



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 9, 2009

Mr. John-Peter Lund
O'Hanlon, McCollom & Demerath
Counsel for Lancaster Independent School District
808 West Avenue
Austin, Texas 78701

OR2009-17427

Dear Mr. Lund:

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# 363954.

The Lancaster Independent School District (the "district"), which you represent, received a request for (1) certain information pertaining to a specified position, (2) documentation the district has released to any individual pertaining to the requestor as of a specified date, and (3) certain e-mail correspondence containing the requestor's name and created within a specified period of time.¹ You state information responsive to item three of the request will be made available to the requestor. You state information responsive to item one of the

¹You indicate the district sought and received clarification from the requestor regarding the request. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

request does not exist in the district's records.² You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code.³ We have considered the exception you claim and reviewed the submitted representative sample of information.⁴

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 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 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.*, 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 pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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

²We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

³Although you also raise section 552.101 of the Government Code in conjunction with the attorney-client privilege under Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

⁴We assume 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 those records contain substantially different types of information than submitted to this office.

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 the submitted information consists of communications that were made between the district, the district's former attorney, and the district's current attorney in connection with the rendition of professional legal services to the district. You further state the communications were intended to remain confidential and that the confidentiality of the communications has been maintained. Based on your representations and our review, we find the district has established the applicability of section 552.107(1) to some of the information at issue. Therefore, the district may withhold the information we have marked under section 552.107 of the Government Code. However, the remaining information consists of documents within the district's records that exist separate and apart from attorney-client communications. Further, we note the request seeks "any form of documentation that [the district] has released to any individual" regarding the requestor, rather than attorney-client communications. Thus, we find you have not demonstrated how the documents that exist separate and apart from the attorney-client communications constitute confidential communications between privileged parties. We therefore conclude the district may not withhold the non-privileged attachments under section 552.107.

We note the remaining information contains a peace officer's L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."⁵ Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes, such as section 1701.306 of the Occupations Code. Section 1701.306 provides as follows:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Occ. Code § 1701.306(a), (b). Therefore, the district must withhold the L-2 and L-3 declarations we have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy 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 *Industrial Found. v. Texas 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 demonstrated. See *id.* at 681-82. The types 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. See *id.* at 683. This office has also found common-law privacy applies to certain information regarding juvenile offenders. See Open Records Decision No. 394 (1983); cf. Fam. Code § 58.007. We have marked information that is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Some of the remaining information is subject to section 552.1175 of the Government Code. Section 552.1175 provides in part:

(b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). The remaining information includes the home addresses and telephone numbers of peace officers who are not district employees. To the extent these individuals are currently licensed peace officers who elect to restrict public access to their personal information in accordance with section 552.1175(b), the district must withhold the information we have marked under section 552.1175. To the extent an individual at issue is not currently a licensed peace officer or does not elect to restrict public access to his personal information, the district may not withhold information pertaining to that individual under section 552.1175.

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). *Id.* § 552.137(a)-(c). We have marked e-mail addresses that are not of types specifically excluded by section 552.137(c) of the Government Code. Therefore, the district must withhold the e-mail addresses we have marked under section 552.137, unless the district has received consent for their release.

In summary, the district may withhold the information we marked under section 552.107 of the Government Code. The district must withhold the L-2 and L-3 declarations we marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code and the information we marked under section 552.101 in conjunction with common-law privacy. To the extent the individuals at issue are currently licensed peace officers who elect to restrict public access to their personal information in accordance with section 552.1175(b), the district must withhold the information we marked under section 552.1175 of the Government Code. The district must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the district has received consent for their release. As you raise no further exception to disclosure of the remaining information, it must be released to this requestor.⁶

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,

⁶We note the information being released contains confidential information to which the requestor has a right of access. See Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide him with information concerning himself). Therefore, if the district receives another request for this same information from a different requestor, then the district should again seek a decision from this office.

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,

A handwritten signature in black ink, appearing to read 'Matt Entsminger', written in a cursive style.

Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/rl

Ref: ID# 363954

Enc. Submitted documents

c: Requestor
(w/o enclosures)