



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 3, 2011

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

OR2010-19316A

Dear Ms. Sheehan:

This office issued Open Records Letter No. 2010-19316 (2010) on December 22, 2010. Since that date, you have provided new information that affects the facts on which this ruling was based. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on December 22, 2010. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID# 412082.

The Carrollton-Farmer's Branch Independent School District (the "district"), which you represent, received a request for records of telephone calls by three named district administrators, including telecommunication invoices for February 15, 2010 through March 15, 2010.¹ You state some requested information has been released to the requestor. You also state the district redacted some information pursuant to the Family Educational

¹You state, and provide documentation reflecting, that the district sought and received clarification from the requestor regarding an aspect of the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (where governmental body seeks clarification or narrowing of request for information, ten-day period to request attorney general opinion is measured from the date request is clarified or narrowed).

Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.² You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.117, and 552.136 of the Government Code.³ We have considered your arguments and reviewed the submitted representative sample of information.⁴

Initially, you claim the portions of the submitted telephone usage reports you marked are not responsive to the request because they pertain to telephone calls made before February 15, 2010 or after March 15, 2010. However, the requestor seeks records of all telephone calls by the named administrators. By specifying that her request includes invoices from a particular date range, we do not believe the requestor excluded records of calls made outside that range. Thus, we find the information you marked is responsive to the request for information, and we address the availability of this information along with the remaining information. You also marked data usage on the submitted usage reports as not responsive. We agree this information is not responsive to the request. This decision does not address the public availability of the non-responsive information, and the data usage information you marked need not be released.

You claim portions of the submitted information are excepted under section 552.117 of the Government Code. This section excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Additionally, section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117 exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). 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

²The 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. 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>.

³Although you assert the attorney-client privilege under rule 503 of the Texas Rules of Evidence, the information at issue is not subject to section 552.022. Thus, section 552.107 is the proper exception to raise for your attorney-client privilege claims in this instance. *See generally* Open Records Decision No. 676 at 1-2 (2002).

⁴We assume 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.

No. 530 at 5 (1989). The district may only withhold information under section 552.117(a)(1) on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You represent all the individuals whose information you marked under section 552.117 properly elected, prior to the district's receipt of the request, to keep their marked information confidential. You also represent the cellular telephone numbers you marked that pertain to district employees are those employees' personal numbers. Based on this representation and our review, we agree the district must withhold the information you marked, as well as the information we marked, under section 552.117 in the remaining information.⁵

You claim the information you highlighted in Exhibit I is excepted under section 552.102(a) of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010) (Dec. 20, 2010, motions for reconsideration and rehearing pending). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code. The remaining information in Exhibit I, however, is not excepted under section 552.102(a) and may not be withheld on that basis.

You claim the information you marked in Exhibits B and G is excepted pursuant to section 552.101 of the Government Code. Section 552.101 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 the doctrine of common-law privacy, which protects information that (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 types 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. *Id.* at 683. This office has found some kinds of medical information or information indicating disabilities or specific illnesses to be excepted from required public disclosure under common-law privacy. See Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Additionally, prior decisions of this office have determined that personal

⁵As our ruling is dispositive for this information, we need not address your argument under section 552.101 against its disclosure.

financial information not related to a transaction between an individual and a governmental body generally meets the first prong of the common-law privacy test. *See* Open Records Decision No. 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history); *see generally* Open Records Decision No. 600 (1992).

However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See id.* at 9 (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure); *see also* Open Records Decision Nos. 545 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common law privacy), 523 (1989). Further, information pertaining to an employee's performance as a public servant generally cannot be considered to be beyond the realm of legitimate public interest. *See* Open Records Decision No. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Whether information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983).

Upon review, we have marked the information in Exhibits B and G that reveals personal medical and financial details or other information that is of no legitimate public interest. The district must withhold this marked information under section 552.101 in conjunction with common-law privacy. However, some of the remaining information you marked pertains to individuals who are not identified in the information at issue; we find release of information about such unidentified individuals would not implicate those individuals' rights to privacy. Additionally, some of the remaining information is of legitimate public interest because it pertains either to financial transactions between the district and its employees or to the work conduct of district employees. You do not explain how any of the remaining information you marked is highly intimate or embarrassing and of no legitimate public interest. Thus, this remaining information is not confidential pursuant to common-law privacy and may not be withheld on that basis.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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 (1998). 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, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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.*, 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).

The information you claim is protected by the attorney-client privilege consists of certain portions of telephone usage reports and telephone messages left for the named administrators. You identify all parties to these communications as district administrators, their secretaries, other district employees, attorneys for the district, and those attorneys’ representatives. You state the communications were made to facilitate the rendition of legal services to the district and were intended to be and have remained confidential. Therefore, based on your representations and our review, the district may withhold the information you marked under section 552.107 of the Government Code.⁶

You claim the account numbers you marked are subject to section 552.136 of the Government Code. Section 552.136 states “[n]otwithstanding any other provision of this chapter, 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). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). Upon review, we

⁶As our ruling is dispositive for this information, we need not address your argument under section 552.103 against its disclosure.

agree the account numbers you marked are access device numbers the district must withhold under section 552.136.

In summary, the district must withhold the information you marked and the information we marked under section 552.117 of the Government Code. The district must withhold the information we marked under section 552.102(a) of the Government Code and under section 552.101 of the Government Code in conjunction with common-law privacy. The district may withhold the information you marked pursuant to the attorney-client privilege under section 552.107 of the Government Code. The district must withhold the portions of the remaining information you 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 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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/tf

Ref: ID# 412082

Enc. Submitted documents

c: Requestor
(w/o enclosures)