



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 9, 2012

Ms. Sandra D. Carpenter
For La Marque I.S.D.
Walsh, Anderson, Brown, Gallegos, and Green, P.C.
10375 Richmond Avenue, Suite 750
Houston, Texas 77042-4196

OR2012-03636

Dear Ms. Carpenter:

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# 447895.

The La Marque Independent School District (the “district”), which you represent, received two requests for e-mails and phone records of two named individuals for specified periods of time, the district police department’s policy manual, and the investigative reports pertaining to a specified incident. You state the district has released or will release some information to the requestor. You indicate some of the requested information does not exist.¹ You claim some of the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.108, 552.110, 552.114, 552.117, and 552.135 of the

¹The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990).

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

Initially, we note some of the submitted information, which we have marked, is not responsive because it was created after the district received the instant requests. The district need not release this nonresponsive information in response to these requests, and this ruling will not address that information.

The United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office that the federal Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code, 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.⁴ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable” information is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). You indicate that some of the responsive information may contain unredacted student records with personally identifiable information. Because our office is prohibited from reviewing education records to determine the applicability of FERPA, we will not address FERPA with respect to this information. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. Such determinations under FERPA must

²Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Furthermore, the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107. *See* ORD 676 at 1-2. Although you also raise sections 552.022 and 552.026 of the Government Code, we note these sections are not an exceptions to disclosure. Section 552.022 lists eighteen categories of information that are subject to required public disclosure unless the information is confidential under the Act or other law, but does not itself make any information confidential. *See* Gov’t Code § 552.022(a)(1). Section 552.026 provides that the Act does not require the release of information contained in education records except in conformity with the Family Educational Rights and Privacy Act of 1974. *See id.* § 552.026.

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

⁴A copy of this letter may be found on the attorney general’s website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

be made by the educational authority in possession of the education record.⁵ Accordingly, we also do not address your arguments under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA).

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 exception encompasses information other statutes make confidential. You contend some of the responsive information is confidential under section 21.355 of the Education Code, which provides in part that "[a] document evaluating the performance of a teacher or administrator is confidential." 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 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* ORD 643 at 4. We also 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 assert the responsive information you have marked is protected by section 21.355. However, the information at issue consists of e-mails between district school board members and employees pertaining to district legal expenses and school board agenda items. Therefore, we find you have failed to demonstrate how the information at issue consists of documents evaluating the performance of a teacher or administrator for the purposes of section 21.355 of the Education Code. Accordingly, the district may not withhold the information at issue under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. You assert the information you have marked is protected under constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The

⁵In the future, if the district does obtain consent to submit unredacted education records and seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). In this instance, you have not demonstrated how constitutional privacy applies to any of the information at issue. Accordingly, the district may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with constitutional privacy.

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 has 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. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 348 (Tex. 2010). Upon review we find no portion of the information you have marked is excepted under section 552.102. Accordingly, the district may not withhold any of the information at issue under section 552.102 of the Government Code.

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. 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 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 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). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that 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 state the responsive information you have marked consists of communications between district attorneys, employees, and representatives that were made for the purpose of facilitating the rendition of professional legal services to the district. You indicate these communications were made in confidence and their confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. Accordingly, the district may withhold the information we have marked under section 552.107(1) of the Government Code. However, you have failed to demonstrate the remaining information at issue constitutes or documents privileged attorney-client communications. Thus, we find you have not established the applicability of the attorney-client privilege to the remaining information at issue, and it may not be withheld under section 552.107 of the Government Code.

You generally claim section 552.108 of the Government Code for some of the remaining responsive information. Section 552.108 reads as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

- (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
- (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;
- (3) it is information relating to a threat against a peace officer collected or disseminated under Section 411.048; or
- (4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from [public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108. A governmental body claiming section 552.108(a)(1) must reasonably explain how and why release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You have not stated the information at issue pertains to an ongoing criminal investigation of the district's police department, nor have you explained how its release would interfere in some way with the detection, investigation, or prosecution of crime. Thus, we find you have failed to demonstrate the applicability of section 552.108(a)(1) to the information at issue and no information may be withheld on that basis.

Section 552.108(b)(1) of the Government Code is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to

effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). To prevail on its claim that section 552.108(b)(1) exempts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). In addition, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under law enforcement exception), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. *See* Open Records Decision No. 409 at 2 (1984) (construing statutory predecessor).

