



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 19, 2011

Ms. Meredith Hayes  
For Carrollton-Farmers Branch Independent School District  
Walsh, Anderson, Brown, Gallegos and Green, P.C.  
P.O. Box 168046  
Irving, Texas 75016-8046

OR2011-12034

Dear Ms. Hayes:

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# 427368.

The Carrollton-Farmers Branch Independent School District (the "district"), which you represent, received a request for information related to a former district employee. You state some responsive information has been released, with redactions agreed to by the requestor.<sup>1</sup> You also state you have 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. § 1232(g).<sup>2</sup> You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information consists of a completed report. Under section 552.022(a)(1) of the Government Code, a completed report, audit, evaluation,

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<sup>1</sup>We note the district received clarification of the information requested. See Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request).

<sup>2</sup>The 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>.

or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law.<sup>3</sup> Gov't Code § 552.022(a)(1). You seek to withhold the information at issue under sections 552.107 and 552.111 of the Government Code. These sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 663 at 5 (1999) (governmental body may waive section 552.111); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, they are not other law that makes information confidential for the purposes of section 552.022; therefore, the district may not withhold the completed report under either of those sections.

However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" that makes information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Sections 552.101 and 552.135 also constitute other law for purposes of section 552.022. Therefore, we will consider your arguments under Texas Rule of Evidence 503, Texas Rule of Civil Procedure 192.5, and sections 552.101 and 552.135 of the Government Code for that report, along with your arguments for the remaining submitted information.

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

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

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<sup>3</sup>We note the district does not raise section 552.108 as an exception to disclosure.

(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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (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. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You assert the completed report, which you have marked as pages AG 046-080, constitutes a confidential communication between district attorneys and staff and employees of the district that was made in furtherance of the rendition of professional legal services. You also assert the communication was intended to be confidential and its confidentiality has been maintained. After reviewing your arguments and the submitted information, we agree the completed report constitutes a privileged attorney-client communication that the district may withhold under Texas Rule of Evidence 503.<sup>4</sup>

You claim pages AG 001-045 are excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information coming 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. ORD 676 at 6-7. The elements of the privilege under section 552.107 are the same as those for rule 503 outlined above.

You explain the information at issue consists of confidential communications between and among attorneys and staff for and employees of the district that were made in furtherance of the rendition of professional legal services. You also assert the communications were

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<sup>4</sup>As we make this determination, we need not address your remaining claims for this information.

intended to be confidential and their confidentiality has been maintained. After reviewing your arguments and the submitted information, we agree pages AG 001-045 constitute privileged attorney-client communications that the district may withhold under section 552.107(1) of the Government Code.<sup>5</sup>

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. This section encompasses information protected by other statutes, such as section 21.355 of the Education Code, which provides that “[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 at 3 (1996). Additionally, we determined that 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. We note that a court 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.” *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You contend that pages AG 081-082 are confidential under section 21.355. You state that the employee concerned was a teacher and indicate the employee was teaching at the time the information was created. The information at issue indicates the employee at issue held the appropriate teaching certificate. However, we note the information at issue consists of a letter from the district to the Texas Education Agency regarding the employee’s resignation. Upon review, we find that you have failed to demonstrate how the information consists of “[a] document evaluating the performance of a teacher or administrator” as contemplated by section 21.355. Educ. Code § 21.355. Accordingly, we conclude the district may not withhold pages AG 081-082 based on section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.135 of the Government Code provides the following:

- (a) “Informer” means a student or former student or an employee or former employee of a school district who has furnished a report of another person’s or persons’ possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

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<sup>5</sup>As our ruling is dispositive, we do not address your remaining claims for this information.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov't Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under the exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* §§ 552.301(e)(1)(A). Additionally, individuals who provide information in the course of an investigation, but do not make the initial report are not informants for purposes of section 552.135 of the Government Code.

In this instance, you claim the remaining information reveals the identities of informers who reported possible violations of federal law, the Texas Penal Code, and the Educator Code of Ethics, section 247.2 of title 19 of the Texas Administrative Code. We note section 552.135 protects an informer's identity, but it generally does not provide protection for witness statements. Upon review, we conclude the district must withhold the information we have marked under section 552.135 of the Government Code. However, the district has failed to demonstrate how any portion of the remaining information at issue reveals the identity of an informer for section 552.135 purposes. Accordingly, none of the remaining information may be withheld on that basis.

We note some of the remaining information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home address and telephone number, social security number, emergency contact information, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024.<sup>6</sup> *See* Act of May 24, 2011, 82<sup>nd</sup> Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)(1)). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information.

We have marked a former district employee's personal information. You have not informed us whether that employee elected to withhold his personal information prior to the district's receipt of the request. Therefore, if the former employee timely elected to withhold his personal information, the district must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. If the former employee did not timely

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<sup>6</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

elect to withhold this information, then the district may not withhold the marked information under section 552.117(a)(1) of the Government Code.

In summary, the district may withhold the completed report, which you have marked as pages AG 046-080, under Texas Rule of Evidence 503. The district also may withhold pages AG 001-045 under section 552.107(1) of the Government Code. The district must withhold the information we have marked under section 552.135 of the Government Code. If the former employee timely elected to withhold his personal information, the district must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. If the former employee did not timely elect to withhold this information, then the district may not withhold the marked information under section 552.117(a)(1) of the Government Code; in that case, it must be released along with the remaining submitted 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](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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 427368

Enc. Submitted documents

c: Requestor  
(w/o enclosures)