



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 16, 2010

Ms. Andrea Sheehan & Ms. Elisabeth A. Donley
Law Offices of Robert E. Luna, P.C.
4411 North Central Expressway
Dallas, Texas 75205

OR2010-08823

Dear Ms. Sheehan and Ms. Donley:

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# 383013. This office also received a request for review of the redaction of certain information subject to Act. The request for review was assigned ID# 384233. We have combined these files and will consider the issues presented in this single ruling assigned ID# 383013.

The Carrollton-Farmers Branch Independent School District (the "district") received a request for information pertaining to specified investigations, four specified employees' personnel files, and a list of employees assigned to the administration office. You state that you have redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You state the district has released some of the requested information with redactions pursuant to

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or student 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 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 552.147 of the Government Code and Open Records Decision No. 684 (2009).² You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

You first state some of the requested information was the subject of several prior requests for information received by the district, as a result of which this office issued Open Records Letter Nos. 2010-04982 (2010), 2010-04467 (2010), 2010-03699 (2010), and 2010-01230 (2010). In those rulings, we concluded the district may withhold certain information under rule 503 of the Texas Rules of Evidence and section 552.107 of the Government Code and that the remaining information must be released. With regard to information responsive to the current request that is identical to the information previously ruled upon by this office, we conclude, as we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, the district may continue to rely on the rulings as a previous determination and withhold or release the previously ruled upon information in accordance with Open Records Letter Nos. 2010-04982, 2010-04467, 2010-03699, and 2010-01230. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the requested information was not the subject of these prior rulings, we will consider your arguments against its disclosure.

Next, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that:

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.

² 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. *See* Gov't Code § 552.147(b). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers and Texas license plate numbers under section 552.130 of the Government Code, account numbers under section 552.136 of the Government Code, and personal e-mail addresses under section 552.137 of the Government Code without the necessity of requesting an attorney general decision.

Gov't Code § 552.022(a)(1). In this instance, the submitted information includes a completed report. The district must release the completed report under section 552.022(a)(1) of the Government Code unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly confidential under other law. Section 552.107 of the Government Code is a discretionary exception that protects a governmental body's interests and may be waived. As such, it is not other law that makes information confidential for purposes of section 552.022. See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 676 at 10-11 (2002) (attorney-client privilege under section 552.107 may be waived). Therefore, the submitted report may not be withheld on the basis of section 552.107. However, the attorney-client privilege, which you raise for the submitted report, is also found in Rule 503 of the Texas Rules of Evidence. The Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and 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 (Tex. 2001); see also Open Records Decision No. 676 (2002). Accordingly, we will consider your assertion of this privilege under Rule 503 with respect to the submitted report.

Texas Rule of Evidence 503(b)(1) provides as follows:

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. 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 explain that the submitted report consists of communications between the district and the district's law firm. You also state that the communication was intended to be confidential. Based on your representations and our review, we agree that the submitted report is a privileged attorney-client communication. Therefore, the district may withhold the submitted report under Rule 503.

Next, we consider your argument under section 552.107 of the Government Code for the information you have marked that is not subject to section 552.022(a)(1). 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 state that the information at issue constitutes communications between district employees and the district's law firm. You state that these communications were made in furtherance of the rendition of legal services to the district, and you inform this office that these communications have remained confidential. Based on your representations and our review, we agree that the information at issue constitutes privileged attorney-client communications. Accordingly, the district may withhold these communications under section 552.107 of the Government Code.

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 section encompasses information protected by other statutes, such as section 21.355 of the Education Code, which provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. 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 an administrator. *See Open Records Decision No. 643 (1996)*. In *Open Records Decision No. 643*, we determined 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 or a school district teaching permit under section 21.055, and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See ORD 643 at 4*. We also determined the word "administrator" in section 21.355 means a person who is

required to, and does in fact, hold an administrator's certificate under subchapter B of chapter 21 of the Education Code, and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.* We further determined that "teacher interns, teacher trainees, librarians, educational aids and counselors cannot be teachers or administrators for purposes of section 21.355." *See id.* at 5.

You assert the documents in Exhibits C-1 through C-4 consist of evaluations of district employees. You state that the administrators in Exhibits C-1 and C-3 were required to hold and did hold a certificate or permit required under Chapter 21 of the Education Code at the time of the evaluation. Upon review, we conclude that the information in Exhibits C-1 and C-3 is confidential under section 21.355 of the Education Code and must be withheld under section 552.101 of the Government Code.

