



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 22, 2011

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

OR2011-08868

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# 421395.

The Carrollton-Farmers Branch Independent School District (the "district"), which you represent, received a request for all e-mails, including attachments, sent to or from seven specified district e-mail addresses during a specified time period. You state the district will make some of the requested information available to the requestor with certain e-mail addresses withheld under section 552.137 of the Government Code pursuant to the previous determination issued to all governmental bodies in Open Records Decision No. 684 (2009).¹ You further state the district has redacted student-identifying information from the information submitted to this office pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).² You claim some of the submitted e-mails are not

¹The previous determination issued in ORD 684 authorizes all governmental bodies to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

²The 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>.

subject to the Act. You further claim portions of the submitted e-mails are excepted from disclosure under sections 552.101, 552.102, 552.107, 552.117, 552.130, 552.136, and 552.137 of the Government Code.³ We have considered your arguments and reviewed the submitted representative sample of information.⁴

Initially, we address your contention the e-mails submitted in Exhibits H-1 through H-6 are not subject to the Act. The Act applies to "public information," which is defined under section 552.002 of the Government Code as:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002; *see also id.* § 552.021. Information is generally subject to the Act when it is held by a governmental body and it relates to the official business of a governmental body, or is used by a public official or employee in the performance of official duties. You represent the content of the e-mails at issue is personal in nature and does not relate to the transaction of official district business. *See* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Based on your representations and our review, we find the e-mails in Exhibits H-1 through H-6 do not pertain to the official business of the district and, therefore, do not constitute public information as defined by section 552.002 of the Government Code. Accordingly, the district is not required to disclose this information under the Act.⁵

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

³Although you also raise the attorney-client privilege under rule 503 of the Texas Rules of Evidence, we note section 552.107 is the proper exception to raise for your attorney-client privilege claim in this instance. *See* Open Records Decision No. 676 (1988). Furthermore, in your letter dated April 22, 2011, you withdrew your assertion under section 552.111 of the Government Code.

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 those records contain substantially different types of information than that submitted to this office.

⁵As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure for portions of this information.

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). 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. 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 e-mails submitted as Exhibit B consist of communications between an attorney for the district and district officials made in furtherance of the rendition of professional legal services. You also state the communications were made in confidence and the confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the district may withhold Exhibit B under section 552.107(1) of the Government Code.⁶

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

⁶As our ruling for this information is dispositive, we need not address your remaining argument against disclosure for this portions of this information.

Code § 552.101. This section encompasses information made confidential 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 e-mail string and attachments you have marked in Exhibit C are confidential under section 21.355. Upon review, we agree the attachments, which are copies of a written reprimand, constitute evaluations for purposes of section 21.355. You state the documents at issue pertain to an employee who was a certified teacher and was performing the functions of a teacher at the time of the evaluations. Therefore, the district must withhold the attachments you have marked in Exhibit C under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. You have not demonstrated, however, nor does the submitted information reflect, how the e-mail string you have marked is an evaluation of a teacher. Consequently, the district may not withhold that e-mail string, which we have marked for release, in Exhibit C under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. As you have not claimed any other exceptions to disclosure for the e-mail string, the district must release it.

Section 552.101 also encompasses section 261.201(a) of the Family Code, which provides:

(a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You acknowledge the district is not an agency authorized to conduct a chapter 261 investigation. *See id.* §§ 261.103 (listing agencies that may conduct child abuse investigations), .406. You claim, however, the information you have marked in Exhibit D is confidential under section 261.201(a) because it relates to a report of alleged child abuse made to the Texas Department of Family and Protective Services' Child Protective Services Division ("CPS") and reveals the identity of the individual who made the report. *See id.* § 261.001(1) (defining "abuse" for purposes of Fam. Code ch. 261); *see also id.* § 101.003(a) (defining "child" for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). Upon review, we agree the information you have marked reveals the identity of a person who made a report of alleged child abuse. We find the marked information is within the scope of section 261.201(a) of the Family Code. Accordingly, the district must withhold the information you have marked in Exhibit D under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.

Section 552.101 also encompasses section 37.108 of the Education Code, which provides, in part:

(b) At least once every three years, each school district or public junior college district shall conduct a safety and security audit of the district's facilities. To the extent possible, a district shall follow safety and security audit procedures developed by the Texas School Safety Center or a comparable public or private entity.

...

