



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 16, 2010

Ms. Andrea Sheehan
Ms. Elisabeth Donley
Law Offices of Robert E. Luna, P.C.
For Carrollton-Farmers Branch ISD
4411 North Central Expressway
Dallas, Texas 75205

OR2010-02315

Dear Ms. Sheehan:

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# 370329.

The Carrollton-Farmers Branch Independent School District (the "district"), which you represent, received a request for legal bills related to the former district superintendent's leave of absence, termination, settlement agreement, and appeal, as well as related correspondence between the district's law firm and the district.¹ You state some responsive information has been released to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.117, 552.126, 552.130, 552.136, 552.137, and 552.147 of the Government Code, and privileged under Texas Rule of Evidence 503. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹The district sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

²We 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.

Initially, you state you have marked information within Exhibits B-1 and B-2, as well as all of Exhibits C and D, as non-responsive because this information is outside the scope of the request. We note, however, that the information within Exhibits C and D was communicated between the district and its attorneys and thus consists of correspondence involving the district and the district's attorneys. Therefore, we conclude Exhibits C and D are responsive to the request, and we will address the submitted arguments for their exception from disclosure. We agree the information you have marked within Exhibits B-1 and B-2, and the additional information we have marked within Exhibit B-2, is non-responsive because it is outside the scope of the request. This ruling does not address the public availability of any information that is not responsive to the request, and the district is not required to release that information in response to the request.³

You also state that portions of the submitted information were the subject of previous requests for information, in response to which this office issued Open Records Letters Nos. 2009-00131 (2009), 2009-02122 (2009), 2009-02257 (2009), 2009-02715 (2009), and 2009-09622 (2009). We note, however, that the information previously ruled on is now submitted as attachments to e-mail correspondence and is not independently responsive to the present request. In the previous rulings, the attachments at issue were requested and submitted independent of e-mail correspondence. Therefore, because circumstances have changed, the district may not rely on the prior rulings as previous determinations. Accordingly, we will address your claimed exceptions for this information along with the submitted information not previously ruled on.

Next, we note, and you acknowledge, the district did not fully comply with section 552.301 of the Government Code. Subsection (b) of section 552.301 requires a governmental body requesting an open records ruling from this office to "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request." Gov't Code § 552.301(b). While the district raised sections 552.101, 552.102, 552.107, 552.117, 552.130, 552.136, 552.137, and 552.147 within the ten-business-day time period as required by subsection 552.301(b), the district did not raise section 552.126 until after the ten-business-day deadline had passed. Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). However, mandatory exceptions to disclosure cannot be waived by a governmental body. *See* Gov't Code § 552.352; Open Records Decision No. 574 at 3 n.4 (2001) (mandatory exceptions). Because section 552.126 is a mandatory exception, we will consider the district's argument under section 552.126 notwithstanding its violation of section 552.301(b) in raising that exception.

³As our determination is dispositive for the non-responsive information, we need not address your arguments against its disclosure.

The information submitted as Exhibit B-1 consists of attorney fee bills. As you acknowledge, attorney fee bills are subject to section 552.022(a)(16) of the Government Code, which provides that information in a bill for attorney's fees must be released unless it is privileged under the attorney-client privilege or is expressly confidential under other law. *See Gov't Code § 552.022(a)(16)*. Although you assert that information contained in the submitted fee bills is excepted from disclosure by section 552.107 of the Government Code, this section is a discretionary exception under the Act and does 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), 665 at 2 n.5 (2000) (discretionary exceptions generally)*. Accordingly, the district may not withhold information contained in the submitted fee bills under section 552.107. However, you also assert that the submitted attorney fee bills in Exhibit B-1 are excepted from disclosure under section 552.101 of the Government Code and privileged under the attorney-client privilege found in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held that the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown, 53 S.W.3d 328, 336 (Tex. 2001)*. Therefore, we will determine whether the district may withhold any of the information in the attorney fee bills under section 552.101 of the Government Code or Texas Rule of Evidence 503. We will also address your arguments for the submitted information not subject to section 552.022 of the Government Code.

