



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 18, 2008

Ms. Mari M. McGowan
Abernathy, Roeder, Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2008-15836

Dear Ms. McGowan:

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# 328180.

The Greenville Independent School District (the "district"), which you represent, received a request for information pertaining to a specified grievance. You state that you will provide the requestor with some of the requested information. We also understand that you have redacted a portion of the submitted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a).¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.135 of the Government Code. You also state, and provide documentation showing, that you notified certain individuals of the request and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).² We have considered the exceptions you claim and reviewed the submitted information.

¹We note that our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made; therefore, we will not address the applicability of FERPA to any of the submitted records, except to note that some of the information you have redacted also exists in unredacted form elsewhere in the submitted information.

²As of the date of this decision, this office has received no correspondence from the individuals in question.

Initially, we note that the August 27, 2008 grievance recording is not responsive to the instant request because it was created after the request was received. The district need not release non-responsive information in response to this request and this ruling will not address that information.

Next, you indicate that some of the submitted information is excepted from disclosure under section 552.101 in conjunction with the informer's privilege. 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 the informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2(1990), 515 at 4-5 (1988). Additionally, the informer's privilege does not apply where the informant's identity is known to the individual who is the subject of the complaint. *See* Open Records Decision No. 208 (1978).

You claim the portions of the remaining information identify an individual who filed the specified grievance. However, the submitted information demonstrates that the subject of the complaint knows the identity of the complainant. Thus, the complainant's information may not be withheld pursuant to section 552.101 in conjunction with the informer's privilege.

You also contend that the submitted information is excepted from disclosure 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.

Gov't Code § 552.135(a)-(c). Because the legislature limited the protection section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under the exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* §§ 552.301(e)(1)(A), .135(a). You state that the allegations contain complaints regarding alleged violations of provisions of the Texas Administrative Code regarding professional ethics. However, we find that you have not identified any specific civil, criminal, or regulatory law that is alleged to have been violated. We therefore conclude that the district may not withhold any of the submitted information under section 552.135 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re 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 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 explain that a portion of the submitted information may consist of confidential communications between an attorney for the district and a district staff member that were made in furtherance of the rendition of professional legal services. You also assert that such communications were intended to be confidential and that their confidentiality has been maintained. However, you have only marked one document within the submitted information as falling under section 552.107. After reviewing your arguments and the submitted information, we agree that the one document you have marked constitutes a privileged attorney-client communication that the commission may withhold under section 552.107.

We note that the remaining information in the submitted documents and a portion of the August 5, 2008 recording contains employees’ personal information. Section 552.117 of the Government Code 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 request that this information be kept confidential under section 552.024.³ Gov’t Code § 552.117(a)(1). We note that section 552.117 also encompasses a personal cellular telephone number, provided that the service is not paid for by a governmental body. *See Open Records Decision No. 506 at 5-7 (1988)* (statutory predecessor to section 552.117 not applicable to cellular phone numbers provided and paid for by governmental body and intended for official use). But an individual’s personal post office box number is not a “home address” for purposes of section 552.117, and therefore may not be withheld under section 552.117. *See Open Records Decision No. 622 at 4 (1994)* (purpose of section 552.117 is to protect public employees from being harassed at home); *see also Open Records Decision No. 658 at 4 (1998)* (statutory confidentiality provision must be express and cannot be implied). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*.

³The 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).

Pursuant to section 552.117(a)(1), the district must withhold the personal information contained within the submitted documents and recording that pertains to a current or former employee of the district who elected, prior to the district's receipt of the request for information, to keep such information confidential. Such information may not be withheld for an individual who did not make a timely election. We have marked or indicated the information that must be withheld if section 552.117 applies.

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 Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c), and you do not inform us that a member of the public has affirmatively consented to its release. Therefore, the district must withhold the e-mail address we have marked under section 552.137 of the Government Code.

In summary, you may withhold the one document you have marked under section 552.107 of the Government Code. If the employees at issue elected to keep their information confidential, then the district must withhold the information we have identified under section 552.117. The district must withhold the e-mail address we have marked under section 552.137 of the Government Code. The remaining submitted 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). 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

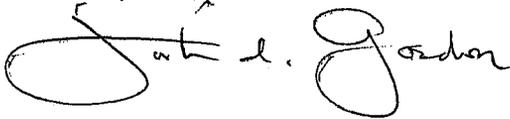
statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental 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,

A handwritten signature in black ink that reads "Justin D. Gordon". The signature is written in a cursive style with a large, looping initial "J".

Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/eeg

Ref: ID# 328180

Enc. Submitted documents

c: Requestor
(w/o enclosures)