



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 13, 2009

Mr. Bryan P. Neal
Thompson & Knight, LLP
1722 Routh Street, Suite 1500
Dallas, Texas 75201-2533

OR2009-14433

Dear Mr. Neal:

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# 358004.

The Allen Independent School District (the "district"), which you represent, received a request for fifteen categories of information pertaining to a named employee. You state that you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

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 or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

ruling process under the Act.² 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 have submitted redacted and unredacted education records for our review. Because our office is prohibited from reviewing these 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 records. Such determinations under FERPA must be made by the educational authority in possession of the education records. To the extent you determine the information you have submitted is not protected by FERPA, we will consider your arguments against disclosure.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses section 261.201(a) of the Family Code, which provides as follows:

(a) [T]he following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Act of April 10, 1995, 74th Leg., R.S., ch. 20, § 1, sec. 261.201, 1995 Tex. Ge. Laws 113, 262, *amended by* Act of June 1, 2009, 81st Leg., R.S., ch. 779, § 1, 2009 Tex. Sess. Law Serv. 1965, 1965-66 (Vernon) (to be codified as an amendment to Fam. Code § 261.201(a)). You indicate that Exhibit F was used or developed in an investigation into alleged child abuse or neglect. We note the district is not an agency authorized to conduct an investigation under chapter 261. *See id.* §§ 261.103 (listing agencies that may conduct child abuse investigations), .406. However, we note the information you seek to withhold was created as part of an investigation conducted under chapter 261 by the Texas Department

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>.

of Family and Protective Services. The documents reflect that the information at issue was provided to the district by the department. Based on your representations and our review of the information at issue, we agree that Exhibit F, and the additional information we have marked in Exhibit D, are within the scope of section 261.201 of the Family Code. Therefore, we conclude that the district must withhold Exhibit F, and the additional information we have marked in Exhibit D, under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (addressing predecessor statute).

Section 552.101 also encompasses chapter 411 of the Government Code. Criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. 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 at 7 (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 the Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. A school district may obtain CHRI from DPS as authorized by section 411.097 and subchapter C of chapter 22 of the Education Code; however, a school district may not release CHRI except as provided by section 411.097(d). *See id.* § 411.097(d); Educ. Code § 22.083(c)(1) (authorizing school district to obtain from any law enforcement or criminal justice agency all CHRI relating to school district employee); *see also* Gov't Code § 411.087. Section 411.087 authorizes a school district to obtain CHRI from the Federal Bureau of Investigation or any other criminal justice agency in this state. *Id.* Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* ORD 565. Furthermore, any CHRI the district obtained from DPS or any other criminal justice agency in this state must be withheld under section 552.101 of the Government Code in conjunction with section 411.097(d) of the Government Code. *See* Educ. Code § 22.083(c)(1). Accordingly, the district must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code.

Section 552.101 also encompasses section 21.048 of the Education Code, which addresses teacher certification examinations. Section 21.048(c-1) provides the following:

The results of an examination administered under this section are confidential and are not subject to disclosure under Chapter 552, Government Code, unless:

- (1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or

(2) the educator has failed the examination more than five times.

Educ. Code § 21.048(c-1). A portion of the submitted information contains ExCET exam results of the teacher at issue. We note subsection 21.048(c-1)(1) is not applicable in this instance. Furthermore, the information reflects the named educator has not failed the examinations more than five times. Thus, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code.

You seek to withhold the information in Exhibit C under section 552.107 of the Government Code. Section 552.107(1) protects information that comes 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. *See 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. *See 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* 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, 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). 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 indicate Exhibit C consists of confidential communications to and from the district and its attorney. You have identified the parties to the communications. You indicate these communications were made for the purpose of facilitating the rendition of professional legal

services. However, we note that the potential opposing party has seen some of the documents you seek to withhold as privileged. Therefore, we find that you have not demonstrated that this information consists of privileged attorney-client communications. Accordingly, this information, which we have marked, may not be withheld under section 552.107 of the Government Code. Based on your representations and our review, we find that, except where we have marked for release, the district may withhold the information in Exhibit C under section 552.107 of the Government Code.

Next, you state that the Collin County district attorney (the "district attorney") may object to the release of the remaining information in Exhibit D and Exhibit E under section 552.108 of the Government Code. Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). Although the district is not a law enforcement agency or prosecutor, you state that the submitted information relates to a pending prosecution by the the district attorney, and that the district attorney may desire to withhold Exhibit D under section 552.108(a)(1) of the Government Code. Where a non-law-enforcement entity has evidentiary information in its custody, the custodian of such information may raise section 552.108 on behalf of a law enforcement entity if the custodian demonstrates that the information relates to a pending case, and provides a representation from the law enforcement entity that it wishes to withhold the information.³ However, as of the date of this ruling, we have not received a written representation from the district attorney stating that it seeks to withhold any portion of the information at issue under section 552.108. Thus, we conclude that the district may not withhold any of the submitted information based on the district attorney's section 552.108 interests.

