



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 20, 2012

Ms. Elisabeth D. Nelson  
Law Offices of Robert E. Luna, P.C.  
4411 North Central Expressway  
Dallas, Texas 75205

OR2012-00983

Dear Ms. Nelson:

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# 442771.

The Lewisville Independent School District (the "district"), which you represent, received a request for four categories of information pertaining to a named employee and enrollment and eligibility information pertaining to a named student. You state the district has released or will release some information to the requestor. You state, as permitted by section 552.024(c) of the Government Code, the district has redacted information subject to section 552.117 of the Government Code.<sup>1</sup> You also state the district has redacted motor vehicle record information in accordance with section 552.130 of the Government Code, as well as Form I-9 information and personal e-mail addresses pursuant to Open Records Decision No. 684 (2009).<sup>2</sup> You also state you have withheld student identifying information

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<sup>1</sup>Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body. Gov't Code § 552.117(a). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the current or former employee or official chooses not to allow public access to the information. *See id.* § 552.024(c).

<sup>2</sup>The Texas legislature amended section 552.130 of the Government Code effective September 1, 2011, to allow a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 52.130(d), (e). Furthermore, Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Form I-9 and attachments under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code and personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

pursuant to the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code.<sup>3</sup> You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.117, 552.130, and 552.137 of the Government Code, as well as privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information, a portion of which is a representative sample.<sup>4</sup>

Section 552.101 excepts from required public disclosure information considered confidential by law, either constitutional, statutory or by judicial decision. Gov’t Code § 552.101. Thus, section 552.101 excepts from disclosure information made confidential by statute. We first consider your claim the information you have marked in Exhibit B is confidential based on sections 411.0845 and 411.097(d) of the Government Code.

Section 411.0845 of the Government Code provides in relevant part:

(a) The [Department of Public Safety (the “DPS”)] shall establish an electronic clearinghouse and subscription service to provide [criminal history record information (“CHRI”)] to a particular person entitled to receive [CHRI] and updates to a particular record to which the person has subscribed under this subchapter.

(b) On receiving a request for [CHRI] from a person entitled to such information under this subchapter, the [DPS] shall provide through the electronic clearinghouse:

(1) the [CHRI] reported to the [DPS] or the Federal Bureau of Investigation relating to the individual who is the subject of the request; or

(2) a statement that the individual who is the subject of the request does not have any [CHRI] reported to the [DPS] or the Federal Bureau of Investigation.

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<sup>3</sup>The United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office that FERPA does not permit a state educational agency or institution to disclose to this office, without parental or an adult student’s consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). The DOE has determined that FERPA determinations must be made by the educational institution from which the education records were obtained. A copy of the DOE’s letter to this office may be found on the Office of the Attorney General’s website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

<sup>4</sup>We assume the “representative sample” of records submitted to this office are truly representative of the requested records at issue. *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.

(d) The [DPS] shall ensure that the information described by Subsection (b) is provided only to a person otherwise entitled to obtain [CHRI] under this subchapter. Information collected under this section is confidential and is not subject to disclosure under [the Act].

*Id.* § 411.0845(a)-(b), (d). Section 411.097(b) of the Government Code provides in part that “[a] school district . . . is entitled to obtain from the [DPS CHRI] maintained by the [DPS] that the district . . . is required or authorized to obtain under Subchapter C, Chapter 22, Education Code, that relates to a[n] . . . employee of the district[.]” *Id.* § 411.097(b). Pursuant to section 22.083(a-1) of the Education Code, a school district is authorized to obtain CHRI from the DPS’s electronic clearinghouse. Educ. Code § 22.083(a-1)(1). Section 22.08391(d) of the Education Code states that any CHRI received by a school district is subject to section 11.097(d) of the Government Code. *Id.* § 22.08391(d). Section 411.097 provides in relevant part:

(d) [CHRI] obtained by a school district, charter school, private school, service center, commercial transportation company, or shared services arrangement in the original form or any subsequent form:

(1) may not be released to any person except:

- (A) the individual who is the subject of the information;
- (B) the [TEA];
- (C) the State Board for Educator Certification;
- (D) the chief personnel officer of the transportation company, if the information is obtained under Subsection (a)(2); or
- (E) by court order[.]

Gov’t Code § 411.097(d). You assert the information you have marked in Exhibit B consists of CHRI obtained through the DPS’s electronic clearinghouse. Based on your representations and our review, we agree the information you have marked is confidential under sections 411.0845 and 411.097(d) of the Government Code and must be withheld by the district under section 552.101 of the Government Code on that basis.

Next, we consider your claim under section 22.08391 of the Education Code for a portion of the remaining information in Exhibit B. Section 22.08391(a) provides in relevant part:

(a) Information collected about a person to comply with this subchapter, including the person’s name, address, phone number, social security number, driver’s license number, other identification number, and fingerprint records:

(1) may not be released except:

(A) to comply with this subchapter;

(B) by court order; or

(C) with the consent of the person who is the subject of the information;

Educ. Code § 22.08391(a). Thus, except in the specified circumstances, section 22.08391 prohibits the release of information about a person collected in order to conduct a criminal history record search. You state a portion of the remaining information in Exhibit B is a form the district used to collect information about an employment applicant for the purpose of conducting a criminal history record search. Based on your representations and our review, we conclude the district must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 22.08391(a) of the Education Code.