Rule 503 of the Texas Rules of Evidence 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 the submitted attorney fee bills contain confidential communications between the district’s outside attorneys and district employees. You state that these communications were made for the purpose of facilitating the rendition of professional legal services to the district. Further, you state that the submitted fee bills were intended to be, and have remained, confidential. Based on your representations and our review, we agree that the attorney fee bills contain information that reveals confidential communications between privileged parties. Accordingly, we have marked the information that is protected by the attorney-client privilege and may therefore be withheld pursuant to rule 503 of the Texas Rules of Evidence. Some of the remaining information, however, does not reveal confidential attorney-client communications. Thus, you have failed to demonstrate that any of this remaining information documents privileged attorney-client communications. Accordingly, none of the remaining information may be withheld under Texas Rule of Evidence 503.

You also raise section 552.101 of the Government Code for the remaining information in Exhibit B-1. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section incorporates 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. *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 satisfied. *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. *Id.* at 683. Upon review, we find that no portion of the remaining information in Exhibit B-1 is highly intimate or embarrassing and not of legitimate public interest. Therefore, we conclude no portion of the remaining information in Exhibit B-1 may be withheld under section 552.101 in conjunction with common-law privacy.

We next turn to the information not subject to section 552.022, found in Exhibits B-2, C, and D. You raise section 552.107 of the Government Code for this remaining information. Section 552.107(1) protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for rule 503. 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 contend that the remaining information consists of privileged communications between the district's outside attorneys and district employees. You have identified the parties to the communications. You state that the communications were made for the purpose of facilitating the rendition of professional legal services to the district. You also state that the communications were intended to be, and have remained, confidential. Based on your representations and our review, we conclude that the district may generally withhold the information within Exhibit B-2 under section 552.107(1).⁴ We note, however, that some of the individual e-mails contained in the submitted e-mail strings you seek to withhold within Exhibit B-2 under section 552.107 consist of communications with non-privileged parties. We have marked these non-privileged e-mails within Exhibit B-2. To the extent these non-privileged e-mails exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107. In addition, most of the e-mails within Exhibit C and all of the documents within Exhibit D consist of communications with non-privileged parties. Accordingly, except for the information we marked in Exhibit C, the information within Exhibits C and D may not be withheld under section 552.107.

Section 552.101 of the Government Code encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. *See id.* § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted that section 164.512 of title 45 of the Code of Federal

⁴As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* ORD 681 at 8; *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, the district may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

Section 552.101 encompasses section 825.507 of the Government Code, which provides in relevant part:

(a) Records of a participant that are in the custody of the retirement system or of an administrator, carrier, attorney, consultant, or governmental agency acting in cooperation with or on behalf of the retirement system are confidential and not subject to public disclosure in a form that would identify an individual and are exempt from the public access provisions of Chapter 552, except as otherwise provided by this section . . . [.]

(b) The retirement system may release records of a participant, including a participant to which Chapter 803 [of the Government Code] applies, to:

(1) the participant or the participant’s attorney or guardian or another person who the executive director determines is acting on behalf of the participant;

(2) the executor or administrator of the deceased participant’s estate, including information relating to the deceased participant’s beneficiary;

(3) a spouse or former spouse of the participant if the executive director determines that the information is relevant to the spouse’s or former spouse’s interest in member accounts, benefits, or other amounts payable by the retirement system;

(4) an administrator, carrier, consultant, attorney, or agent acting on behalf of the retirement system;

- (5) a governmental entity, an employer, or the designated agent of an employer, only to the extent the retirement system needs to share the information to perform the purposes of the retirement system, as determined by the executive director;
- (6) a person authorized by the participant in writing to receive the information;
- (7) a federal, state, or local criminal law enforcement agency that requests a record for a law enforcement purpose;
- (8) the attorney general to the extent necessary to enforce child support; or
- (9) a party in response to a subpoena issued under applicable law if the executive director determines that the participant will have a reasonable opportunity to contest the subpoena.

...

(g) In this section, "participant" means a member, former member, retiree, annuitant, beneficiary, or alternate payee of the retirement system.