In this instance, you have provided no argument as to how section 552.108(b)(1) of the Government Code applies to the information at issue. Thus, we find you have failed to meet your burden to demonstrate how the release of the information at issue would interfere with law enforcement and crime prevention. Accordingly, the district may not withhold any of the information at issue under section 552.108(b)(1).

A governmental body claiming section 552.108(a)(2) or section 552.108(b)(2) of the Government Code must demonstrate the requested information relates to a criminal investigation or prosecution that concluded in a final result other than a conviction or deferred adjudication. We find you have failed to demonstrate the applicability of section 552.108(a)(2) or section 552.108(b)(2) to the information at issue. Section 552.108(a)(3) is also inapplicable, as the information at issue does not relate to a threat against a police officer. *See* Gov’t Code § 552.108(a)(3).

Lastly, you do not assert the information at issue was prepared by an attorney representing the state or that it reflects the mental impressions or legal reasoning of an attorney representing the state. *See id.* § 552.108(a)(4), (b)(3). Thus, we find the district has not established that the information at issue is subject to either sections 552.108(a)(4) and 552.108(b)(3), and the district may not withhold it on either of those bases.

The district also asserts section 552.110 of the Government Code for portions of the remaining responsive information. Section 552.110 protects the proprietary interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated, based on specific factual evidence, that disclosure would cause substantial competitive harm to the person from whom the information was obtained. Gov’t Code § 552.110. By its terms, section 552.110 only

protects the interests of the person from whom the information was obtained. This provision does not protect the interests of the governmental body that receives proprietary information nor does it allow a governmental body to assert section 552.110 for information it creates. Accordingly, we find the district has failed to establish the applicability of section 552.110 to the information at issue. We therefore conclude that the district may not withhold any of the information at issue under section 552.110 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, 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 of the Government Code. *Id.* § 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 official or 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 official or employee who did not timely request under section 552.024 that the information be kept confidential. You have not informed us whether the board member whose personal information is at issue chose to withhold her personal information prior to the district's receipt of the request for information. Therefore, we must rule conditionally. If the board member timely elected to withhold her home address or telephone number, the district must withhold that individual's information, which we have marked, under section 552.117(a)(1) of the Government Code. If the board member did not timely elect to withhold her home address or telephone number, then the district may not withhold the marked information for that individual under section 552.117(a)(1). Furthermore, we find no part of the remaining information at issue consists of the home addresses, home telephone numbers, emergency contact information, social security numbers, or family member information of a district employee. Therefore, the district may not withhold any of the remaining information at issue under section 552.117(a)(1) of the Government Code.

Section 552.135 of the Government Code provides, in relevant part:

- (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.
- (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(a)-(b). 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 this 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), .135(a). We note section 552.135 protects an informer's identity, but it does not generally encompass protection for witness statements. In this instance, you claim some of the remaining responsive information reveals the identity of a district informer. However, you do not inform us what civil, criminal, or regulatory law is alleged to have been violated. Further, we note the party who reported the possible violation of law was a parent of a district student. We, therefore, find you have failed to demonstrate how the individual whose information is at issue constitutes an informer for purposes of section 552.135(a). Accordingly, none of the information at issue may be withheld under section 552.135(b) of the Government Code.

Section 552.136 of the Government Code provides in part that "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential."⁶ *Id.* § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Upon review, we find the district must withhold the cellular telephone account number we have marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code 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). *Id.* § 552.137(a)-(c). The e-mail addresses we have marked are not a type specifically excluded by section 552.137(c). Accordingly, the district must withhold these e-mail addresses under section 552.137 of the Government Code unless the owners of the e-mail addresses affirmatively consent to their release under section 552.137(b).

In summary, the district may withhold the information we have marked under section 552.107(1) of the Government Code. If the board member timely elected to withhold her home address and telephone number pursuant to section 552.024 of the Government Code, the district must withhold that individual's information, which we have marked, under section 552.117(a)(1) of the Government Code. The district must withhold the cellular telephone account number we have marked under section 552.136 of the Government Code. The district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the e-mail addresses affirmatively consent to

⁶The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

their release under section 552.137(b). The district must release the remaining information at issue.

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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/akg

Ref: ID# 447895

Enc. Submitted documents

c: Requestor
(w/o enclosures)