Section 552.101 of the Government Code also encompasses section 21.048 of the Education Code, which addresses teacher certification examinations. Section 21.048(c-1) provides the following:

The results of an examination administered under this section are confidential and are not subject to disclosure under Chapter 552, Government Code, unless:

(1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or

(2) the educator has failed the examination more than five times.

Educ. Code § 21.048(c-1). We note a portion of Exhibit D contains teacher certification examination results. We further note subsections 21.048(c-1)(1) and (2) are not applicable in this instance. Therefore, the district must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code.

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.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having

carefully reviewed the remaining information, we agree the information you have marked in Exhibit D must be withheld under section 552.102(a) of the Government Code.

Section 552.102(b) of the Government Code excepts from disclosure higher education transcripts of professional public school employees, but does not except the employee's name, the courses taken, and the degree obtained from disclosure. Gov't Code § 552.102(b); *see also* Open Records Decision No. 526 (1989). Upon review, with the exception of the employee's name, courses taken, and degree obtained, we find the district must withhold the transcript you have marked in Exhibit D under section 552.102(b) of the Government Code.<sup>5</sup>

Section 552.107(1) of the Government Code protects information that comes 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. *See* 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. *See* 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. *See 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 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, and lawyer representatives. *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. *See 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).

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<sup>5</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

You claim Exhibit C is protected by section 552.107(1) of the Government Code. You state the e-mails consist of attorney-client communications that were made between counsel for the district and district employees for the purpose of rendering professional legal services to district. You state these communications were intended to be and remain confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the district may generally withhold Exhibit C under section 552.107(1) of the Government Code. We note, however, one of the privileged e-mail strings in Exhibit C includes a document to a non-privileged party that is separately responsive to the instant request. Consequently, to the extent this document, which we have marked, exists separate and apart from the privileged e-mail string in which it was included, the district may not withhold it under section 552.107(1) of the Government Code. If this document does not exist separate and apart from the privileged e-mail string in which it was included, the district may withhold it as a privileged attorney-client communication under section 552.107(1) of the Government Code.

Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Gov't Code § 552.117(a). We note that a post office box number is not a "home address" for purposes of section 552.117.<sup>6</sup> Furthermore, whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the named individual timely requested confidentiality under section 552.024, and with the exception of the post office box numbers, which we have marked for release, the district must withhold the personal information you have marked, and the additional information we have marked, in Exhibit B and Exhibit D under section 552.117(a)(1). Conversely, to the extent he did not make a timely election under section 552.024, the district may not withhold this information under section 552.117(a)(1) of the Government Code.<sup>7</sup>

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<sup>6</sup>*See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of Gov't Code § 552.117 is to protect public employees from being harassed at home) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)) (emphasis added).

<sup>7</sup>Regardless of the applicability of section 552.117 to the named employee's social security number, we note section 552.147(b) of the Government Code authorizes a governmental body to redact the social security number of a living person without the necessity of requesting a decision from this office under the Act. *See* Gov't Code § 552.147(b).

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license or permit issued by an agency of Texas, another state, or another country is excepted from public release. Gov't Code § 552.130(a)(1). The district must withhold the driver's license number you have marked in Exhibit D under section 552.130 of the Government Code.

Section 552.137 of the Government Code provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)–(c). Upon review, the district must withhold the e-mail addresses you have marked in Exhibit D under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release.

In summary, the district must withhold the information you have marked in Exhibit B under section 552.101 of the Government Code in conjunction with sections 411.0845 and 411.097(d) of the Government Code. The district must withhold the information you have marked in Exhibit B under section 552.101 of the Government Code in conjunction with section 22.08391(a) of the Education Code. The district must withhold the information we have marked in Exhibit D pursuant to section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code. The district must withhold the information you have marked in Exhibit D under section 552.102(a) of the Government Code. With the exception of the employee's name, courses taken, and degree obtained, the district must withhold the transcript you have marked in Exhibit D under section 552.102(b) of the Government Code. With the exception of the non-privileged document, which we have marked, the district may withhold Exhibit C under section 552.107(1) of the Government Code; however, if the non-privileged document does not exist separate and apart from the privileged e-mail string in which it was included, the district may withhold it as a privileged attorney-client communication under section 552.107(1). To the extent the named individual timely requested confidentiality under section 552.024 of the Government Code, and with the exception of the information we have marked for release, the district must withhold the information you have marked, and the additional information we have marked, in Exhibits B and D under section 552.117(a)(1) of the Government Code. The district must withhold the driver's license number you have marked in Exhibit D under section 552.130 of the Government Code. The district must withhold the e-mail addresses you have marked in Exhibit D, unless the owners affirmatively consent to their release, under section 552.137 of the Government Code. The district must release the remaining 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,



Sean Nottingham  
Assistant Attorney General  
Open Records Division

SN/agn

Ref: ID# 442771

Enc. Submitted documents

c: Requestor  
(w/o enclosures)