



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 9, 2011

Mr. Robert Russo
Counsel for the Judson Independent School District
Walsh, Anderson, Brown, Gallegos and Green, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2011-11450

Dear Mr. Russo:

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# 426431.

The Judson Independent School District (the "district"), which you represent, received a request for a complete copy of the investigative file pertaining to the requestor's client. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code, and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.¹ We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you inform us the district redacted student-identifying information in the submitted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.² We note FERPA is not applicable to

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

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>.

law enforcement records maintained by the district's police department (the "department") that were created by the department for a law enforcement purpose. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8. Upon review, we find the records labeled AG-0171 through AG-0173 are law enforcement records created and maintained by the department for a law enforcement purpose. Thus, these records are not subject to FERPA, and no portion of these records may be withheld on that basis.

Next, we address the applicability of section 552.022 of the Government Code to the submitted information. This section provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The documents labeled AG-0034 to AG-0289 are part of a completed investigation. Pursuant to section 552.022(a)(1) of the Government Code, this information is expressly public unless it is either excepted under section 552.108 of the Government Code or is expressly confidential under other law. Although you seek to withhold these records under sections 552.103, 552.107(1), and 552.111 of the Government Code, these sections are discretionary exceptions that protect a governmental body's interest and are, therefore, not "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Record Decision Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver). Therefore, the district may not withhold the records labeled AG-0034 to AG-0289 under section 552.103, section 552.107(1), or section 552.111 of the Government Code. The Texas Supreme Court has held, however, that the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" that make information confidential for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege, as encompassed by section 552.107(1), is also found at Texas Rule of Evidence 503, and the attorney work product privilege, as encompassed by section 552.111, is also found at Texas Rule of Civil Procedure 192.5. Accordingly, we will consider your assertion of the attorney-client privilege under rule 503 for the records labeled AG-0034 to AG-0109. We will also consider your assertion of the attorney work product privilege under rule 192.5 for the documents labeled AG-0044, AG-0084 to AG-0093, and AG-0096 to AG-0109. Additionally, we will address the applicability of sections 552.103, 552.107(1), and 552.111 to the records labeled AG-0001 to AG-0033, which are not subject to section 552.022.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

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 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). 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that 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 that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You inform us the records labeled AG-0034 through AG-0109 are communications between or among the district's legal counsel and district employees which were made for the

purpose of facilitating professional legal services to the district. You state these communications were intended to be confidential and the district has protected their confidentiality. Based on your representations and our review, we conclude the district has established the records labeled AG-0034 through AG-0109 are protected by the attorney-client privilege. Therefore, the district may withhold this information under Texas Rule of Evidence 503.³

We next turn to your argument under section 552.107(1) of the Government Code for the records labeled AG-0001 to AG-0033, which are not subject to section 552.022. Section 552.107 protects information that comes within the attorney-client privilege. The test for determining whether information is protected under the attorney-client privilege under section 552.107 is the same as that discussed above under Texas Rule of Evidence 503. First, a governmental body must demonstrate the information constitutes or documents a communication. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. Lastly, the attorney-client privilege applies only to a confidential communication, 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.” ORD 676.

You represent the records labeled AG-0001 through AG-0033 are communications between or among the district’s legal counsel and district employees which were made for the purpose of facilitating professional legal services to the district. You state these communications were intended to be confidential and the district has protected their confidentiality. Based on your representations and our review, we conclude the district has established the records labeled AG-0001 through AG-0033 are protected by the attorney-client privilege. Therefore, the district may withhold this information under section 552.107(1) of the Government Code.⁴

We note the records labeled AG-143, AG-147, and AG-213 may be subject to section 1701.454 of the Occupations Code. Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information protected by other statutes, such as section 1701.454. This section provides in relevant part, “[a] report or statement submitted to the [Texas Commission on Law Enforcement Officer Standards and Education] under this subchapter is confidential and is not subject to disclosure under [the Act], unless the person resigned or was terminated due

³As our ruling for this information is dispositive, we need not address your arguments under Texas Rule of Civil Procedure 192.5.

⁴As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure.

to substantiated incidents of excessive force or violations of the law other than traffic offenses.” Occ. Code § 1701.454(a). The records at issue are F-5 Report of Separation of License Holder forms. However, in this instance, it is unclear whether the requestor’s client was terminated due to a substantiated incident of excessive force. Thus, if the requestor’s client was not terminated due to a substantiated incident of excessive force, the district must withhold the records labeled AG-143, AG-147, and AG-213 under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. Otherwise, this information must be released.

The remaining information also contains the birth date of a secretary employed by the district. Section 552.102(a) of the Government Code 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). Accordingly, the birth date we marked must be withheld under section 552.102(a) of the Government Code.

Finally, the remaining information contains a Texas driver’s license number. Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s license or driver’s license issued by a Texas agency, or an agency of another state or country, is excepted from public release. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov’t Code § 552.130(a)(1)). Accordingly, the district must withhold the marked driver’s license number under section 552.130 of the Government Code. As you raise no other exceptions to disclosure, the remaining information must be released.⁵

In summary, the district may withhold the records labeled AG-0034 through AG-0109 under Texas Rule of Evidence 503. The records labeled AG-0001 to AG-0033 may be withheld under section 552.107(1) of the Government Code. The birth date we marked in the records labeled AG-0171 and AG-0174 must be withheld under section 552.102 of the Government Code. The driver’s license number we marked in AG-0171 must be withheld under section 552.130 of the Government Code. Lastly, if the requestor’s client was not terminated

⁵The remaining information contains information about an individual represented by the requestor that would be protected from disclosure by section 552.102 and 552.117 of the Government Code. See Gov’t Code §§ 552.102(a), .117(a)(2). These sections protect personal privacy. Thus, because the requestor is his client’s authorized representative, he has a right of access to this private information. See Gov’t Code §§ 552.023(a) (person or person’s authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person’s privacy interests), .102(a) (stating employee’s authorized representative has right of access to information about employee that is protected by section 552.102); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide her with information concerning herself). However, if the district receives another request for this particular information from a different requestor, then it should again seek a decision from this office.

due to a substantiated incident of excessive force, the district must withhold the records labeled AG-143, AG-147, and AG-213 under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. Otherwise, this information must be released with the remaining information.⁶

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# 426431

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶We note the information being released contains the social security number of an individual who is not the requestor's client. 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 under the Act. Gov't Code § 552.147(b).