



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 2, 2009

Mr. Robert A. Schulman
Feldman, Rogers, Morris, & Grover, L.L.P.
Counsel for Alamo Heights Independent School District
517 Soledad Street
San Antonio, Texas 78205-1508

OR2009-12413

Dear Mr. Schulman:

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# 354188.

The Alamo Heights Independent School District (the "district"), which you represent, received a request for information pertaining to all teachers and administrators placed on administrative leave from "August of 2006 to present day." You state that the district is redacting some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.¹ You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

¹The United States Department of Education Family Policy Compliance Office (the "DOE") 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. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

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 exception encompasses information made confidential by statute. Section 21.355 of the Education Code provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. Additionally, the court has concluded that a written reprimand constitutes an evaluation for purposes of section 21.355 as it “reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). 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 administrator. See Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined that 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 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. See *id.* at 4.

You state that portions of the submitted information relate to teachers who held the appropriate teaching certificates and were teaching at the time of the evaluations. Based on your representations and our review, we agree that the information we have marked is subject to section 21.355 of the Education Code. Accordingly, the district must withhold the marked information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, we find that the remaining documents do not constitute evaluations or written reprimands as contemplated by section 21.355 of the Education Code. Thus, the district may not withhold any of the remaining information under section 552.101 in conjunction with section 21.355 of the Education Code.

You claim that some of the remaining information is confidential under article 55.03 of the Code of Criminal Procedure, which is also encompassed by section 552.101. Article 55.03 concerns the effect of an expunction order and provides the following:

When the order of expunction is final:

- (1) the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited;
- (2) except as provided in Subdivision (3) of this article, the person arrested may deny the occurrence of the arrest and the existence of the expunction order; and
- (3) the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which

the records have been expunged, may state only that the matter in question has been expunged.

Code Crim. Proc. art. 55.03. Article 55.04 imposes sanctions for violations of an expunction order and provides in relevant part:

Sec. 1. A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state . . . and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

Id. art. 55.04, § 1. This office has previously determined that the expunction statute prevails over the Act. *See* Open Records Decision No. 457 at 2 (1987) (governmental body prohibited from releasing or disseminating arrest records subject to expunction order, as “those records are not subject to public disclosure under the [Act]”). You inform us that some of the remaining information is subject to an order of expunction. You have provided this office with a copy of the expunction order and the information subject to that order. Accordingly, the information that is subject to the order of expunction, which we have marked, is confidential under article 55.03, and must be withheld under section 552.101 of the Government Code.²

You contend that some of the remaining information is excepted from public disclosure under common-law and constitutional privacy. Section 552.101 encompasses the doctrine of common-law privacy, which 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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered to be intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include 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. This office has found certain kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). This office has also found that a compilation of an individual’s criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual’s privacy interest, court

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

recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Moreover, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. However, this office has also found that the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. See Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); see also Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)).

Upon review, we agree some of the submitted information is highly intimate or embarrassing and not of legitimate interest to the public. Therefore, the district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, we find that none of the remaining information is highly intimate or embarrassing and not of legitimate interest to the public. Further, we find the district has not demonstrated how the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the district may not withhold any of the remaining information under section 552.101 on the basis of common-law or constitutional privacy.

Next, you raise section 552.107(1) of the Government Code for a portion of the remaining information. Section 552.107 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 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 that submitted e-mails and an attachment constitute communications amongst a district attorney and district staff that were made for the purpose of providing legal advice to the district. You state these communications were made in confidence and have maintained their confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have highlighted, which the district may withhold under section 552.107 of the Government Code.

We note that portions of the remaining information may be subject to section 552.117 of the Government Code.³ 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. Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cell phone service. *See Open Records Decision No. 506 at 5-6 (1988)* (section 552.117 not applicable to cellular telephone 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

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).*

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. If the employees at issue timely elected to keep their personal information confidential under section 552.024, the district must withhold the information we have marked pursuant to section 552.117(a)(1); however, the district may only withhold the marked cellular telephone number if the employee at issue paid for her cellular telephone with her own funds. If the employees at issue did not make a timely request for confidentiality, the information at issue must be released.

We also note that some of the remaining information is 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). Gov't Code § 552.137(a)-(c). The e-mail addresses at issue do not appear to be 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 owner of the e-mail addresses have affirmatively consented to their disclosure.

In summary, the district must withhold the information we have marked 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 article 55.03 of the Code of Criminal Procedure. The district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The district may withhold the information you have highlighted under section 552.107 of the Government Code. If the employees at issue timely elected to keep their personal information confidential under section 552.024, the district must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code; however, the district may only withhold the marked cellular telephone number if the employee at issue paid for her cellular telephone with her own funds. The district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owner of the e-mail addresses have affirmatively consented to their disclosure. 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, 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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rls

Ref: ID# 354188

Enc. Submitted documents

cc: Requestor
(w/o enclosures)