



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 18, 2008

Mr. Don M. Dean
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P.O. Box 9158
Amarillo, Texas 79105-9158

OR2008-09822

Dear Mr. Dean:

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# 316306.

The Amarillo School District (the "district"), which you represent, received a request for information regarding a former teacher, including (1) his personnel records; (2) electronic and written communications for a specified period of time; and (3) his salary and administrative leave information. We note that you have redacted social security numbers pursuant to section 552.147 of the Government Code.¹ You state that you have released some information to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, and 552.107 of the Government Code, and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have also received comments from an attorney representing the former teacher. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have considered all of the submitted arguments and reviewed the submitted information.

Initially, we address the district's contention that Exhibits K and L are not responsive to the request for information. In this instance, the requestor seeks, among other information, the personnel records for a former teacher as well as communications concerning the former teacher for a specified time period. Although the separation agreement in Exhibit K is maintained in the former teacher's personnel file, you assert that because the agreement was completed outside of the specified time period, it is not responsive to the request. We note, however, that the separation agreement in Exhibit K is responsive to the portion of the request asking for all personnel records, and therefore is not a communication which would only be responsive if it fit within the specified time frame. Likewise, the computer printouts

¹Section 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).

contained in Exhibit L are maintained by the district as personnel records. Thus, we conclude that because these exhibits are maintained in the personnel file of the named former teacher, the submitted exhibits are responsive to the request.

Next, we note that the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Education Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purposes of our review in the open records ruling process under the Act.² Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). You have submitted both redacted and unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine the applicability of FERPA, we will not address FERPA with respect to these records, other than to note that parents have a right of access to their own child's education records. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. Such determinations under FERPA must be made by the educational authority in possession of the education records.³ The DOE also has informed this office, however, that a parent's right of access under FERPA to information about that parent's child does not prevail over an educational institution's right to assert the attorney-client privilege.⁴ Therefore, to the extent that the requestor has a right of access under FERPA to any of the information for which you claim the attorney-client privilege, we will address your claim.

We also note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). In this instance, a portion of the submitted information constitutes a completed investigation. This information must be released under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 or confidential under other law. Although you seek to withhold some of the information that is subject to section 552.022(a)(1) under

²A copy of this letter may be found on the attorney general's website, *available at* <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

³In the future, if the district does obtain parental consent to submit unredacted education records, and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

⁴Ordinarily, FERPA prevails over an inconsistent provision of state law. *See Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F.Supp. 381, 382 (E.D. Tex. 1995); Open Records Decision No. 431 at 3 (1985).

section 552.107 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision No. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived). As such, section 552.107 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any of the information that is subject to section 552.002(a)(1) under section 552.107.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022 of the Government Code. *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, and the attorney work product privilege also is found at Texas Rule of Civil Procedure 192.5. Accordingly, we will consider your assertion of these privileges under rule 503 and rule 192.5 for the information subject to section 552.022 in Exhibits H and M. Furthermore, because sections 552.101 and 552.102 are "other law" within the meaning of section 552.022 of the Government Code, we also will determine whether any of the other information that is subject to section 552.022(a)(1) is excepted from disclosure under these sections. We also will consider your exceptions to the disclosure of the information that is not subject to section 552.022(a)(1).

Texas Rule of Evidence 503 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You have marked the information in Exhibit H for which the district claims the attorney-client privilege. You state that the information at issue documents communications between the district’s attorneys and district administrators that were made for the purpose of facilitating the rendition of professional legal services. You also state that the communications were intended to be and remain confidential. Based on your representations, we have marked information that the district may withhold under rule 503.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent that the information implicates the core work product aspect of the work product privilege. *See Open Records Decision No. 677 at 9-10 (2002)*. Rule 192.5 defines core work product as the work product of an attorney or an attorney’s representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney’s representative. *See TEX. R. CIV. P. 192.5(a), (b)(1)*. Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney’s representative. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat’l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204. The second part of the work product test

requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's or an attorney's representative. See TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided that the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). See *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You contend that the documents in Exhibit M contain attorney work product that is protected by rule 192.5. You assert that the documents at issue contain information that was developed by attorneys in connection with anticipated litigation. Having considered your arguments and reviewed the remaining information, we agree that the information in Exhibit M constitutes core work product for purposes of Texas Rule of Civil Procedure 192.5. Accordingly, the district may withhold the information in Exhibit M on the basis of core work product under Texas Rule of Civil Procedure 192.5.

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. This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. See *Open Records Decision No. 643* (1996). In *Open Records Decision No. 643*, we determined that a “teacher” for purposes of section 21.355 means a person who (1) is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and (2) is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. See *id.* at 4; see *Abbott v. North East Indep. Sch. Dist.*, No. 03-04-00744-CV, 2006 WL 1293545 (Tex. App.—Austin May 12, 2006, no pet.) (concluding that written reprimand constitutes evaluation for purposes of Educ. Code § 21.355).

