



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 1, 2009

Ms. Leslie McCollom  
O'Hanlon, McCollom & Demerath  
808 West Avenue  
Austin, Texas 78701

OR2009-05824

Dear Ms. McCollom:

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# 341535.

The Lancaster Independent School District (the "district"), which you represent, received a request for nine categories of information, including a report prepared by Anderson & Jones law firm, regarding a named superintendent. You state that the district will release information responsive to all categories except the request for the report on the named superintendent.<sup>1</sup> You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.136 of the Government Code and the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code and privileged under rule 503 of the Texas Rules of Evidence.<sup>2</sup> We have considered your arguments and reviewed the submitted information.

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<sup>1</sup>We note that the submitted information contains social security numberS. Section 552.147(b) of the Government Code 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.

<sup>2</sup>We understand the district to raise sections 552.107 and 552.111 of the Government Code in asserting the attorney-client and work product privileges, respectively. Although the district asserts section 552.126 for account numbers, section 552.136 is the proper exception. In addition, although the district does not raise sections 552.101 and 552.136 within the ten-business-day deadline described by section 552.301(b), we will address your arguments under these sections, as they are mandatory exceptions to disclosure that a governmental body may not waive. *See* Gov't Code §§ 552.301, .302.

The United States Department of Education Family Policy Compliance Office has informed this office that "FERPA" 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 ruling process under the Act.<sup>3</sup> 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 state that a portion of the submitted information is subject to FERPA. Because our office is prohibited from reviewing these education records, we will not address the applicability of FERPA to any of this information. Such determinations under FERPA must be made by the educational authority in possession of the education records.<sup>4</sup>

Next, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

Gov't Code § 552.022(a)(1). The submitted information consists of a completed report, along with its attachments, made for the district. A completed report must be released under section 552.022(a)(1) unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Although you claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code, we note these exceptions to disclosure are discretionary exceptions under the Act that do not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 677 at 10-11 (2002) (attorney work-product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the district may not withhold the submitted information under sections 552.107 or 552.111 of

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<sup>3</sup>A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

<sup>4</sup>In 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.

the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence and the 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 is also found under rule 503 of the Texas Rules of Evidence, and the attorney work product privilege is also found at rule 192.5 of the Texas Rules of Civil Procedure. Accordingly, we will consider your assertions of these privileges under rule 503 and rule 192.5 for submitted information. Furthermore, because information subject to section 552.022(a)(1) may be withheld under sections 552.101 and 552.136, we will consider your arguments under these exceptions.

Rule 503 encompasses the attorney-client privilege and provides:

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

You state that Exhibit 2 was prepared by attorneys representing the district and was sent to the district's board of trustees. You explain the report was created in the furtherance of the rendition of professional legal services and was not intended to be disclosed to third parties. In addition, you state that the portions of Exhibit A consist of communications between attorneys for the district and members of the district's board of trustees. You further state that these communications have not been and were not intended to be disclosed to third parties. Based on your representations and our review, we agree that Exhibit 2 and the portions of Exhibit A you have marked, constitute privileged attorney-client communications. Accordingly, the district may withhold this information under Texas Rule of Evidence 503.<sup>5</sup>

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. You assert that portions of the remaining information are protected by common-law privacy, which is encompassed by section 552.101 of the Government Code. 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure under common-law privacy. *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 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we find portions of the remaining information constitute personal financial information that is not of legitimate public concern. Thus, the district must withhold the personal financial information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find that the remaining information is not highly intimate or embarrassing or is of legitimate public concern. Therefore, no portion of the remaining information is confidential under common-law privacy.

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<sup>5</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

Next, you contend that the employee identification numbers you have marked in the submitted information are confidential. Section 552.136(b) of the Government Code 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, and includes an account number. *Id.* § 552.136(a). You inform us that an employee’s identification number “can be used, in combination with another access device, to direct transfers of employee compensation.” Based on this representation, the district must withhold the information that you have marked, and the additional account numbers we have marked, under section 552.136 of the Government Code.

Next, portions of the remaining information may be subject to section 552.117 of the Government Code.<sup>6</sup> 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. *Id.* § 552.117(a)(1). 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). The district may only withhold the information at issue under section 552.117(a)(1) if the individuals in question elected confidentiality under section 552.024 prior to the date on which the request for this information was made. If the individuals made a timely election under section 552.024, the district must withhold the information we have marked under section 552.117(a)(1). If the employees did not make a timely election under section 552.024, the information at issue may not be withheld under section 552.117(a)(1) of the Government Code.

Finally, we note that the remaining information contains 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.

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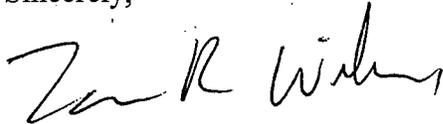
<sup>6</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the district may withhold Exhibit 2 and the information you have marked in Exhibit A under rule 503 of the Texas Rules of Evidence. The district must withhold the personal financial information we have marked under section 552.101 in conjunction with common-law privacy. The district must withhold the employee identification numbers you have marked, as well as the account numbers we have marked, under section 552.136. If the employees at issue make a timely election under section 552.024, the district must withhold the information we have marked under section 552.117(a)(1). The district must withhold the e-mail addresses we have marked under section 552.137. The remaining information must be released.

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](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,



Tamara Wilcox  
Assistant Attorney General  
Open Records Division

TW/eeg.

Ref: ID# 341535

Enc. Submitted documents

c: Requestor  
(w/o enclosures)