



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 12, 2011

Ms. Cheryl T. Mehl  
Attorney for Temple Independent School District  
Schwartz & Eichelbaum Wardell Mehl and Hansen, P.C.  
4201 West Parmer Lane, Suite A-100  
Austin, Texas 78727

OR2011-09828

Dear Ms. Mehl:

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# 423670.

The Temple Independent School District (the "district"), which you represent, received a request for the personnel files of seven named district employees, attorney invoices for the 2010-2011 school year, and information relating to DAEP. You state the district will release some information to the requestor. You further state the district will redact information as permitted by section 552.147(b)<sup>1</sup> of the Government Code and Open Records Decision No. 684 (2009).<sup>2</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.107 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information.

---

<sup>1</sup>Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting an attorney general decision.

<sup>2</sup>Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers under section 552.130, bank account and routing numbers under section 552.136, and I-9 forms under section 552.101 in conjunction with section 1324a of title 8 of the United States Code, without the necessity of requesting an attorney general decision.

We first note, and you acknowledge, portions of the submitted information are subject to section 552.022, which provides for the required public disclosure of “information that is in a bill for attorney’s fees and that is not privileged under the attorney-client privilege” unless it is expressly confidential under “other law.” Gov’t Code § 552.022(a)(16). Exhibit 5 of the submitted information contains attorney fee bills subject to section 552.022(a)(16). Although you seek to withhold portions of this information under section 552.107 of the Government Code, this section is a discretionary exception to disclosure that protects only a governmental body’s interests and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.107 is not “other law” that makes information confidential for the purposes of section 552.022(a), and the district may not withhold any of the submitted information under that exception. However, you also raise Texas Rule of Evidence 503. The Texas Supreme Court has held that the Texas Rules of Evidence are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your attorney-client privilege claim under rule 503 of the Texas Rules of Evidence.

Texas Rule of Evidence 503(b)(1) provides:

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 attorney-client privileged 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 assert the marked portions of the submitted fee bills in Exhibit 5 are privileged under rule 503. You state this information consists of privileged attorney-client communications between the district and its attorneys. You state the communications at issue were made in furtherance of the rendition of legal services, and were intended to be, and have remained, confidential. However, you have failed to identify the parties to the communications in the submitted attorney fee bills. *See* ORD 676 at 8 (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made only among categories of individuals identified in section 552.111); *see generally* Gov't Code § 552.301(e)(1(A)); *Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it). Nevertheless, upon review, we are able to discern from the face of the documents that certain individuals are privileged parties. Accordingly, we conclude the district may withhold the information we have marked in Exhibit 5 under rule 503. However, the remaining information you seek to withhold either does not reveal a communication or reveals a communication with a party you have not identified as privileged. You have thus failed to provide this office with the necessary facts to demonstrate the elements of the attorney-client privilege with respect to the remaining information in Exhibit 5 you seek to withhold. Consequently, the district may not withhold any of this information under Texas Rule of Evidence 503. Because you raise no additional exceptions for the remaining information in Exhibit 5, it must be released to the requestor.

We now turn to your arguments against disclosure of the remaining information not subject to section 552.022(a). 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 made confidential by other statutes, such as the Medical Practice Act (the “MPA”). The MPA, subtitle B of title 3 of the Occupations Code, governs access to medical records. *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides, in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

*Id.* § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records must be released upon the patient's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). Upon review, we find Exhibit 2 consists of records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created by a physician. Therefore, Exhibit 2 constitutes confidential medical records and may be released only in accordance with the MPA.

Section 552.101 of the Government Code also encompasses section 21.048 of the Education Code, which is applicable to information relating to teacher certification examinations. Section 21.048(c-1) states:

The results of an examination administered under this section are confidential and are not subject to disclosure under Chapter 552, Government Code, unless:

- (1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or

(2) the educator has failed the examination more than five times.

Educ. Code § 21.048(c-1). You state Exhibit 3 consists of the results of teacher certification examinations. Subsections 21.048(c-1)(1) and (2) do not appear to be applicable in this instance. We therefore conclude the district must withhold Exhibit 3 under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code.

Section 552.101 also encompasses section 21.355 of the Education Code, which provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” *Id.* § 21.355. In Open Records Decision No. 643 (1996), 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 an administrator. *See* ORD 643 at 3. In that opinion, this office also 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.* We note the Third Court of Appeals has concluded that a written reprimand constitutes an evaluation for the purposes of section 21.355 because “it reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *Abbott v. N. E. Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). You state Exhibit 4 consists of appraisals and evaluations of the employees at issue. You inform us the employees were appropriately certified and serving in teaching or administrative capacities at the time of the evaluations. Upon review, we agree Exhibit 4 is confidential under section 21.355 of the Education Code and must be withheld under section 552.101 of the Government Code on that basis.

Section 552.102(b) of the Government Code excepts from disclosure all information from higher education transcripts of professional public school employees other than the employee’s name, the courses taken, and the degree obtained. Gov’t Code § 552.102(b); Open Records Decision No. 526 (1989). You state you will release the highlighted portions of the submitted transcripts in Exhibit 1 and wish to withhold the remaining information under section 552.102(b). Upon review, we agree the district must release the highlighted information in Exhibit 1. We have marked additional information for release. The district must withhold the remainder of Exhibit 1 under section 552.102(b) of the Government Code.

In summary, the district may withhold the information we have marked in Exhibit 5 under Texas Rule of Evidence 503. Exhibit 2 may be released only in accordance with the MPA. The district must withhold, in conjunction with section 552.101 of the Government Code, Exhibit 3 under section 21.048(c-1) of the Education Code and Exhibit 4 under section 21.355 of the Education Code. With the exception of the information we have marked for release, the district must withhold the non-highlighted information in Exhibit 1. The remaining information must be released to the requestor.

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,



Misty Haberer Barham  
Assistant Attorney General  
Open Records Division

MHB/dls

Ref: ID # 423670

Enc. Submitted documents

c: Requestor  
(w/o enclosures)