



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 18, 2011

Ms. Haley Turner
Walsh, Anderson, Brown, Gallegos and Green, P.C.
For Round Top-Carmine Independent School District
P.O. Box 2156
Austin, Texas 78768

OR2011-15173

Dear Ms. Turner:

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# 433469.

The Round Top-Carmine Independent School District (the "district"), which you represent, received a request for the following information: (1) all district insurance liability policies, (2) the personnel records of a named individual, (3) all complaints against the named individual, (4) and all e-mail correspondence between the named individual and three named individuals. You state the district will make some of the responsive information available to the requestor. You also state the district has redacted personal information of employees subject to section 552.117 of the Government Code pursuant to section 552.024 of the Government Code and personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim that the remaining submitted information is excepted from disclosure under sections 552.101 and 552.107 of

¹Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

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. Section 552.101 encompasses medical records made confidential under the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

(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.

Occ. Code § 159.002(b)-(c). Information that is 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 determined that 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). Upon review, we find the drug test result, submitted as Exhibit 4, constitutes a medical record subject to the MPA. *See* ORD 598. Therefore, the district may only release this information in accordance with the MPA.⁴

You contend the information submitted as Exhibits 5 and 6 is protected under section 21.355 of the Education Code. Section 552.101 also encompasses section 21.355, which provides in part that “[a] document evaluating the performance of a teacher or administrator is

²You also claim this information is protected under the attorney-client privilege based on Texas Rule of Evidence 503. In this instance, however, the information is properly addressed here under section 552.107, rather than rule 503. Open Records Decision No. 676 at 3 (2002). We note you raise Rule 503 in conjunction with section 552.101 of the Government Code. However, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2, 575 at 2 (1990).

³We assume that 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 that those records contain substantially different types of information than that submitted to this office.

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

confidential.” See Act of May 25, 2011, 82nd Leg., R.S., H.B. 2971, § 1 (to be codified at Educ. Code § 21.355(a)). 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 (1996). We have determined the word “administrator” in 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 of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.* You state Exhibits 5 and 6 consist of evaluations of a certified administrator. You inform us, and provide documentation showing, the administrator holds the appropriate administrator’s certification under subchapter B of chapter 21 of the Education Code. Based on your representations and our review, we find the district must withhold Exhibit 5 under section 552.101 in conjunction with section 21.355 of the Education Code. However, we note Exhibit 6 consists of a memorandum discussing the results of an investigation, and does not constitute an evaluation under section 21.355 of the Education Code. Therefore, the district may not withhold Exhibit 6 on that basis.

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. ORD 676 at 6–7. First, a governmental body must demonstrate that 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 Texas 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 that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. See 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 only to 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). 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).

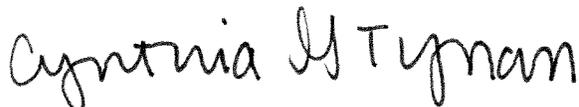
You state Exhibit 3 consists of confidential communications among district employees regarding communication with and advice from attorneys for the district. You state these communications were made in furtherance of the rendition of legal services to the district, you identify the parties, and you inform this office these communications have remained confidential. Based on your representations and our review, we agree the information in Exhibit 3 constitutes privileged attorney-client communications. The district may withhold Exhibit 3 under section 552.107(1) of the Government Code.

In summary, the district must withhold Exhibit 4 under section 552.101 of the Government Code in conjunction with the MPA. The district must withhold Exhibit 5 under section 552.101 in conjunction with section 21.355 of the Education Code. The district may withhold Exhibit 3 under section 552.107 of the Government Code. 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, 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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/em

Ref: ID# 433469

Enc. Submitted documents

c: Requestor
(w/o enclosures)