



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 29, 2012

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

OR2012-08077

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# 455721.

The Garland Independent School District (the "district"), which you represent, received a request for (1) six categories of information pertaining to a named individual; (2) the policies and procedures relating to the school start time and the daily schedule for students, teachers, and staff at district elementary schools during a specified time period; and (3) the policies and procedures relating to absences from campus for less than half a day by district elementary school principals.¹ You state the district has redacted student-identifying information from the submitted documents pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.² You state a majority of the responsive information has been released to the requestor with personal e-mail addresses redacted under section 552.137 of the Government Code pursuant to the

¹We note the requestor clarified his request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²The 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 or student 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. A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

previous determination in Open Records Decision No. 684 (2009).³ You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, and 552.107 of the Government Code.⁴ We have considered the exceptions you claim and reviewed the submitted information, a portion of which is a representative sample.⁵

Initially, we note portions of the submitted information, which you have marked, and the additional information we have marked, are not responsive to the instant request. This ruling does not address the public availability of non-responsive information, and the district is not required to release non-responsive information in response to this request.

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 section 21.355 of the Education Code, which provides, “[a] document evaluating the performance of a teacher . . . is confidential.” *See* 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. *See* Open Records Decision No. 643 (1996). We have determined for purposes of section 21.355, the term “teacher” means a person who is required to and does in fact hold a teaching certificate or permit under subchapter B of chapter 21 of the Education Code 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. 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 North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You state the responsive information submitted in Exhibit B consists of teacher evaluations and letters of reprimand pertaining to district employees. You have provided copies of these individuals’ Educator Certificates, indicating they hold certifications under subchapter B of chapter 21 of the Education Code. You state the individuals at issue were performing the

³This office issued Open Records Decision No. 684, a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

⁴You also claim this information is protected under the attorney-client privilege based on Texas Rule of Evidence 503. In this instance, however, 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 3.

⁵We 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.

duties of a teacher at all relevant times. Based on your representations and our review of the information, we agree the information in Exhibit B, except where we have marked for release, is confidential under section 21.355 of the Education Code, and the district must withhold this information under section 552.101 of the Government Code. However, we conclude you have not demonstrated any of the remaining information in Exhibit B evaluates the performance of a teacher or administrator for purposes of section 21.355. Accordingly, none of the remaining information in Exhibit B may be withheld under section 21.355 of the Education Code in conjunction with section 552.101 of the Government 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 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 (Tex. 2010). Upon review, we find the district must withhold the dates of birth, which you have marked in Exhibit C, under section 552.102(a) 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 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). 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 in Exhibit D consists of communications between district attorneys and employees. You state these communications

were made to facilitate the rendition of professional legal services to the district. You identify the parties to the communications and state the district did not intend for or allow the communications to be disclosed. Based on your representations and our review, we conclude you have established the applicability of the attorney-client privilege to the responsive information you have marked in Exhibit D. Therefore, the district may withhold the responsive information you have marked in Exhibit D under section 552.107(1) of the Government Code.

In summary, the district must withhold the responsive information in Exhibit B, except where we have marked for release, under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold the dates of birth, which you have marked in Exhibit C, under section 552.102(a) of the Government Code. The district may withhold the responsive information you have marked in Exhibit D under section 552.107(1) of the Government Code. The remaining responsive 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, 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 Opperman
Assistant Attorney General
Open Records Division

SO/bhf

Ref: ID# 455721

Enc. Submitted documents

c: Requestor
(w/o enclosures)