ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 19, 2012

Ms. LeAnne Lundy
Attorney for Klein Independent School District
Rogers, Morris & Grover, LLP
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2012-03956

Dear Ms. Lundy:

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# 448656.

The Klein Independent School District (the "district"), which you represent, received a request for information regarding the requestor's child during a specified time period, including any performance counseling, reprimands, disciplinary actions, or performance improvement plans for district employees who interacted with the requestor's child. You state most of the information will be released to the requestor. We note you have redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.[1] You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

[1]The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that 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 that 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.

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 that other statutes make confidential, such as section 21.355 of the Education Code, which provides 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 at 3 (1996). The Third Court of Appeals 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." *See Abbott v. N. E. Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). We have concluded that a "teacher" for purposes of section 21.355 means a person who (1) is required to, and does in fact, hold a certificate or permit required under chapter 21 of the Education Code and (2) is teaching at the time of his or her evaluation. *See* ORD 643 at 3.

You contend that Exhibit B constitutes a confidential evaluation of a teacher by the district. You inform us, and provide documentation showing, that the individual at issue was certified by the State Board for Educator Certification and was acting as a teacher at the time the evaluation was prepared. Based on your representations and our review, we conclude Exhibit B is confidential under section 21.355 of the Education Code and must be withheld under section 552.101 of the Government Code.

Section 552.107(1) of the Government Code protects information coming 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. 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. 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. 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 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 portions of Exhibit C consist of communications between individuals you have identified as attorneys for and employees of the district. You state the communications were made for the purpose of facilitating the rendition of legal services, and were intended to be, and have remained, 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, with the exception of the information you have marked as released, the district may withhold Exhibit C under section 552.107(1) of the Government Code.

In summary, the district must withhold Exhibit B under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code and, with the exception of information you have marked as released, may withhold Exhibit C under section 552.107 of the Government Code.

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,

Misty H Barham

Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/som

Ref: ID # 448656

Enc. Submitted documents

c: Requestor
(w/o enclosures)