



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 4, 2008

Ms. Laura C. Rodriguez  
Walsh, Anderson, Schulze, & Aldridge, P.C.  
P.O. Box 460606  
San Antonio, Texas 78246

OR2008-12205

Dear Ms. Rodriguez:

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# 320798.

The Northside Independent School District (the "district"), which you represent, received a request for all of the superintendent's incoming and outgoing e-mails on June 12, 2008. You state the district is redacting some of the responsive information pursuant to the federal Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>1</sup> You claim a portion of the remaining requested information is not subject to the Act. You also claim portions of the remaining requested information are excepted from disclosure under sections 552.101, 552.107, 552.116, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the information you have submitted.

Initially, we note the requestor seeks incoming and outgoing e-mails from June 12, 2008. You have provided our office with e-mails from dates other than June 12, 2008. Thus, this information, which we have marked, is not responsive to this request. This ruling does not address the public availability of nonresponsive information, and the district is not required to release nonresponsive information in response to this request. Accordingly, we will address your arguments with regard to the responsive information.

---

<sup>1</sup>Because our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted information.

You claim portions of the remaining information are not subject to the Act. The Act is only applicable to "public information." See Gov't Code § 552.021. Section 552.002(a) defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). Information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if it is maintained for a governmental body, the governmental body owns or has a right of access to the information, and the information pertains to the transaction of official business. See Open Records Decision No. 462 (1987).

After reviewing the information at issue, we agree the information we have marked consists of personal e-mails that do not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the district. See Gov't Code § 552.021; see also Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Thus, we conclude this information is not subject to the Act, and need not be released in response to this request.

Next, you claim section 552.107 for portions of the remaining information. 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 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 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 privilege at any time, a governmental body must explain 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 portions of the remaining information consist of confidential communications between attorneys representing the district and its employees and officials that were made for the purpose of rendering professional legal advice. You also state the confidentiality of the communications has been maintained. Based on these representations and our review of the information at issue, we agree the information we have marked consists of privileged attorney-client communications the district may withhold under section 552.107.<sup>2</sup> We note, however, a portion of the information at issue does not consist of or reveal a confidential attorney-client communication. Thus, you have failed to demonstrate this information documents a privileged attorney-client communication, and it may not be withheld under section 552.107.

Next, you assert portions of the remaining information are excepted from disclosure under section 552.116 of the Government Code. Section 552.116 provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or

---

<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

other action of a joint board described by Subsection (a) and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state pages AG-0081 through AG-0086 consist of audit working papers prepared or maintained in conducting an audit. You have not, however, informed this office what the audit is or under what authority the audit was conducted. *See id.* § 552.116(a), (b)(1); *see also* Open Records Decision No. 580 (1990) (addressing statutory predecessor to Government Code section 552.116). Thus, having considered your arguments, we find you have not demonstrated that pages AG-0081 through AG-0086 constitute audit working papers for the purposes of section 552.116. Accordingly, we conclude the district may not withhold this information under section 552.116.

You indicate pages AG-0087 and AG-0088 consist of audit working papers of an audit conducted by the district relating to criminal history background checks of applicants. Gov't Code § 552.116(b)(1). We note that the information at issue consists of a general e-mail and a list of the applicants. The district has not demonstrated that this information constitutes audit working papers rather than information in an audit working paper that is also maintained in another record. *See Gov't Code* § 552.116(a). Accordingly, we find you have failed to demonstrate the applicability of section 552.116 to pages AG-0087 through AG-0088. Therefore, the district may not withhold these pages under section 552.116 of the Government Code.

We will now address your remaining arguments against the disclosure of pages AG-0087 through AG-0088. 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. Section 552.101 encompasses information protected by other statutes. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Texas Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See Gov't Code* § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose.

*Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Upon review of pages AG-0087 through AG-0088, we determine no portion of this information constitutes CHRI generated by either the TCIC or NCIC databases. Therefore, this information is not confidential under section 411.083 and, thus, it may not be withheld under section 552.101 on that basis.