We now turn to your argument under section 552.111 for the information in Exhibit E. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This section encompasses the attorney work product privilege found at rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.5; *City of Garland*, 22 S.W.3d at 360; Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines attorney work product as consisting of

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

³*See generally* Open Records Decision Nos. 474 (1987), 372 (1983).

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body that seeks to withhold information on the basis of the attorney work product privilege under section 552.111 bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *See id.*; ORD 677 at 6-8. You claim the work product privilege under section 552.111 for Exhibit E. You have not demonstrated, however, that any of the information at issue consists of material prepared or mental impressions developed in anticipation of litigation or for trial by a party or a representative of a party. Likewise, you have not sufficiently shown that any of the remaining information consists of a communication made in anticipation of litigation or for trial between a party and a representative of a party or among a party's representatives. *See* TEX. R. CIV. P. 192.5. We therefore conclude the district may not withhold Exhibit E on the basis of the attorney work product privilege under section 552.111 of the Government Code.

Next, we note the remaining information contains W-2 and W-4 forms. Section 552.101 also encompasses section 6103(a) of title 26 of the United States Code which renders tax return information confidential. *See* Attorney General Opinion H-1274(1978) (tax returns); Open Records Decision No. 226 (1979) (W-2 forms); *see also* Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of . . . income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments [sic], or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with the determination of the existence, or possible existence, of liability . . . for any tax, . . . penalty, . . . or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993).

Subsections (c) and (e) of section 6103 are exceptions to the confidentiality provisions of section 6103(a) and provide for disclosure of tax information to the taxpayer or the taxpayer's designee. *See* 26 U.S.C. § 6103(c), (e)(1)(A)(i) (tax return information may be disclosed to taxpayer); (e)(7) (information may be disclosed to any person authorized by subsection(e) to obtain such information if Secretary of Treasury determines such disclosure would not seriously impair tax administration); *see also Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1998) (26 U.S.C. § 6103 represents exclusive statutory route for taxpayer to gain access to own return information and overrides individual's right of access under the federal Freedom of Information Act). Section 6103(c) provides that, unless the Secretary of

Treasury determines that disclosure would seriously impair tax administration, tax record information may be released to any person or persons as the taxpayer may designate in a consent to such disclosure. *See* 26 U.S.C. § 6103(c). We note the requestor represents the individual whose tax information is at issue. Therefore, pursuant to section 6103(c) of title 26 of the United States Code, the district must release the submitted W-2 and W-4 forms to the requestor if his client has consented to the disclosure of her tax record information to the requestor and the Secretary of Treasury determines that such disclosure would not seriously impair federal tax administration. Otherwise, the submitted W-2 and W-4 forms are confidential under section 6103 of title 26 of the United States Code, and the district must withhold them pursuant to section 552.101 in conjunction with federal law.

Section 552.101 of the Government Code also encompasses the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(b)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). We also have concluded that when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). Upon review, we have marked the records that are subject to the MPA. In this instance, the requestor represents the individual who is the subject of the medical records. Thus, he may have a right of access to the medical records. These medical records must be released to this requestor on receipt of a signed, written consent from the individual who is the subject of the medical records, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). If this consent is not received, the medical records must be withheld from disclosure pursuant to the MPA and section 552.101 of the Government Code.

Section 552.137 of the Government Code states “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure. Gov’t Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked the e-mail addresses in the submitted information that are subject to this exception. The district must withhold the e-mail addresses we have marked under section 552.137, unless the owner of a particular e-mail address has affirmatively consented to its public disclosure.

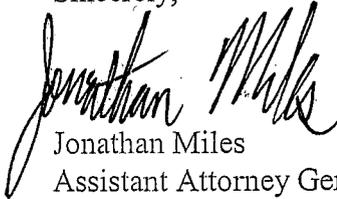
In summary, the district must withhold Exhibit F and the additional information we have marked in Exhibit D under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The district must withhold the CHRI we have marked pursuant to section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The district must withhold the ExCET examination results we have marked under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code. Except where we have marked for release, the district may withhold Exhibit C under section 552.107 of the Government Code. Unless the requestor’s client has consented to the disclosure of her tax record information to the requestor and the Secretary of Treasury determines that such disclosure would not seriously impair federal tax administration, the district must withhold the submitted W-2 and W-4 forms under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code. The district may only release the medical records in the submitted information in accordance with the release provisions of the MPA. The district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners have affirmatively consented to their release. The remaining information must be released.⁴

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.

⁴We note, however, that the remaining documents contain information that is confidential with respect to the general public. *See* Gov’t Code § 552.023 (person’s authorized representative has special right of access to information that is excepted from public disclosure under laws intended to protect person’s privacy interest as subject of the information); *see also* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when person asks governmental body for information concerning the person himself or herself). Thus, in the event the district receives another request for this information from someone other than this requestor or the individual who he represents, the district must ask this office for a decision whether the information is subject to public disclosure.

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, toll free, at (888) 672-6787.

Sincerely,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 358004

Enc. Submitted documents

c: Requestor
(w/o enclosures)