



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 2, 2011

Mr. Tony Resendez  
Walsh, Anderson, Brown, Gallegos, and Green, P.C.  
P.O. Box 460606  
San Antonio, Texas 78246

OR2011-17798

Dear Mr. Resendez:

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# 437885.

The Natalia Independent School District (the "district"), which you represent, received a request for specified e-mails and communications, specified records from the AVID program, information pertaining to specified grievances, information pertaining to specified expenses and reimbursements, and specified board meeting minutes.<sup>1</sup> You state you have made some of the requested information available to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.107 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments

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<sup>1</sup>We note the district sought and 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>Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, although you also raise rule 503 of the Texas Rules of Evidence, we note section 552.107 of the Government Code is the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code. *See* ORD 676 at 1-2.

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, we address the requestor's argument that the district failed to comply with the Act's procedural requirements under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. *See id.* § 552.301(b). Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The district received the initial request from the requestor on August 15, 2011. In response to a conversation with the district, the requestor clarified her request on August 19, 2011. The district sought additional clarification from the requestor on August 24, 2011, and the requestor responded to this request for clarification on August 25, 2011. We note September 5, 2011 was a holiday for the district. This office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. The district sought final clarification from the requestor on September 9, 2011, and the requestor responded to this clarification on September 14, 2011. We have no indication the district did not act in good faith in seeking clarification of the request. Accordingly, based on the submitted documentation, the district's ten- and fifteen-business-day periods under subsections 552.301(b) and 552.301(e) for requesting this decision commenced on September 14, 2011, the date of the district's receipt of the requestor's final response to the requests for clarification. *See City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Consequently, the district's ten-business-day deadline was September 28, 2011, and its fifteen-business-day deadline was October 5, 2011. We note the district's request for a ruling was sent to this office by facsimile on September 28, 2011 and by certified mail postmarked on September 28, 2011, and the district submitted the information required by section 552.301(e) by facsimile on October 5, 2011 and certified mail postmarked on October 5, 2011. *See* Gov't Code § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the district timely complied with the procedural requirements mandated by section 552.301 of the Government Code. Accordingly, we will address the district's arguments against disclosure of the submitted information.

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 information protected by other statutes, such as section 21.355 of the Education Code. Section 21.355(a) provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Act of May 25, 2011, 82nd Leg., R.S., H.B. 2971, § 1 (to be codified at Educ. Code § 21.355(a)). In addition, the court 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.” *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. 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 claim that the documents numbered AG-0046 through AG-0051 are confidential under section 21.355 of the Education Code. You state, and provide documentation showing, the individual at issue held the appropriate administrator’s certification. We note the information at issue consists of grievance decisions written by the district’s superintendent and interim superintendent. Upon review, we find you have failed to demonstrate how any portion of the grievance decisions constitutes an evaluation for the purposes of section 21.355 of the Education Code. Accordingly, none of the documents numbered AG-0046 through AG-0051 may be withheld under section 552.101 on that basis.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *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 established. *Id.* at 681-82. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. However, this office also has found a legitimate public interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 542 at 5 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). You claim the documents numbered AG-0044 through AG-0049 contain private information of district employees. However, we find the district has not demonstrated any of the information at issue is highly intimate or embarrassing and of no legitimate public interest.

Accordingly, the district may not withhold any of the information in documents numbered AG-0044 through AG-0049 under section 552.101 of the Government Code on that basis.

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). You assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert*’s interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163, at 5 (Tex. Dec. 3, 2010). The supreme court then considered the applicability of section 552.102, and has 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. *Id.* at 10. Upon review, the information at issue is not excepted under section 552.102(a) and may not be withheld 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 explain the documents numbered AG-0001 through AG-0043 consist 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 intended to be confidential and their confidentiality has been maintained. After reviewing your arguments and the submitted information, we agree the information we have marked constitutes privileged attorney-client communications that the district may withhold under section 552.107(1) of the Government Code. We note, however, one of the privileged communications includes an attachment, which we have marked, that is with a non-privileged party. If this marked attachment exists separate and apart from the otherwise privileged communication, then the district may not withhold this marked information under section 552.107 of the Government Code. Further, we find the district has failed to demonstrate how the remaining information at issue consists of communications between privileged parties. Thus, we find you have failed to demonstrate the applicability of the attorney-client privilege to the remaining information at issue, and the district may not withhold this information under section 552.107(1) of the Government Code.

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>3</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 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 employee timely elected to withhold his personal

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<sup>3</sup>The 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.

information, the district must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. If the 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 summary, the district may withhold information we have marked under section 552.107(1) of the Government Code. However, to the extent the non-privileged attachment, which we have marked, exists separate and apart from the otherwise privileged communication, the district must release it. If the 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. 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](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,



Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/ag

Ref: ID# 437885

Enc. Submitted documents

c: Requestor  
(w/o enclosures)