



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 18, 2010

Ms. Leticia D. McGowan
School Attorney
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204

OR2010-17491

Dear Ms. McGowan:

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# 400483 (Dallas ORR# 9603).

The Dallas Independent School District (the "district") received a request for all Office of Professional Responsibility ("OPR") final reports dealing with the conduct of teachers or administrators at Pinkston High School within the past year. You state some of the information has been released to the requestor. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code and privileged under Texas Rule of Evidence 503.¹ We have considered your arguments and reviewed the submitted information.

Initially, we note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, 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

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision No. 676 at 1-2 (2002).

ruling process under the Act.² Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). The submitted information includes unredacted education records. Because our office is prohibited from reviewing these records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of such records.³ We will, however, address the applicability of the claimed exceptions to the submitted information.

Next, we note that a portion of the submitted information was the subject of a previous ruling by this office. In Open Records Letter No. 2010-07825 (2010), this office issued a ruling pertaining to all OPR final reports from March 25, 2009 to March 4, 2010. As we have no indication that the law, facts, and circumstances on which this prior ruling was based have changed, the district must continue to rely on Open Records Letter No. 2010-07825 as a previous determination and withhold or release the information at issue in accordance with that ruling. *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). However, to the extent the information in the current request is not encompassed by that previous decision, we will address your arguments for the remaining information.

We note the remaining information is subject to section 552.022 of the Government Code. Section 552.022 provides in part:

(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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

²A copy of this letter may be found on the Office of the Attorney General’s website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

³In the future, if the district does obtain parental consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

Gov't Code § 552.022(a)(1). You have submitted reports of completed investigations, which are subject to section 552.022(a)(1). However, section 552.101 is "other law" for purposes of section 552.022. Texas Rule of Evidence 503 also is "other law" for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001) (Texas Rules of Evidence are "other law" that make information confidential for purposes of section 552.022). Thus, we will consider each of their applicability to the submitted information. Additionally, we note portions of the information at issue may be subject to sections 552.117 and 552.136 of the Government Code, which are also "other law" for purposes of section 552.022; thus, we will consider the applicability of those sections as well.

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. Chapter 411 of the Government Code authorizes the Texas Department of Public Safety ("DPS") to compile and maintain criminal history record information ("CHRI") from law enforcement agencies throughout the state and to provide access to authorized persons to federal criminal history records. *See id.* §§ 411.042, .087. CHRI is defined as "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." *Id.* § 411.082(2).

In 2007, the Legislature enacted section 411.0845 of the Government Code, which provides in relevant part:

(a) [DPS] shall establish an electronic clearinghouse and subscription service to provide criminal history record information to a particular person entitled to receive criminal history record information and updates to a particular record to which the person has subscribed under this subchapter.

(b) On receiving a request for criminal history record information from a person entitled to such information under this subchapter, [DPS] shall provide through the electronic clearinghouse:

(1) the criminal history record information reported to [DPS] or the Federal Bureau of Investigation relating to the individual who is the subject of the request; or

(2) a statement that the individual who is the subject of the request does not have any criminal history record information reported to [DPS] or the Federal Bureau of Investigation.

...

(d) [DPS] shall ensure that the information described by Subsection (b) is provided only to a person otherwise entitled to obtain criminal history record information under this subchapter. Information collected under this section is confidential and is not subject to disclosure under [the Act].

Id. § 411.0845(a)–(b), (d). Section 411.097(b) of the Government Code provides in part that “[a] school district . . . is entitled to obtain from [DPS CHRI] maintained by [DPS] that the district . . . is required or authorized to obtain under Subchapter C, Chapter 22, Education Code, that relates to a[n] . . . employee of the district[.]” *Id.* § 411.097(b). Pursuant to section 22.083(a-1) of the Education Code, a school district is authorized to obtain CHRI from DPS’s electronic clearinghouse. *See* Educ. Code § 22.083(a-1)(1); *see also* Gov’t Code § 411.097(d) (stating CHRI obtained by a school district in its original form or any subsequent form is not subject to disclosure under the Act), .084(c) (agency may not confirm the existence or nonexistence of CHRI to any person who is not eligible to receive the information). Based on your representations and our review, we find portions of the information at issue, which we have marked, are confidential under section 411.0845 and must be withheld under section 552.101 of the Government Code.

Texas Rule of Evidence 503(b)(1) enacts the attorney-client privilege and 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(b)(1). A communication is “confidential” if it is 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 information from disclosure under rule 503, a governmental body must: (1) show 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the information at issue was communicated between representatives of the district and the district's outside legal counsel; it was created for the purpose of receiving legal advice on certain issues; it was not intended to be disclosed to third persons; and the district has not waived its privilege. Based upon those representations and our review, we find you may withhold the information we have marked under Texas Rule of Evidence 503(b)(1). However, you have failed to demonstrate how the remaining information reveals a communication between privileged parties. *See* ORD 676. Thus, the remaining information is not privileged under rule 503, and the district may not withhold it on that basis.

We note that some of the remaining information may be subject to section 552.117(a)(1) of the Government Code.⁴ Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5–6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). 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 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 information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

timely request under section 552.024 that the information be kept confidential. Therefore, to the extent the employee at issue made a timely request for confidentiality under section 552.024, the city must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code, if it is a personal cellular telephone number and the cellular service was paid for with personal funds. If the employee did not timely elect confidentiality for the marked cellular telephone number or the cellular service is not paid for with personal funds, the city may not withhold the marked cellular telephone number under section 552.117(a)(1) of the Government Code.

We note the remaining information contains bank account and bank routing numbers. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of [the Act], 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.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, we find the department must withhold the bank account and bank routing numbers we have marked pursuant to section 552.136 of the Government Code.⁵

In summary, the district must continue to rely upon Open Records Letter No. 2010-07825 and withhold or release the information we have ruled on previously in accordance with that ruling. The district must withhold the CHRI we have marked under section 552.101 in conjunction with section 411.0845 of the Government Code. The district may withhold the attorney-client communications we have marked under Texas Rule of Evidence 503. To the extent the employee at issue made a timely request for confidentiality under section 552.024 of the Government Code, the district must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code, if it is a personal cellular telephone number and the cellular service was paid for with personal funds. The district must withhold the bank account and bank routing numbers we have marked under section 552.136 of the Government Code. The remaining information must be released.

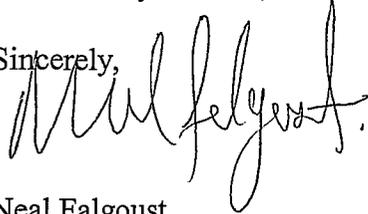
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

⁵ We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account and bank routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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,

A handwritten signature in black ink, appearing to read "Neal Falgoust". The signature is written in a cursive style with a large initial "N" and a long, sweeping underline.

Neal Falgoust
Assistant Attorney General
Open Records Division

NF/dls

Ref: ID# 400483

Enc. Submitted documents

c: Requestor
(w/o enclosures)