In 2007, the Legislature enacted section 411.0845 of the Government Code, which provides in relevant part as follows:

(a) The [DPS] shall establish an electronic clearinghouse and subscription service to provide criminal history record information to a particular person entitled to receive criminal history record information and updates to a particular record to which the person has subscribed under this subchapter.

(b) On receiving a request for criminal history record information from a person entitled to such information under this subchapter, the [DPS] shall provide through the electronic clearinghouse:

(1) the criminal history record information reported to the [DPS] or the Federal Bureau of Investigation relating to the individual who is the subject of the request; or

(2) a statement that the individual who is the subject of the request does not have any criminal history record information reported to the [DPS] or the Federal Bureau of Investigation.

...

(d) The [DPS] shall ensure that the information described by Subsection (b) is provided only to a person otherwise entitled to obtain criminal history record information under this subchapter. Information collected under this section is confidential and is not subject to disclosure under [the Act].

(e) A person entitled to receive criminal history record information under this section must provide the [DPS] with the following information regarding the person who is the subject of the criminal history record information requested:

(1) the person's full name, date of birth, sex, Texas driver's license number or personal identification certificate number, and social security number;

(2) a recent electronic digital image photograph of the person and a complete set of the person's fingerprints as required by the [DPS]; and

(3) any other information required by the [DPS].

*Id.* § 411.0845(a)-(b), (d)-(e). Pursuant to section 22.083(a-1) of the Education Code, a school district is authorized to obtain this CHRI from the DPS. *See* Educ. Code § 22.083(a-1)(1); *see also* Gov't Code § 411.097.

You contend that pages AG-0087 through AG-0088 are confidential under section 411.0845. Section 411.0845 pertains to information obtained from the DPS clearinghouse. You do not state pages AG-0087 through AG-0088 contain information DPS gathered pursuant to section 411.0845 of the Government Code. Therefore, the district has failed to demonstrate how pages AG-0087 through AG-0088 constitute confidential information obtained from the clearinghouse reports. Accordingly, this information may not be withheld under section 552.101 on that basis.

Next, you claim pages AG-0087 through AG-0088 are excepted from disclosure under chapter 560 of the Government Code. Section 552.101 also encompasses chapter 560 of the Government Code, which provides that a governmental body may not release a biometric identifier of an individual, such as fingerprints, except in certain limited circumstances. *See* Gov't Code §§ 560.001 (defining "biometric identifier" to include fingerprints), 560.002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). We note that pages AG-0087 and AG-0088 do not contain biometric identifiers for purposes of chapter 560; therefore, the district may not withhold any portion of this information under section 552.101 of the Government Code on the basis of section 560.003.

Section 552.101 also encompasses common-law privacy. Common-law privacy protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. Upon review, we find that no portion of pages AG-0087 through AG-0088 is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district may not withhold any portion of the information at issue pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

You also claim a portion of the remaining 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. An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument. *Id.* Although you assert the username you have marked is an access device number, we find that you have failed to demonstrate how the username at issue constitutes an access device number used to obtain money, goods, services, or another thing of value or initiate a transfer of funds other than a transfer originated solely by paper instrument. We therefore conclude the district may not withhold the marked username under section 552.136 of the Government Code.

Section 552.137 of the Government Code 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). The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that the member of the public has affirmatively consented to the release of the submitted e-mail address. Therefore, the district must withhold the e-mail address it has marked in the remaining information under section 552.137 of the Government Code.

In summary, the information we have marked is not subject to the Act. The district may withhold the information we have marked under section 552.107. The district must withhold the e-mail address we have marked under section 552.137. The remaining information must be released.

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

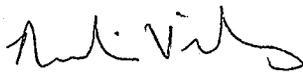
Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor 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,



Melanie J. Villars  
Assistant Attorney General  
Open Records Division

MJV/jh

Ref: ID# 320798

Enc. Submitted documents

c: Mr. Raymond Tamayo  
10734 Volimer Lane  
San Antonio, Texas 78254-1757  
(w/o enclosures)