



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 31, 2009

Ms. Bertha Bailey Whatley
Chief Legal Counsel and Public Information Officer
Office of Legal Services
100 North University Drive
Fort Worth, Texas 76107

OR2009-04180

Dear Ms. Whatley:

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# 338493.

The Fort Worth Independent School District (the "district") received a request for communications to or from specified individuals related to a named individual's job performance or to the named individual's medical condition or absences, and evaluations and complaints regarding the named individual, over a specified time period. You state that you will release portions of the requested information. You claim that the submitted information is excepted from disclosure under section 552.107 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information.

Initially, we note that the United States Department of Education Family Policy Compliance Office has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, 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 purpose of our review in the open records

¹Although we understand you to claim rule 503 of the Texas Rules of Evidence in conjunction with section 552.111 of the Government Code, we note that section 552.107 is the proper exception to raise for your attorney-client privilege claim in this instance. See Open Records Decision No. 676 (2002).

ruling process under the Act.² See 20 U.S.C. § 1232g(b); see also *id.* § 1232g(a)(4)(A) (defining “education records”); Open Records Decision No. 462 at 15 (1987). 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”).

We note that portions of the submitted information contain unredacted student names, some of which you appear to have marked. Because our office is prohibited from reviewing an education record to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of the education records.

Next, we address your argument against disclosure 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 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 a capacity other than that of attorney). 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.* 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

²A copy of this letter may be found on the Office of the Attorney General’s website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

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 claim the submitted information consists of communications made for the purpose of facilitating the rendition of professional legal services. You state that the communications were between district employees and an attorney for the district. You further state that the communications were intended to be confidential, and that the confidentiality of the communications has been maintained. Upon review, we find the district may withhold the submitted information pursuant to section 552.107 of the Government Code. We note, however, that some of the individual e-mails contained in the submitted e-mail strings consist of communications that were not made for the purpose of facilitating the rendition of professional legal services to the district, and thus are not privileged. Accordingly, to the extent these non-privileged e-mails exist separate and apart from the submitted e-mail string, they may not be withheld under section 552.107. We have marked these non-privileged e-mails.

We note that the marked non-privileged e-mails contain information subject to other exceptions under the Act.³ 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, such as section 21.355 of the Education Code, which provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. 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 for purposes of section 21.355, the word "teacher" means a person who 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 who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See ORD 643* at 4. We also determined 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.*

We find that the non-privileged e-mails contain an evaluation for purposes of section 21.355. However we are unable to determine if the district employee whose evaluation is at issue held a teaching or administrator's certificate under subchapter B of

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).

chapter 21 of the Education Code at the time of the evaluation. Furthermore we are unable to determine if the district employee at issue was engaged in the process of teaching or performing the functions of an administrator at the time of the evaluation. Thus, if the employee at issue held a teaching or administrator's certificate and was engaged in the process of teaching or performing the functions of an administrator at the time of the evaluation, the submitted performance evaluation we have marked is confidential under section 21.355 of the Education Code, and must be withheld under section 552.101 of the Government Code. To the extent this employee did not hold a requisite certificate, or was not engaged in the process of teaching or performing the functions of an administrator, the submitted performance evaluation is not confidential under section 21.355, and may not be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or 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. 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. 540 S.W.2d at 683. Information also excepted from required public disclosure under common-law privacy includes some kinds of medical information or information indicating disabilities or specific illnesses. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We note that this office has found that the public has a legitimate interest in information that relates to public employment and public employees, and information that pertains to an employee's actions as a public servant generally cannot be considered beyond the realm of legitimate public interest. See Open Records Decisions Nos. 542 (1990); 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). Therefore, if the district maintains the non-privileged e-mails separate and apart from the submitted e-mail string, the district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

Finally, we note some of the information within the non-privileged e-mails may be subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the 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 of the Government Code. See Gov't Code §§ 552.117(a)(1), .024. We note section 552.117 also encompasses a personal cellular telephone number, unless the cellular service is paid for by a governmental

body. *See* Open Records Decision Nos. 670 at 6 (2001), 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and 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 information under section 552.117(a)(1) on behalf of a former or current employee who has made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. In this instance, we have marked the information within the submitted documents that is generally subject to section 552.117. You do not inform this office that the district employee whose information we have marked elected to keep her personal information confidential before the district received the instant request for information. Therefore, we must rule conditionally. If the employee whose personal information we have marked timely elected to withhold her personal information under section 552.024, this marked information must be withheld under section 552.117(a)(1); however, the district may only withhold the marked cellular telephone number if the employee at issue paid for the cellular telephone with her own funds. If the employee did not timely elect confidentiality, the marked information may not be withheld under section 552.117(a)(1).

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 may withhold the submitted information under section 552.107 of the Government Code. However, to the extent the non-privileged e-mails we have marked exist separate and apart from the submitted e-mail string, the separate e-mails must be released with the following exceptions: if the employee at issue held a teaching or administrator's certificate and was engaged in the process of teaching or performing the functions of an administrator at the time of the evaluation, the submitted performance evaluation we have marked must be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code; the district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy; and if the employee whose cellular telephone number we have marked timely elected to withhold her personal information under section 552.024, and the employee at issue paid for the cellular telephone with her own funds, the district must withhold the information we have marked under section 552.117(a)(1). The remainder of the non-privileged e-mails must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 338493

Enc. Submitted documents

c: Requestor
(w/o enclosures)