You seek to withhold documents, communications, and other information concerning a former district teacher. However, you do not state or provide documentation showing, that the teacher at issue held an teacher's certificate under subchapter B of chapter 21 of the Education Code and was performing the functions of an teacher at the time of the evaluations. Nonetheless, if the teacher held a teacher's certificate and was performing the functions of an teacher at the time of the evaluations, then the information we have marked is confidential under section 21.355 and must be withheld under section 552.101 of the Government Code. To the extent that the teacher does not satisfy these criteria, the information we have marked is not confidential under section 21.355 and may not be withheld under section 552.101 on that ground. In either case, you have failed to demonstrate how the remaining information consists of evaluations or written reprimands as contemplated by section 21.355 or as interpreted by *North East Independent School District*. Accordingly, the district may not withhold any of the remaining information under

section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Section 552.102(a) of the Government Code 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). We will therefore consider the applicability of common-law privacy under section 552.101 together with your claim under section 552.102.

Common-law privacy protects information if (1) the information contains highly intimate and 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. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). You state that portions of the submitted information relate to a completed investigation conducted by the district and assert that *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. — El Paso 1992, writ denied) is instructive in this instance. We note that *Ellen* addressed the applicability of common-law privacy to information concerning investigations of sexual harassment allegations. *See id.* However, we find no evidence either that the complainants in this case alleged that they had been sexually harassed or that the district conducted a sexual harassment investigation pursuant to the complainants' allegations. Accordingly, we find that no portion of the submitted information may be withheld from disclosure under section 552.101 on the basis of *Ellen*.

Common-law privacy also encompasses the types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation*, including 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. *See* 540 S.W.2d 668 at 683. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected by common-law privacy. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

Further, this office has found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group

insurance, health care, or dependent care), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities). Upon review, we find that the information we have marked must be withheld under section 552.101 in conjunction with common-law privacy. Generally, however, the public has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decision No. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern). Information that pertains to an employee's actions as a public servant generally cannot be considered to be beyond the realm of legitimate public interest. *See* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find that no portion of the remaining information is highly intimate or embarrassing information that is of no legitimate concern to the public. Accordingly, none of the remaining information may be withheld under either section 552.101 or section 552.102 in conjunction with common-law privacy.

The submitted information contains transcripts that you claim are subject to section 552.102(b) of the Government Code. 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 or the curriculum on a transcript in the personnel file of the employee" are not excepted from disclosure. Thus, with the exception of the employee's name, the courses taken, and the degree obtained, the district must withhold the submitted transcripts, which we have marked, pursuant to section 552.102(b).

Next, we note that some of the remaining information may be protected under sections 552.117(a)(1) and 552.137 of the Government Code.⁵ 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). 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. 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). 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

⁵The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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. Accordingly, to the extent the telephone numbers we have marked in the remaining information are personal cellular telephone numbers of district employees who made timely elections under section 552.024, the numbers must be withheld under section 552.117(a)(1). To the extent the marked telephone numbers are not personal cellular telephone numbers or do not belong to district employees who made timely elections under section 552.024 of the Government Code, they may not be withheld under section 552.117(a)(1). Likewise, if the district employees whose personal information we have marked timely elected to withhold their information under section 552.024, the marked information must be withheld under section 552.117(a)(1). If those employees did not timely elect, the marked information may not be withheld under section 552.117(a)(1).

We note that some of the submitted information consists of personal e-mail addresses that are subject to 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* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure.

We note that a portion of the submitted information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, this ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consist of "education records" subject to FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act. The district must withhold the following: (1) to the extent the teacher at issue held an teacher's certificate and was performing the functions of an teacher at the time of the evaluations, the information we have marked under section 552.101 in conjunction with section 21.355 of the Education Code; (2) the information we have marked under section 552.101 in conjunction with common-law privacy; (3) with the exception of the employee's name, the courses taken, and the degree obtained, the submitted transcripts pursuant to section 552.102(b); (4) to the extent the cellular telephone numbers we have marked are personal cellular telephone numbers that belong to district employee who made a timely election under section 552.024, the phone

numbers we have marked under section 552.117(a)(1) of the Government Code; (5) to the extent the district employees timely elected under section 552.024, the personal information we have marked under section 552.117(a)(1) of the Government Code; and (6) the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have affirmatively consented to their disclosure. The district may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.

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). If the governmental body does not file suit over 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,



Bill Longley
Assistant Attorney General
Open Records Division

BL/jb

Ref: ID# 316306

Enc. Submitted documents

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