552.117(a)(1). Therefore, the district may not withhold any of the information in Exhibit B in the first set of documents under section 552.117(a)(1).

You also argue that the information you marked in Exhibits C and D in the first set of documents and Exhibits B and C in the second set of documents is protected by section 552.117(a)(1). As discussed above, section 552.117(a)(1) excepts from disclosure specific categories of personal 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. *Id.* Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989).* Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. We note that you have only included the election form of Dr. Andra Barton. Dr. Barton elected to keep all categories of information confidential. We have marked Dr. Barton's section 552.117 information. Because the purpose of section 552.117 is to protect the employee's privacy, the employee or her representative has a right of access to the protected information. Accordingly, you must release the marked section 552.117 information pertaining to Dr. Barton to her attorney. Gov't Code § 552.023(b) This information must, however, be withheld from the other two requestors.

You have also marked information that you claim to be the personal information of other district employees under section 552.117(a)(1). We note that you have not included the

election forms documenting that these employees requested confidentiality pursuant to section 552.024. Therefore, we must rule conditionally. Accordingly, if these employees timely elected confidentiality, the district must withhold the information we marked in Exhibits C and D under section 552.117(a)(1). As for the remaining information you have marked under section 552.117, you do not explain how it is personal information subject to section 552.117. Therefore, the district may not withhold any of the remaining information under section 552.117.

Exhibit B in the second set of documents contains Dr. Barton's Texas driver's license number. 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." Gov't Code § 552.130. Because the purpose of section 552.130 is to protect the privacy interest of the license holder, Mr. Lungwitz, as Dr. Barton's representative, has a special right of access to her driver's license number. We have marked the driver's license number in Exhibit B in the second set of documents that the district must withhold from the other two requestors under section 552.130 of the Government Code.

Finally, we address your assertion that the e-mail addresses you have marked in Exhibit C are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 states that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. Gov't Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). The e-mail addresses at issue are not of a type specifically excluded by section 552.137(c). You do not state that the owners of these e-mail addresses have consented to their public disclosure. Therefore, the district must withhold the e-mail addresses you have marked in Exhibit C under section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure.

In summary, the district must withhold from Mr. Lungwitz: (1) the marked W-4 form in Exhibit E if his client did not consent to its release or the Secretary of Treasury determines that disclosure would seriously impair federal tax administration; (2) the marked evaluations in Exhibit A in the second set of documents under section 552.101 in conjunction with section 21.355 of the Education Code; (3) the information we have marked in Exhibit B of the first set of documents under section 552.101 in conjunction with common-law privacy; (4) the information we have marked in Exhibit D in the first set of documents under section 552.135 of the Government Code; (5) the personal information of the other district administrators we have marked under section 552.117(a)(1) of the Government Code, if the individuals made timely elections; and (6) the e-mail addresses you have marked in Exhibit C of the first set of documents under section 552.137, unless the owners affirmatively consent to their disclosure. The district may withhold Exhibit A in the first set of documents under section 552.107 of the Government Code. The remaining information must be released to Mr. Lungwitz.

As to the remaining two requestors, the district must withhold: (1) the submitted W-4 form in Exhibit E under section 552.101 of the Government Code and federal law; (2) the marked evaluations in Exhibit A in the second set of documents under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code; (3) the information we have marked in Exhibit B of the first set of documents under section 552.101 of the Government Code in conjunction with common-law privacy; (4) with the exception of the employee's name, courses taken, and degree obtained, the transcripts at Exhibit G under section 552.102(b) of the Government Code; (5) the information we have marked in Exhibit D in the first set of documents under section 552.135 of the Government Code; (7) the personal information of Dr. Barton we have marked under section 552.117(a)(1) of the Government Code; (8) marked personal information of the other district administrators under section 552.117(a)(1) of the Government Code, if those individuals made timely elections; (9) the Texas driver's license number we have marked in Exhibit B of the second set of documents under section 552.130; and (10) the e-mail addresses you have marked in Exhibit C of the first set of documents under section 552.137, unless the owners affirmatively consent to their disclosure. The district may withhold Exhibit A in the first set of documents under section 552.107 of the Government Code. The remaining information must be released to these two requestors.

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).

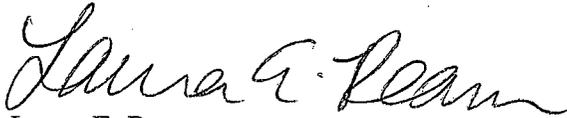
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 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,



Laura E. Ream  
Assistant Attorney General  
Open Records Division

LER/jb

Ref: ID# 311680

Enc. Submitted documents

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