



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 12, 2011

Ms. Mia M. Martin  
General Counsel  
Richardson Independent School District  
400 South Greenville Avenue  
Richardson, Texas 75081

OR2011-00641

Dear Ms. Martin:

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# 405776.

The Richardson Independent School District (the "district") received two requests from the same requestor for (1) all records regarding complaints about a named former employee pertaining to the former employee's actions against students, parents, or district staff and administration, and (2) a copy of the named former employee's resignation letter. You state the district will make some of the requested information available to the requestor. You inform us the district has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).<sup>1</sup> You also state the district will withhold certain information pursuant to section 552.024 of the Government Code, as well as under sections 552.101, 552.136, and 552.137 of the Government Code pursuant to the previous determination issued to all governmental bodies in Open Records

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<sup>1</sup>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 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>.

Decision No. 684 (2009).<sup>2</sup> You claim portions of the requested information are excepted from disclosure under sections 552.101, 552.107, and 552.135 of the Government Code.<sup>3</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>4</sup> We have also received and considered comments submitted by the named former employee. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you inquire whether or not the district may withhold the named former employee's employee identification number from the requested information pursuant to Open Records Letter No. 2008-01744 (2008). In that ruling, we concluded the employee identification numbers the district sought to withhold did not constitute public information under section 552.002 of the Government Code. Accordingly, we ruled that information was not subject to the Act and need not be released to the requestor.

In Open Records Decision No. 673 (2001), this office set forth the circumstances under which a governmental body may rely on a ruling from this office as a previous determination for purposes of section 552.301(a) of the Government Code. *See* Open Records Decision No. 673. In that decision, this office noted there are two types of previous determinations. The first type exists when the requested information is precisely the same information as was addressed in a prior attorney general ruling, the ruling was addressed to the same governmental body, the ruling concluded the information is or is not excepted from disclosure, and the facts, circumstances, and law on which the prior ruling was based have not changed. *Id.* at 6-7. The second type is an attorney general decision that explicitly grants a governmental body or class of governmental bodies a previous determination that may be relied upon to withhold a specific type of information without seeking an attorney general's ruling if certain conditions are met. *Id.* at 7-8.

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<sup>2</sup>Section 552.024 of the Government Code authorizes a governmental body to redact from public release a current or former official's or employee's home address, home telephone number, social security number, and information that reveals whether the person has family members without the necessity of requesting a decision from this office under the Act, if the employee or official timely elected to withhold such information. Gov't Code § 552.024(a)-(c). The previous determination issued in ORD 684 authorizes all governmental bodies to withhold ten categories of information, including direct deposit authorization forms under section 552.101 in conjunction with common-law privacy; bank account and bank routing numbers under section 552.136; and e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision.

<sup>3</sup>Although you also raise sections 552.102 and 552.116 of the Government Code, you have not submitted arguments explaining how these exceptions apply to the requested information. Therefore, we presume you have withdrawn your claims under these exceptions. *See id.* §§ 552.301, .302.

<sup>4</sup>We 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 those records contain substantially different types of information than that submitted to this office.

We note Open Records Letter No. 2008-01744 does not authorize the district to withhold employee identification numbers on the basis of section 552.002 without the necessity of again requesting an attorney general decision with regard to the applicability of section 552.002. *See* Gov't Code § 552.301(a); ORD 673 at 7-8. Thus, the district may not rely on Open Records Letter No. 2008-01744 as a second type of previous determination and withhold any of the requested information on that basis.<sup>5</sup> You indicate, however, the named employee's identification number at issue in the current request was ruled upon by this office in Open Records Letter No. 2008-01744, and the law, facts, and circumstances on which the prior ruling was based have not changed. Therefore, we conclude the district may continue to rely on that ruling as a first type of previous determination and need not release the employee identification number at issue pursuant to section 552.002 of the Government Code in accordance with Open Records Letter No. 2008-01744. *See* ORD 673.

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 "[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 id.* at 4. The Third Court of Appeals has held a written reprimand constitutes an evaluation for purposes of section 21.355. *See Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin, 2006).

You assert the submitted letters and e-mail you have marked are confidential under section 21.355. You have failed to demonstrate, however, how the submitted letters and e-mail constitute evaluations for purposes of section 21.355. Consequently, the letters and e-mail at issue may not be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. As you have claimed no other exceptions to disclosure, these records must be released.

You claim portions of the remaining information are protected under common-law privacy. Section 552.101 also 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

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<sup>5</sup>We note a governmental body need not request a ruling from this office with respect to information that is not subject to the Act.

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 established. *Id.* at 681-82. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). This office has also found, however, the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 470 at 4 (public has legitimate interest in job qualifications and performance of public employees), 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under common-law right of privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

You seek to withhold portions of the named former employee's notice of resignation form. Although the information you have marked may be considered intimate or embarrassing, we find there is a legitimate public interest in this information. Therefore, this information may not be withheld on the basis of common-law privacy. We note the remaining information contains the former employee's personal bank records. We find a portion of this information, which we have marked, is of legitimate public interest because it pertains to alleged misconduct by the former employee. Consequently, this information may not be withheld on the basis of common-law privacy. We find, however, there is no legitimate public interest in the remainder of the bank records. Therefore, the district must release the information we have marked in the bank records and withhold the remaining bank records under section 552.101 of the Government Code in conjunction with common-law privacy.

You claim the memorandum and notes you have marked in the remaining information are protected by the attorney-client privilege. Section 552.107(1) of the Government Code 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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. *See* 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. See *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, and lawyer representatives. 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. See *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 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 the memorandum and notes you seek to withhold consist of communications between an attorney for the district and district officials made in furtherance of the rendition of professional legal services. You indicate 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 the memorandum and notes at issue. Thus, the district may withhold the memorandum and notes you have marked under section 552.107(1) of the Government Code.

You claim portions of the remaining information are excepted under section 552.135 of the Government Code, which provides:

- (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].

Gov't Code § 552.135. You claim the information you have marked in the remaining information should be withheld in its entirety. You indicate the employees whose statements are at issue reported to the district a possible violation of law. Upon review, we find the information we have marked reveals the identities of the informers at issue. Accordingly, the district must withhold this information under section 552.135 of the Government Code. You have not explained, or otherwise demonstrated, how the remaining information you seek to withhold would substantially reveal the informers' identities. Thus, the district may not withhold any of the remaining information you seek to withhold under section 552.135 of the Government Code.

In summary, the district need not release the employee identification number at issue pursuant to section 552.002 of the Government Code in accordance with Open Records Letter No. 2008-01744. With the exception of the information we have marked for release, the district must withhold the submitted bank records under section 552.101 of the Government Code in conjunction with common-law privacy. The district may withhold the memorandum and notes you have marked under section 552.107(1) of the Government Code, and must withhold the information we have marked under section 552.135 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](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,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/dls

Ref: ID# 405776

Enc. Submitted documents

c: Requestor  
(w/o enclosures)