In regard to Exhibit C-2, we agree this information consists of evaluations for purposes of section 21.355. You state the employee held an administrator's certificate under chapter 21 of the Education Code at the time of the evaluations. However, we are unable to determine if the district employee at issue was performing the functions of an administrator at the time of the evaluations. Thus, if the employee was performing the functions of an administrator at the time of the evaluations, the documents in Exhibit C-2 are confidential under section 21.355 of the Education Code, and must be withheld under section 552.101 of the Government Code. To the extent this employee was not performing the functions of an administrator, Exhibit C-2 is not confidential under section 21.355, and this information may not be withheld under section 552.101 of the Government Code. However, we conclude that the self appraisal forms, which we have marked, do not evaluate the employee for purposes of section 21.355. Therefore, the district may not withhold this information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

We note the documents in Exhibit C-4 consist of evaluations of a records clerk. Thus, you have failed to demonstrate how these evaluations pertain to a teacher engaged in the process of teaching. Consequently, the district may not withhold the information in Exhibit C-4 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.101 of the Government Code 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). You state the information you have marked in Exhibit E includes teacher certification exam results for the district employee. You further state subsections 21.048(c-1)(1) and (2) are not applicable in this instance. Based on your representations and our review, we agree the district must withhold the information you have marked, and the additional information we have marked, under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code.

Next, you claim the transcripts in Exhibit D are excepted from disclosure under section 552.102(b) of the Government Code. Section 552.102(b) excepts from disclosure all information from transcripts of professional public school employees other than the employee's names, the courses taken, and the degrees obtained. Gov't Code § 552.102(b); Open Records Decision No. 526 (1989). Thus, with the exception of the district employees' names, courses taken, and degrees obtained, the district must withhold the transcripts in Exhibit D pursuant to section 552.102(b) of the Government Code.

You seek to withhold e-mail addresses contained in the remaining submitted information pursuant to section 552.137 of the Government Code. Section 552.137 of the Government Code states that "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). You do not state that the owners of the addresses have consented to their release. Therefore, the district must withhold the marked e-mail addresses under section 552.137, unless the owners consent to release.

We now address the requestor's appeal of the redacted information, pursuant to section 552.024(c-1). As permitted by section 552.024(c)(2) of the Government Code, you state you redacted some information pursuant to section 552.117(a)(1) of the Government Code without requesting a decision from this office. Section 552.117(a)(1) excepts from disclosure the home address, home telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. We note this section does not apply to an individual's work telephone number. 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). You state that the individuals at issue timely elected to keep their information confidential. However, you further state the election form on record only permits the employees at issue to request confidentiality for their home address, telephone number, and social security number. Thus, the employees at issue did not request confidentiality for their family member information. Accordingly, the district must withhold only the home address, telephone number, and social security numbers you have marked under section 552.117(a)(1) of the Government Code. The family member

information, which we have marked, must be released. You also state that upon further review of the redacted information, the district improperly redacted work numbers. The district must release the work numbers, which we have also marked for release.

We note that the information you submitted for our review contains a Form I-9. As noted above, section 552.101 encompasses information that other statutes make confidential. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). In this instance, the release of the Form I-9 would be "for purposes other than for enforcement" of the applicable federal law. A Form I-9 may only be released for purposes of compliance with the federal laws and regulations governing the employment verification system. Therefore, the district must withhold the Form I-9 under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.³

In summary, with regard to information responsive to the current request that is identical to the information previously ruled upon by this office, we conclude, as we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, the district may continue to rely on the rulings as a previous determination and withhold or release the previously ruled upon information in accordance with Open Records Letter Nos.2010-04982, 2010-04467, 2010-03699, and 2010-01230. The district may withhold the information subject to section 552.022(a)(1) under rule 503 of the Texas Rules of Evidence. The district may withhold the remaining information you marked under section 552.107. The information in Exhibits C-1 and C-3 is confidential under section 21.355 of the Education Code and must be withheld under section 552.101 of the Government Code. If the employee was performing the functions of an administrator at the time of the evaluations, with the exception of the information we have marked, the documents in Exhibit C-2 are confidential under section 21.355 of the Education Code, and must be withheld under section 552.101 of the Government Code. The district must withhold the information you have marked, and the additional information we have marked, under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code. With the exception of the district employees' names, courses taken, and degrees obtained, the district must withhold the transcripts in Exhibit D pursuant to section 552.102(b) of the Government Code. The district must withhold the marked e-mail addresses under section 552.137, unless the owners consent to release.

In regard to the review of the district's redactions under section 552.117, the district must withhold only the home address, telephone number, and social security numbers you have marked under section 552.117(a)(1) of the Government Code. The family member

³ Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Form I-9 and attachments under section 552.101 in conjunction with section 1324a of title 8 of the United States Code, without the necessity of requesting an attorney general decision.

information and work telephone numbers, which we have marked, must be released. The district must also withhold the Form I-9 under section 552.101 in conjunction with section 1324a of title 8 of the United States Code. 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, toll free, at (888) 672-6787.

Sincerely,



Chris Schulz
Assistant Attorney General
Open Records Division

CS/tp

Ref: ID# 383013

Enc. Submitted documents

cc: Requestor
(w/o enclosures)