



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 9, 2012

Ms. Elisabeth A. Donley
Counsel for the Lewisville Independent School District
Law Offices of Robert E. Luna, P.C.
4411 North Central Expressway
Dallas, Texas 75205

OR2012-02092

Dear Ms. Donley:

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# 445050.

The Lewisville Independent School District (the "district"), which you represent, received a request for all information relating to any district investigations involving three former district employees and all information from a specified time period pertaining to any district investigations concerning hazing.¹ You state some of the requested information has been or will be made available to the requestor, with certain information redacted as permitted by Open Records Decision No. 684² and sections 552.117,³ 552.130,⁴ and 552.147⁵ of the

¹You state the district asked for and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify request). You also inform us the requestor was required to make a deposit for payment of anticipated costs under section 552.263 of the Government Code and you state the district received the cost deposit on December 15, 2011. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that governmental body receives deposit or bond).

²Open Records Decision No. 684 (2009) 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, W-2 forms under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code, a Texas license plate number under section 552.130 of the Government Code, and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney

Open Records Decision No. 684² and sections 552.117,³ 552.130,⁴ and 552.147⁵ of the Government Code. You claim that some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.117, 552.130, 552.137, and 552.147 of the Government Code, and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information, portions of which are representative samples.⁶

Initially, you have marked portions of Exhibit D as not responsive to the request for information. In addition, we note the requestor specifically excluded information subject to the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code, from his request.⁷ This decision does not address the public availability

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³Section 552.117 of the Government Code excepts from disclosure the home address and telephone number, social security number, family member information, and emergency contact information of a current or former employee of a governmental body. *See* Gov’t Code § 552.117(a)(1). Section 552.024(c) 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 chooses not to allow public access to the information in accordance with section 552.024(b). *See id.* § 552.024(b), (c).

⁴The 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.* § 552.130(d), (e).

⁵Section 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 an attorney general decision under the Act. *See* Gov’t Code § 552.147(b).

⁶We assume that the “representative sample” of information 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.

⁷The 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>.

of the non-responsive information and it need not be released in response to the present request.

Next, you state the marked information in Exhibit B-2 was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2005-11001 (2005). In that decision, we ruled the district must withhold certain information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code and section 1324a of title 8 of the United States Code, and sections 552.102(b), 552.107(1), 552.117, and 552.137 of the Government Code, but must release the remaining information not subject to FERPA. You also state the information marked in Exhibit B-3 was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-01361 (2010). In that decision, we ruled some of the information at issue was excepted from disclosure under sections 552.107 and 552.117(a)(1), but the remaining information had to be released. Further, you inform us that the written reprimand in Exhibit B-1 was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-00485 (2012). In that decision, we ordered the release of the written reprimand. As we are unaware of any change in the relevant law, facts, and circumstances on which these previous rulings were based with respect to the submitted responsive information at issue in Exhibits B-1, B-2, and B-3, we conclude the district must rely on Open Records Letter Nos. 2005-11001, 2010-01361, and 2012-00485 as previous determinations and withhold or release the responsive information at issue with these rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

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 protected by other statutes, such as section 551.104 of the Open Meetings Act, chapter 551 of the Government Code. Section 551.104 provides in part that “[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3).” *Id.* § 551.104(c). We note the district is not required to submit a certified agenda or tape recording of a closed meeting to this office for review. *See* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether a governmental body may withhold such information from disclosure under statutory predecessor to section 552.101). Such information cannot be released to a member of the public in response to an open records request. *See* Attorney General Opinion JM-995 at 5-6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act). Section 551.146 of the Open Meetings Act makes it a criminal offense to disclose a certified agenda or tape recording of a lawfully closed meeting to a member of

the public. *See* Gov't Code § 551.146(a)-(b); *see also* ORD 495 at 4. You inform us a portion of the responsive information consists of tape recordings of closed meetings of the district's Board of Trustees. Based on your representation, we conclude the district must withhold these tape recordings under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.⁸

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). You claim that Exhibit E contains teacher certification examination results. You inform us that 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. However, the remaining information you have marked in Exhibit E under section 21.048 does not consist of teacher examination results; therefore, this information is not confidential under section 21.048(c-1) and may not be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code, which provides in part that "[a] document evaluating the performance of a teacher or administrator is confidential." *Id.* § 21.355(a). In Open Records Decision No. 643, this office interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. *See* Open Records Decision No. 643 (1996). In that opinion, we concluded a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *See id.* You argue Exhibit C consists of teacher evaluations. You inform us that the teachers at issue held the appropriate certifications and were teaching at the time of these evaluations. Based on your

⁸We note Open Record Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold a tape of a closed meeting under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code without the necessity of requesting an attorney general decision.

representations and our review, we find the district must withhold Exhibit C under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.101 of the Government Code also encompasses section 22.08391 of the Education Code. Subchapter C of chapter 22 of the Education Code addresses criminal history records of school district employees and volunteers. Section 22.08391 of the Education Code 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;

(2) is not subject to disclosure as provided by Chapter 552, Government Code; and

(3) shall be destroyed by the requestor or any subsequent holder of the information not later than the first anniversary of the date the information is received.

