



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 12, 2010

Ms. Bertha Bailey Whatley
Chief Legal Counsel
Fort Worth Independent School District
100 North University Drive
Fort Worth, Texas 76107

OR2010-15470

Dear Ms. Whatley:

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# 397421.

The Fort Worth Independent School District (the "district") received a request for 1) documents pertaining to district-related travel taken by current school board members during the 2009-2010 fiscal year; 2) documents showing expenditures by the district during the 2009-2010 fiscal year for cellular telephones or similar electronic communications devices provided to current and former school board members; and 3) all e-mails sent by school board members from their district e-mail accounts during a specified time period. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.²

¹Although, you initially raised sections 552.103, 552.104, 552.105, 552.109, and 552.135 of the Government Code as exceptions to disclosure of the requested information, you have provided no arguments regarding the applicability of these sections. Since you have not submitted arguments concerning these exceptions, we assume that you no longer urge them. *See* Gov't Code §§ 552.301(b), (e), .302

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, we note that you have only submitted information responsive to the third category of requested information. Thus, to the extent any information responsive to the first and second categories of the request existed and was maintained by the district on the date the district received the request, we assume you have released it. If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

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.

You assert the e-mails in Attachment A, none of which are directed to the teachers at issue, are confidential under section 21.355. You state that these e-mails evaluate the performance of certified employees because they find "they have likely engaged in misconduct." Upon review, however, we find you have not demonstrated, nor do the e-mails reflect, how the submitted information constitutes evaluations of the teacher as contemplated by section 21.355. Accordingly, the district may not withhold the e-mails in Attachment A under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. As you raise no further exceptions for these e-mails, Attachment A must be released.

Next, you claim Attachment B is excepted under section 552.107(1) of the Government Code, which 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. 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 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). 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 a lawyer representing another party in a pending action and concerning a matter of common interest therein. See 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 that Attachment B consists of communications between attorneys for the district and the district’s board and administration that were made for the purpose of facilitating the rendition of professional legal services to the district. You state that this information was made in confidence and has maintained its confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to Attachment B. Accordingly, the district may withhold Attachment B under section 552.107 of the Government Code.

Next, you claim that the e-mails in Attachment C are confidential pursuant to common-law privacy. 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 of the Government Code also encompasses the common-law right of privacy, while 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). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.) (addressing statutory predecessor). We will therefore consider the applicability of common-law privacy under section 552.101 together with your claim regarding section 552.102(a).

The doctrine of common-law privacy protects information if it (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 type of information considered intimate or 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. *Indus. Found.* at 683. We note, however, that this office has found that the public generally has a legitimate interest in the qualifications and work conduct of employees of governmental bodies. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

Upon review of your arguments and the information in Attachment C, we find that you have failed to establish that any of the information you seek to withhold is highly intimate or embarrassing and of no legitimate public interest. Thus, the information in Attachment C is not confidential under common-law privacy, and the district may not withhold it on that ground under section 552.101 or section 552.102(a).

We note that some of the information in Attachment C may be subject to section 552.117(a)(1) of the Government Code.³ Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. *See* Gov't Code §552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 that the information be kept confidential. Therefore, if the employee to whom the information pertains timely requested confidentiality under section 552.024, then the district must withhold the information we have marked in Attachment C under section 552.117(a)(1). If the employee did not timely elect to withhold her personal information, then the district may not withhold the marked information under section 552.117(a)(1) of the Government Code.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

We also note that Attachment C contains information subject to section 552.137 of the Government Code, which provides 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). The e-mail address we have marked in Attachment C is not of the type specifically excluded by section 552.137(c). Accordingly, the e-mail address we have marked must be withheld under section 552.137 of the Government Code, unless the owner affirmatively consents to its disclosure.⁴

In summary, the district may withhold Attachment B under section 552.107 of the Government Code. If the employee at issue timely requested confidentiality under section 552.024, then the district must withhold the information we have marked in Attachment C under section 552.117(a)(1) of the Government Code. The e-mail address we have marked must be withheld under section 552.137 of the Government Code, unless the owner affirmatively consents to its disclosure. 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,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/eb

⁴We 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 the e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 397421

Enc. Submitted documents

c: Requestor
(w/o enclosures)