(c-1) Except as provided by Subsection (c-2), any document or information collected, developed, or produced during a safety and security audit conducted under Subsection (b) is not subject to disclosure under [the Act].

Educ. Code § 37.108(b), (c-1). You state the School Crisis Plan copies you have marked in Exhibit E were collected, developed, or produced during a safety and security audit of the district's facilities. *See id.* § 37.108(b). You contend none of the exceptions in subsection (c-2) are applicable to this information. *See id.* § 37.108(c-2) (listing types of documents relating to district's multihazard emergency operations plan subject to disclosure). Based on your arguments and our review, we find the district must withhold the information you have marked in Exhibit E under section 552.101 of the Government Code in conjunction with section 37.108(c-1) of the Education Code.⁷

⁷As our ruling for this information is dispositive, we need not address your remaining argument against disclosure for this portions of this information.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). 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 information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or 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 seek to withhold portions of the e-mails submitted as Exhibit F. You state the employees whose information is at issue timely chose to not allow public access to their personal information. Therefore, the district must withhold the employees' personal information we have marked in Exhibit F under section 552.117(a)(1) of the Government Code. We note, however, the remaining information you seek to withhold does not constitute the home telephone number, home address, emergency contact information, social security number, or family member information of a district official or employee. Consequently, the district may not withhold the remaining information at issue in Exhibit F under section 552.117(a)(1) of the Government Code. As you have not claimed any other exceptions to disclosure for this information, the district must release it.

Section 552.101 also encompasses the doctrine of common-law privacy, which 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 established. *Id.* at 681-82. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). 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 (1987) (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).

You contend the information you have marked in the remaining information in Exhibit F is protected by common-law privacy. Upon review, we agree portions of the information you seek to withhold, which we have marked, constitute medical information that we find is not of legitimate public concern. Therefore, the district must withhold the information we have marked in Exhibit F under section 552.101 of the Government Code in conjunction with common-law privacy. You have failed to demonstrate, however, how the remaining information you seek to withhold is highly intimate or embarrassing. *See* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Consequently, the district may not withhold the remaining information at issue in Exhibit F under section 552.101 of the Government Code in conjunction with common-law privacy. As you have not claimed any other exceptions to disclosure for this information, the district must release it.

You claim the e-mail addresses you have marked in the remaining information in Exhibit F are excepted from disclosure under section 552.137 of the Government Code. This section excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail addresses you have marked are not specifically excluded by section 552.137(c). As such, the district must withhold the e-mail addresses you have marked in Exhibit F under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

You seek to withhold the information you have marked in Exhibit G under section 552.102(a) of the Government Code. Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” *Id.* § 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.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). The district must withhold the date of birth information we have marked in Exhibit G under section 552.102(a) of the Government Code. You have failed to demonstrate, however, how the remaining information you seek to withhold constitutes district employees’ dates of birth. Consequently, the district may not withhold the remaining information at issue in Exhibit G under section 552.102(a) of the Government Code. As you have not claimed any other exceptions to disclosure for this information, the district must release it.

Section 552.136 of the Government Code provides:

(a) In this section, “access device” means 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:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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. You claim the temporary password you have marked in Exhibit I is excepted under section 552.136. You have failed to demonstrate, however, how the temporary password constitutes an access device number that may be used to obtain money, goods, services, or another thing of value for purposes of section 552.136. Consequently, the district may not withhold the temporary password under section 552.136 of the Government Code. As you have not claimed any other exceptions to disclosure for this information, the district must release it.

In summary, Exhibits H-1 through H-6 are not subject to the Act. The district may withhold Exhibit B under section 552.107(1) of the Government Code. Except for the information we have marked for release, the district must withhold the information you have marked in Exhibit C under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold under section 552.101 of the Government Code the information you have marked in Exhibit D in conjunction with section 261.201(a) of the Family Code; the information you have marked in Exhibit E in conjunction with section 37.108(c-1) of the Education Code; and the information we have marked in Exhibit F in conjunction with common-law privacy. The district must withhold the employees' personal information we have marked in Exhibit F under section 552.117(a)(1) of the Government Code. The district must withhold the e-mail addresses you have marked in Exhibit F under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release. The district must withhold the date of birth information we have marked in Exhibit G under section 552.102(a) of the Government Code. The district must release the remaining information.

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 421395

Enc. Submitted documents

c: Requestor
(w/o enclosures)