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 claim Exhibit F is confidential under section 22.08391. Exhibit F is a form the district used to collect information about an employment applicant for purposes of conducting a criminal history record search. Accordingly, we conclude Exhibit F must be withheld under section 552.101 of the Government Code in conjunction with section 22.08391 of the Education Code.⁹

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

⁹As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

(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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* Tex. R. Evid. 503(b)(1)(A)-(E). 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.* 503(b)(1), 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).

You have marked portions of Exhibit D under section 552.107. You inform us that this information consists of communications or documents communications between the district’s attorneys and representatives that were made in furtherance of the rendition of professional legal services to the district. You have identified the parties to these communications. You state this information has not been, nor was it intended to be, disclosed to third persons. Based on your representations and our review, we find the district has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the district may withhold the information you have marked in Exhibit D under section 552.107(1) of the Government Code.¹⁰

Section 552.102(b) of the Government Code excepts from disclosure all information from higher education transcripts of professional public school employees other than the employee’s name, the courses taken, and the degree obtained. *See* Gov’t Code § 552.102(b); Open Records Decision No. 526 (1989). You raise section 552.102(b) for the information

¹⁰As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

you have marked in the transcripts in Exhibit G. Upon review, we agree the district must withhold this information pursuant to section 552.102(b) of the Government Code.¹¹

You raise section 552.102(a) of the Government Code for portions of the remaining information. Section 552.102(a) 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 held that 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.*, 354 S.W.3d 336 (Tex. 2010). Accordingly, the birth dates of district employees, which you have marked, must be withheld under section 552.102(a) of the Government Code.

You assert some of the remaining information is subject to section 552.117(a)(1) of the Government Code. As noted above, this section excepts from disclosure the home address and telephone number, social security number, family member information, and emergency contact information of a current or former employee of a governmental body. *See* Gov’t Code § 552.117(a)(1). 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 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. Accordingly, the remaining information you have marked, and the additional information we have marked, must be withheld under section 552.117(a)(1) of the Government Code to the extent the individuals at issue timely elected confidentiality for this information under section 552.024 of the Government Code. If any of the information marked under section 552.117(a)(1) belongs to individuals who did not timely elect to keep this information confidential, it may not be withheld on that basis.

You have marked e-mail addresses contained in the remaining information under section 552.137 of the Government Code. This section 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). Upon review, we have marked the e-mail addresses that do not appear to be of a type specifically excluded by section 552.137(c). We note section 552.137 protects personal privacy. In this instance, the requestor may be the authorized representative of some of the individuals whose e-mail addresses we have marked. *See id.* § 552.023(a) (person or person’s authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person’s privacy interests). Accordingly, the district must withhold the email addresses we marked under section 552.137 of the Government

¹¹As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

Code, unless the individuals to whom these e-mail addresses belong affirmatively consent to their release or the requestor is the authorized representative of the individual whose e-mail address is at issue. *See id.* § 552.137(b). However, pursuant to section 552.137(c)(4), an e-mail address “provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public” is specifically excluded from the confidentiality provided by section 552.137(a). *Id.* § 552.137(c)(4). The remaining e-mail addresses you have marked are printed on a business card and a letterhead and, therefore, are subject to section 552.137(c)(4). Accordingly, this information may not be withheld under section 552.137(a).

We note some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, with respect to the submitted responsive information at issue in Exhibits B-1, B-2, and B-3, the district must rely on Open Records Letter Nos. 2005-11001, 2010-01361, and 2012-00485 as previous determinations and withhold or release this information in accordance with these rulings. The district must withhold under section 552.101 of the Government Code the following: (1) the responsive tape recordings of closed meetings in conjunction with section 551.104(c) of the Government Code; (2) the information we marked in Exhibit E in conjunction with section 21.048(c-1) of the Education Code; (3) Exhibit C in conjunction with section 21.355 of the Education Code; and (4) Exhibit F in conjunction with section 22.08391 of the Education Code. The district may withhold the information marked in Exhibit D under section 552.107(1) of the Government Code. The district must withhold the information you marked in Exhibit G pursuant to section 552.102(b) of the Government Code. The birth dates you marked in the remaining information must be withheld under section 552.102(a) of the Government Code. The remaining information you marked, and the additional information we marked, under section 552.117(a)(1) of the Government Code must be withheld to the extent the individuals at issue timely elected confidentiality for this information under section 552.024 of the Government Code. If any of the information marked under section 552.117(a)(1) of the Government Code belongs to individuals who did not timely elect to keep this information confidential, it may not be withheld on that basis. The district must withhold the email addresses we marked in the remaining information under section 552.137 of the Government Code, unless the individuals to whom these e-mail addresses belong affirmatively consent to their release or the requestor is the authorized representative of the individual whose e-mail address is at issue. The district must release the remaining information, but any information that is protected by copyright may only be released in accordance with copyright law.

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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/agn

Ref: ID# 445050

Enc. Submitted documents

c: Requestor
(w/o enclosures)

