ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 2, 2010

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

OR2010-16611

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# 398821.

The Carrollton-Farmers Branch Independent School District (the "district"), which you represent, received a request for all documents that are currently or were previously in the possession of a named district administrator regarding a named district student, excluding documents previously provided to the requestor; any payments, billings or reimbursements for legal services on behalf of a named district teacher; and all personnel records for the same teacher. You state the district has no information responsive to the second category of the request.[1] You also 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

[1]The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos.605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

United States Code.[2] You further state the district has released some of the information responsive to the third category of the request with redactions pursuant to section 552.147 of the Government Code[3], section 552.024 of the Government Code[4], and Open Records Decision No. 684 (2009).[5] You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.107 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. We have considered the exceptions you claim and reviewed the submitted information.

You inform us 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. 2010-08938 (2010), 2010-09920 (2010), 2010-14638 (2010), and 2010-14662 (2010). In those rulings, we concluded the district may withhold certain information under rule 503 of the Texas Rules of Evidence, rule 192.5 of the Texas Rules of Civil Procedure, and section 552.107 of the Government Code but the remaining information must be released. You have identified the information responsive to the current request that is identical to the information previously ruled upon by this office. You assert the law, facts, and circumstances on which these prior rulings were based have not changed. Accordingly, with respect to this information, the district may continue to rely on these rulings as previous determinations and withhold or release the previously ruled upon information in accordance with Open Records Letter Nos. 2010-08938, 2010-09920, 2010-14638, and 2010-14662.[6] *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on

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[2]The 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.

[3]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).

[4]*See* Gov't Code § 552.024(c)(2) (if an employee or official or former employee or official chooses not to allow public access to his or her personal information, the governmental body may redact the information without the necessity of requesting a decision from this office).

[5]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 and personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

[6]As we are able to make this determination, we need not address the exceptions you raise for this information.

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). With respect to the remaining requested information that was not the subject of these prior rulings, we will consider your arguments against disclosure.

Next, we note a portion of the information you seek to withhold in Exhibit C-2 is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part that:

> (a) 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:
>
> > (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]
> >
> > . . .
> >
> > (16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(3), (16). In this instance, some of the information in Exhibit C-2, which we have marked, consists of information in an account, voucher, or contract relating to the expenditure of public funds by the district and in attorney fee bills. Thus, the district must release this information pursuant to subsections 552.022(a)(3) and 552.022(a)(16) unless it is expressly confidential under other law. You assert that this information is excepted under section 552.107 of the Government Code. However, section 552.107 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision No. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, the district may not withhold the information subject to section 552.022 under section 552.107 of the Government Code. However, the Texas Supreme Court has held that the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your attorney-client privilege argument under Texas Rule of Evidence 503 for the information that is subject to section 552.022.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 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:
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> (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> (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 information at issue constitutes communications between the district and its legal counsel made for the purpose of facilitating the rendition of professional legal services to the district. You indicate that these communications were not intended to be disclosed and that they have remained confidential. However, upon review of the information at issue, we find you have failed to establish that this information documents

privileged attorney-client communications. Therefore, we conclude that rule 503 of the Texas Rules of Evidence is not applicable to any of the information subject to section 552.022, and it may not be withheld on this basis. As you raise no further exceptions to the disclosure of this information, it must be released.

Next, we consider your argument under section 552.107 of the Government Code for the information in Exhibit C-1 and the information in Exhibit C-2 that is not subject to section 552.022. 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 attorneys for the district. 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. Section 552.101 encompasses information protected by other statutes, including 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 this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 at 3 (1996). Additionally, this office has determined a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is serving as a teacher at the time of the evaluation. *Id.* at 4.

You assert the information in Exhibit B-1 consists of evaluations of a district employee. You state, and have provided documentation showing, the employee was required to hold and did hold a certificate or permit required under chapter 21 of the Education Code at the time of the evaluations. Based on your representations and our review, we agree the information in Exhibit B-1 constitutes teacher evaluations for purposes of section 21.355 of the Education Code. Thus, the district must withhold the information in Exhibit B-1 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 B-2 consists of teacher certification exam results for the district teacher. 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 conclude the district must withhold the information you have marked in Exhibit B-2 under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code.

Next, you claim the college transcript in Exhibit B-3 is excepted from disclosure under section 552.102(b) of the Government Code. Section 552.102(b) excepts from disclosure all information from higher education 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's name, courses taken, and degree obtained, the district must withhold the transcript in Exhibit B-3 pursuant to section 552.102(b) of the Government Code.

In summary, the district may continue to rely on the Open Records Letter Nos. 2010-08938, 2010-09920, 2010-14638, and 2010-14662 and withhold or release the previously ruled upon information in accordance with those rulings. With the exception of the information subject to section 552.022 of the Government Code, the district may withhold the information in Exhibits C-1 and C-2 under section 552.107 of the Government Code. The district must withhold Exhibit B-1 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold the information you have marked in Exhibit B-2 under section 552.101 of the Government Code in conjunction with section 21.048 of the Education Code. With the exception of the district employee's name, courses taken, and degree obtained, the district must withhold the transcript in Exhibit B-3 under section 552.102(b) of the Government 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,

Kate Hartfield

Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 398821

Enc. Submitted documents

c: Requestor
(w/o enclosures)