



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

August 11, 2011

Dr. Carol Simpson
For the Rocksprings Independent School District
Schwartz & Eichelbaum
Wardell Mehl and Hansen, P.C.
5300 Democracy Drive, Suite 200
Plano, Texas 75024

OR2011-11638

Dear Dr. Simpson:

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# 426822.

The Rocksprings Independent School District (the "district") received a request for information created during a specified time period pertaining to a named district employee's job performance, conduct, and suitability. You state some information is being released to the requestor. You further state the district has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.¹ Additionally, you inform us the district has redacted social security numbers under section 552.147(b) of the Government Code.² You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We

¹The 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>.

²Section 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 a decision from this office under the Act. Gov't Code § 552.147(b).

have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, we note some of the submitted information in Exhibit C, which we have marked, is not responsive to the instant request because it was not created during the specified time period. This ruling does not address the public availability of any information that is not responsive to the request, and the district is not required to release this information in response to this request.

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. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term “return information” as “a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]” See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993). Upon review, we find you have failed to demonstrate the responsive information in the payroll earning registers in Exhibit C fall within the definition of “return information” under section 6103(b)(2). Therefore, none of the information at issue is confidential under section 6103(a), and the district may not withhold the responsive information under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses information protected by section 21.355 of the Education Code. Section 21.355 provides “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. The Third Court of Appeals has concluded a written reprimand constitutes an evaluation for 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.” *N.E. Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly

³We 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.

understood, the performance of a teacher or 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 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. Further, in Open Records Decision No. 643, we determined an “administrator” for purposes of section 21.355 means a person who is required to, and does in fact, hold an administrator’s certificate under subchapter B of chapter 21 of the Education Code, and is performing the functions as an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

You assert Exhibit B consists of confidential evaluations of a teacher and an administrators by the district. You inform us the teacher and administrator at issue were certified as a teacher and administrator, respectively, by the State Board of Educator Certification and were acting as teachers or administrators at the time evaluations were prepared. However, you seek to withhold a memorandum instructing an employee to advertise for a new position and the reference to a reprimand within a written response to a reprimand. This information does not evaluate any employee for purposes of section 21.355. Thus, we find you have failed to demonstrate how this information in Exhibit B, which we marked for release, consists of documents evaluating the performance of a teacher or administrator for purposes of section 21.355. We agree the remaining information in Exhibit B consists of evaluations made confidential by section 21.355. Thus, except for the information we marked for release, the district must withhold Exhibit B under section 552.101 in conjunction with section 21.355.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See 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 demonstrated. *Id.* at 681-82. This office has found an employee’s voluntary financial choices are highly intimate and embarrassing for purposes of common-law privacy. *See* Open Records Decision Nos. 600 (1992) (employee’s designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (information about employee decision to allocate salary to deferred compensation plan, to participate in voluntary investment program, to elect optional insurance coverage, employee’s mortgage payments, assets, bills, and credit history). However, because there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body, financial information related to such transactions is generally not excepted from disclosure. *See* Open Records Decision Nos. 600 (information revealing employee participates in group insurance plan funded party or wholly by governmental body not excepted from disclosure), 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body

not protected by common-law privacy), 373 (1983), 342 (1982). 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* ORD 373. Upon review, we find some of the information in Exhibit C is highly intimate or embarrassing of no legitimate public interest. Thus, the district must withhold the information we marked in Exhibit C under section 552.101 in conjunction with common-law privacy.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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. 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. 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. *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 a 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 a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies to only communications between or among clients, client representatives, lawyers, and lawyer representatives. 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 to only 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). 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-mail correspondence in Exhibit D constitutes confidential communications between the district's legal counsel and the district's superintendent that were made for the purpose of providing legal advice to the district. You explain the communications were intended to be, and have remained, confidential. Based on your representations and our

review, we conclude the district may generally withhold Exhibit D on the basis of the attorney-client privilege under section 552.107 of the Government Code. We note, however, the otherwise privileged e-mail strings contain an e-mail from a individual who is not a privileged party in this instance. Thus, to the extent this non-privileged e-mail, which we marked, exists separate and apart from the submitted e-mail strings, it may not be withheld under section 552.107.

We note the non-privileged e-mail contains an e-mail address subject to section 552.137 of the Government Code.⁴ Section 552.137 of the Government Code 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). Gov’t Code § 552.137(a)-(c). The e-mail address we marked is not of a type specifically excluded by section 552.137(c). Accordingly, the district must withhold the e-mail address we marked under section 552.137 unless the owner of the address affirmatively consents to its release.⁵

In summary, except for the information we marked for release, the district must withhold Exhibit B under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must also withhold the information we marked in Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy. The district may withhold Exhibit D under section 552.107 of the Government Code; however, to the extent the marked non-privileged e-mail exists separate and apart from the otherwise privileged e-mail strings, the non-privileged e-mail may not be withheld under section 552.107. In that event, the district must withhold the e-mail address we marked under section 552.137 of the Government Code unless its owner affirmatively consents to its release. 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, or call the Office of the Attorney General’s Open Government Hotline, toll free,

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁵We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,

A handwritten signature in black ink, appearing to read 'Ana Carolina Vieira', with a long horizontal flourish extending to the right.

Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/agn

Ref: ID# 426822

Enc. Submitted documents

c: Requestor
(w/o enclosures)