Gov't Code § 825.507(a)-(b), (g). You state that portions of the remaining information consist of records of participants in the retirement system that are in the custody of the district in cooperation with the retirement system. We note the requestor has not asserted any of the provisions of section 825.507(b) are applicable in this instance, nor provided any information that would allow the district to determine that any of these provisions apply. *See id.* § 825.507(b). Accordingly, we conclude the information you have marked within Exhibit D is confidential under section 825.507 of the Government Code and must be withheld under section 552.101 of the Government Code.

You also contend that portions of the remaining information are excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102(a) excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" *Id.* § 552.102(a). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the test to be applied to information protected under section 552.102 is the same test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we will consider your privacy

claims under section 552.101 in conjunction with common-law privacy and section 552.102 together.

As previously discussed, a governmental body must show the information it seeks to withhold (1) contains highly intimate or embarrassing facts, such that its publication would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public in order to demonstrate the applicability of common-law privacy. *Indus. Found.*, 540 S.W.2d at 685. This office has found that medical information or information indicating disabilities or specific illnesses is excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). In addition, this office has found financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy but there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. See Open Records Decision Nos. 600 (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pre-tax 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). This office has also found information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, generally not protected from disclosure under common-law privacy. See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow).

You also raise constitutional privacy under section 552.101, which protects two kinds of interests: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of a personal matter. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); ORD Nos. 600 at 3-5, 478 at 4, 455 at 3-7. The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. See *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. See ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

Upon review, we find that a portion of the remaining information 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. However, we find that none of the remaining information constitutes highly intimate or embarrassing information of no legitimate public concern. We further conclude that none of the remaining information implicates an individual's privacy interests for the purposes of constitutional privacy. Thus, no portion of the remaining information may be withheld on the basis of either common-law or constitutional privacy.

You claim portions of the remaining information are excepted from disclosure pursuant to section 552.117(a)(1) of the Government Code. Section 552.117 excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1); *see id.* § 552.024. 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 current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You state that the former superintendent elected to keep her personal information confidential prior to the date the district received the current request for information. Thus, the district must withhold her personal information, which we have marked, under section 552.117(a)(1). However, the remaining information you have marked does not fall within the scope of section 552.117(a)(1) and may not be withheld on that basis. We note a portion of the remaining information may also be subject to section 552.117(a)(1). This information, which we have marked, relates to a former district employee. To the extent this individual timely elected to keep her personal information confidential prior to the date the district received the current request for information, the district must withhold her personal information under section 552.117(a)(1).

Next, you raise section 552.130 of the Government Code for portions of the remaining information. Section 552.130 provides that information relating to a motor vehicle title or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(2). Accordingly, the district must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

You also raise section 552.136 of the Government Code for portions of the remaining information. Section 552.136 provides 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." *Id.* § 552.136. Accordingly, the district must withhold the bank account and routing numbers we have marked pursuant to section 552.136 of the Government Code.

Next, you raise section 552.137 of the Government Code for portions of the remaining information. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purposes 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 in the remaining information that are not of a type specifically excluded by subsection (c). Accordingly, the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure.

Finally, you raise section 552.147 of the Government Code, which provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *Id.* § 552.147. We agree that the district may withhold the social security numbers in the remaining information under section 552.147 of the Government Code.⁵

We note that portions of the submitted information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, this ruling does not address the non-responsive information and the district need not release it. The district may withhold the information we have marked within Exhibit B-1 under rule 503 of the Texas Rules of Evidence and the information we have marked within Exhibits B-2 and C under section 552.107 of the Government Code. The district must withhold the information you have marked within Exhibit D under section 552.101 of the Government Code in conjunction with section 825.507 of the Government Code, and the information we have marked under section 552.101 in conjunction with common-law privacy. To the extent the individuals whose information is at issue timely elected to keep their personal information confidential prior to the date the district received the current request for information, the district must withhold the information we have marked under section 552.117(a)(1). The district must also withhold the information we have marked under sections 552.130, 552.136, and 552.137 of the Government Code.⁶ The remaining

⁵We note that 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.

⁶We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including certain Texas motor vehicle record information under section 552.130, bank account and routing numbers under section 552.136, and an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision.

responsive information must be released, but any information that is protected by copyright may only be released in accordance with copyright law.⁷

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

Sincerely,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 370329

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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⁷As our ruling is dispositive, we need not address your remaining arguments against disclosure.