



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 9, 2008

Mr. Paul A. Lamp  
Feldman Rogers  
5718 Westheimer Road, Suite 1200  
Houston, Texas 77057

OR2008-07843

Dear Mr. Lamp:

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# 312270.

The Pasadena Independent School District (the "district"), which you represent, received a request for information pertaining to a specified survey, as well as information relating to grievances filed against the district during the years 2005-2008. You state that you are making some information available to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.101 and 552.107 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 § 552.101. Section 552.101 encompasses section 21.355 of the Education Code, which provides, "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. In addition, the court has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 because "it reflects the principal's judgment regarding [a teacher's] actions, gives corrective direction, and provides for further review." *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). 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. *Id.* 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.*

Upon review, we agree that most of the documents within Exhibit C are evaluations. However, you do not state or provide documentation showing that the district employees at issue held teachers' or administrators' certificates under subchapter B of chapter 21 of the Education Code. We must therefore rule conditionally: if the employees at issue held teachers' or administrators' certificates at the time of the evaluations, the evaluations that we have marked are confidential under section 21.355 and must be withheld under section 552.101 of the Government Code. To the extent that these employees do not hold the requisite certificates, the evaluations that we have marked are not confidential under section 21.355 and may not be withheld under section 552.101. As to the remaining information within Exhibit C, you do not explain how this memo was used to evaluate a teacher or administrator for purposes section 21.355. Accordingly, the district may not withhold this information under section 21.355 and section 552.101. As no other exceptions are raised, it must be released to the requestor.

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 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 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, lawyer representatives, and lawyers representing another party in a pending action concerning a matter of common interest therein. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning

it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that Exhibit B consists of communications between district attorneys and district employees, all of whom you have identified. You state that these communications were made in furtherance of the rendition of legal services and advice for the district and that they have remained confidential. Based on your representations and our review, we find that you have demonstrated the applicability of the attorney-client privilege to most of Exhibit B. We note that Exhibit B contains some documents, most of which are handwritten notes, that do not appear to be part of any privileged communication. You have failed to demonstrate how these notes are protected by the attorney-client privilege, and they may not be withheld in their entirety on this basis. However, upon review, we find that small portions of these notes document a confidential communication between privileged parties. Accordingly, we have marked the information within the handwritten notes that is protected under the attorney-client privilege. This information, along with the rest of Exhibit B, may be withheld under section 552.107. The remaining information within the handwritten notes may not be withheld on this basis.

Next, we note that some of the remaining information may be protected under section 552.117(a)(1) of the Government Code.<sup>1</sup> Section 552.117(a)(1) 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. *See Gov't Code* § 552.117(a)(1). 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). The district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the district

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<sup>1</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *Open Records Decision Nos. 481* (1987), *480* (1987), *470* (1987).

employee whose personal information we have marked timely elected to withhold his information under section 552.024, the marked information must be withheld under section 552.117(a)(1). If that employee did not timely elect, the marked information may not be withheld under section 552.117(a)(1).

We note that the remaining documents also contain a Texas-issued driver's license number. Section 552.130 of the Government Code provides that information relating to a motor vehicle driver's license issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1). The district must withhold the Texas driver's license number we have marked within Exhibit B under section 552.130 of the Government Code.

In summary, if the employees at issue held teachers' or administrators' certificates, the documents we marked within Exhibit C are confidential under section 21.355 of the Education Code and must be withheld under section 552.101 of the Government Code. The district may withhold the information we marked within Exhibit B under section 552.107 of the Government Code. If the district employee whose personal information we have marked timely elected to withhold his information under section 552.024, the district must withhold the information we marked within Exhibit B under section 552.117(a)(1). Finally, the district must withhold the Texas-issued driver's license number within Exhibit B under section 552.130 of the Government Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must 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

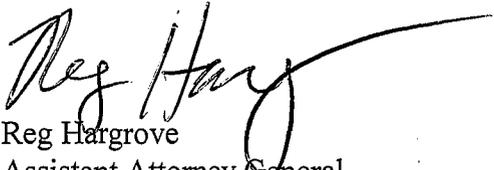
requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Reg Hargrove  
Assistant Attorney General  
Open Records Division

RJH/eeg

Ref: ID# 312270

Enc. Submitted documents

c: Ms. Tana L. Haass  
2209 Donegal Court  
Deer Park, Texas 77536  
(w/o enclosures)