



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 9, 2010

Mr. Justin Graham
Abernathy, Roeder, Boyd & Joplin P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2010-13726

Dear Mr. Graham:

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# 393106.

The Plano Independent School District (the "district"), which you represent, received a request for "[a]ny and all documents housed in, and all personnel files pertaining to [a named individual] at the central office, as well as at any campuses that maintain any such file, including, but not limited to Renner Middle School" and "[a]ny and all complaints, concerns, and/or issues that were filed or raised against [the named individual] in her capacity as an employee of the district." You state you have released some of the requested information. We note the district has redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.135 of the Government Code. You state, and provide documentation showing, that

¹We note that the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. A copy of the DOE's letter to this office is posted on the Attorney General's website at: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

you have notified third parties whose privacy interests may be implicated by the request.² See Gov't Code § 552.304 (allowing interested party to submit comments indicating why requested information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

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 that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and lawyers representing another party in a pending action concerning a matter of common interest therein. TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no 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 state Exhibit E consists of communications between outside counsel for the district and district staff that were made in furtherance of the rendition of professional legal services.

²As of the date of this letter, we have not received any correspondence from the notified third parties.

You also state the communications were made in confidence, and that confidentiality has been maintained. Based on your representations and our review of the information at issue, we find you have demonstrated the applicability of the attorney-client privilege to Exhibit E. Thus, the district may withhold Exhibit E 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. Section 552.101 encompasses the common-law informer’s privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer’s privilege protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer’s identity. *See* Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” *See* Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5.

The district claims the informer’s privilege for information relating to alleged violations of the educators’ code of ethics, section 247.2 of title 19 of the Texas Administrative Code, and district policy. We note that witnesses who provide information in the course of an investigation but do not make the initial report of a violation are not informants for the purposes of the common-law informer’s privilege. To the extent that the information at issue identifies any individual who reported a violation of the educators’ code of ethics, we note that the code is enforced by the Texas State Board for Educator Certification (the “SBEC”). *See* 19 T.A.C. § 247.1. The district does not inform us that any violation of the educators’ code of ethics was reported to the SBEC or that the district is authorized to enforce the code of ethics. Likewise, the district does not inform us of any alleged violation of a district policy that would be punishable by a civil or criminal penalty. *See* ORD 582, 515. We, therefore, conclude that the district may not withhold any of the information at issue under section 552.101 on the basis of the common-law informer’s privilege.

Section 552.135 of the Government Code provides in part:

- (a) “Informer” means a student or former student or an employee or former employee of a school district who has furnished a report of another person’s possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

Gov't Code § 552.135(a)-(c). Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under the exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* §§ 552.301(e)(1)(A). We note that section 552.135 protects an informer's identity, but it does not generally encompass protection for witness statements. In this instance, you state that the submitted information reveals the identity of an employee of the district who reported possible violations of section 247.2 of title 19 of the Texas Administrative Code. *See* Educ. Code § 21.041(b) (TEA shall propose rules providing for disciplinary proceedings); 19 T.A.C. § 247.2 (Code of Ethics and Standard Practices for Texas Educators). Based on this representation and our review of the information at issue, we conclude the district must withhold the identities of the employees who reported the possible violations, which we have marked, under section 552.135 of the Government Code. However, we find that none of the remaining information at issue reveals an informer's identity for the purpose of section 552.135, and it may not be withheld on this basis.

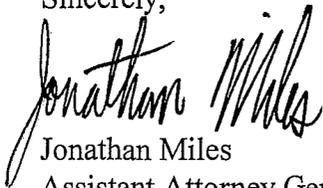
In summary, the district may withhold Exhibit E under section 552.107 of the Government Code. The district must withhold the marked identities of the employees who reported possible violations under section 552.135 of the Government Code. The remaining information must be released.³

³We note that the information being released contains confidential information to which the requestor has a right of access. *See* Gov't Code § 552.023(a). However, if the district receives another request for this particular information from a different requestor, the district should again seek a decision from this office.

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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/eeg

Ref: ID# 393106

Enc. Submitted documents

c: Requestor
(w/o enclosures)