



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 22, 2011

Ms. Elisabeth A. Donley
Counsel for the Lewisville Independent School District
Law Offices of Robert E. Luna, P.C.
4411 North Central Expressway
Dallas, Texas 75205

OR2011-08889

Dear 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# 420120.

The Lewisville Independent School District (the "district"), which you represent, received a request for information pertaining to a named educator. You state the district will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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. Section 21.355 of the Education Code provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. In Open Records Letter No. 643, this office interpreted section 21.355 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 (1996). In that opinion, we concluded 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 teaching at the time of his or her evaluation. *Id.* You claim the records in Exhibit B are evaluations of the named educator. You state, and provide documentation showing, the educator held the appropriate certification and was

teaching at the time of the evaluations. Based on your representations and our review, we conclude the records in Exhibit B are teacher evaluations for purposes of section 21.355. Accordingly, Exhibit B is confidential under section 21.355 of the Education Code and must be withheld under section 552.101 of the Government Code.¹

Section 552.101 also encompasses section 825.507 of the Government Code, which provides in relevant part:

(a) Records of a participant that are in the custody of the retirement system or of an administrator, carrier, attorney, consultant, or governmental agency acting in cooperation with or on behalf of the retirement system are confidential and not subject to public disclosure in a form that would identify an individual and are exempt from the public access provisions of Chapter 552, except as otherwise provided by this section.

...

(c) The records of a participant remain confidential after release to a person as authorized by this section. This section does not prevent the disclosure or confirmation, on an individual basis, of the status or identity of a participant as a member, former member, retiree, deceased member or retiree, beneficiary, or alternate payee of the retirement system.

...

(g) In this section, "participant" means a member, former member, retiree, annuitant, beneficiary, or alternate payee of the retirement system.

Gov't Code § 825.507(a), (c), (g). In Exhibit C, you marked a notation on the educator's resignation letter under section 825.507. Although you state this information identifies a participant of the retirement system, you have failed to demonstrate how the resignation letter is a record of a participant in the retirement system that is being maintained by the district on behalf or in cooperation with the retirement system. Accordingly, the information you marked in Exhibit C pursuant to section 825.507 of the Government Code may not be withheld under section 552.101 of the Government Code.

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).

¹As our ruling for this information is dispositive, we need not address your remaining argument against disclosure.

To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. You marked financial and other information in Exhibit C under common-law privacy. Prior decisions of this office have determined that personal 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 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 generally* Open Record Decision No. 545 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). Whether financial 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). The financial information you marked reveals the details of a transaction between the educator and the district involving funds that were to be received by the educator as part of his resignation, and the manner in which he was to receive those funds. Therefore, we find there is a legitimate public interest in the financial information you marked in Exhibit C. Accordingly, the district may not withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. The other information you marked in Exhibit C under common-law privacy concerns a physical altercation between the educator and another person which ultimately led to the educator's resignation. This office has stated in numerous formal decisions that the public has a legitimate interest in knowing the reasons for the dismissal, demotion, promotion, or resignation of public employees. Open Records Decision No. 444 at 5-6 (1986); *see e.g.*, Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Thus, the remaining information you marked in Exhibit C may not be withheld pursuant to section 552.101.

You claim the documents in Exhibit D and a portion of a record contained in Exhibit C are excepted from disclosure under section 552.107(1) of the Government Code. This section 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). 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 documents in Exhibit D and the marked portion of Exhibit C are communications or document communications between the district’s attorneys and representatives that were made in furtherance of the rendition of professional legal services to the district. You also state this information has not been disclosed to third persons and it was not intended to be disclosed. Based on your representations and our review, we find the district has demonstrated the applicability of the attorney-client privilege to the documents in Exhibit D, and the marked portion of Exhibit C. Thus, the district may withhold this information under section 552.107 of the Government Code.

You raise section 552.102 of the Government Code for the birth date you marked in Exhibits C and E. 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.” 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). Therefore, the birth date marked in Exhibits C and E must be withheld under section 552.102(a) of the Government Code.

Finally, you raise section 552.147 of the Government Code for the social security numbers in Exhibits C and E. Section 552.147 provides “[t]he social security number of a living person is excepted from [required public disclosure under the Act], but is not confidential under this section and this section does not make the social security number of a living person confidential under another provision of this chapter or other law.” Gov’t Code § 552.147(a). Thus, the district may withhold the social security numbers in Exhibits C and E under section 552.147 of the Government Code.

In summary, Exhibit B must be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district may withhold Exhibit D as well as the marked portion in Exhibit C under section 552.107(1) of the Government Code. The birth date marked in Exhibits C and E must be withheld under section 552.102(a)

of the Government Code. Lastly, the district may withhold the social security numbers in Exhibits C and E under section 552.147 of the Government Code. The remaining information in Exhibits C and E must be released.²

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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/eb

Ref: ID# 420120

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²The district states it is withholding the Texas driver's license information marked in Exhibit C under section 552.130 of the Government Code in accordance with the previous determination issued to all governmental bodies in Open Records Decision No. 684 (2009). See Gov't Code § 552.130(a)(1) (excepting from disclosure information relating to motor vehicle driver's license).