



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 2, 2012

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

OR2012-10187

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# 457887.

Uplift Education Charter School ("Uplift"), which you represent, received a request for any information concerning the termination of employment of a named employee. You state some information has been made available to the requestor. You further state you have redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.¹ You claim the remaining submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.137 of the Government Code.² You also state release of the requested information may implicate the interests of the named former employee. Accordingly, we understand Uplift notified the

¹The 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>.

²Although you do not raise section 552.102 of the Government Code in your brief, we understand you to claim this section based on your markings in the submitted information. We also note that although you raise Rule 503 of the Texas Rules of Evidence, section 552.107 is the appropriate exception to raise for the information you have submitted, which is not subject to section 552.022 of the Government Code. *See* Open Records Decision No. 676 (2002).

named former employee of the request for information and his right to submit arguments to this office as to why the submitted information should not be released.³ See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴

Initially, you state, and we agree, some of the information submitted in Exhibit D is not responsive to the instant request, because it does not pertain to the named employee that is the subject of the request. This ruling does not address the public availability of the non-responsive information, which you have marked, and Uplift is not required to release non-responsive information in response to this request.

Section 552.101 of the Government Code exempts 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. Section 21.355 of the Education Code provides, in relevant part, as follows:

(a) A document evaluating the performance of a teacher or administrator is confidential.

(b) Subsection (a) applies to a teacher or administrator employed by an open-enrollment charter school regardless of whether the teacher or administrator is certified under Subchapter B.

Educ. Code § 21.355(a), (b). 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 administrator. See Open Records Decision No. 643 (1996). Additionally, the Third Court of Appeals has concluded that a written reprimand constitutes an evaluation for purposes of section 21.355, as it "reflects the principal's judgment regarding [a teacher's] actions, gives corrective direction, and provides for further review." *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You claim a portion of the submitted information consists of written evaluations of a teacher at an open enrollment charter school that are confidential under section 21.355. Upon review, we find the information we have marked is confidential under section 21.355 of the Education Code, and Uplift must withhold this information under section 552.101 of the Government Code. However, we find you have failed to demonstrate how any of the

³As of the date of this letter, we have not received comments from the named former employee.

⁴We assume the "representative sample" of records 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 that submitted to this office.

remaining information, including the former employee's letters responding to his evaluation, constitutes an evaluation for the purposes of section 21.355. Accordingly, Uplift may not withhold any of the remaining information on that basis.

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, 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)(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, no pet). 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 claim portions of Exhibit D are protected by section 552.107(1) of the Government Code. You state this information consists of confidential communications between Uplift's attorney and representatives of Uplift. You state the communications were made in the furtherance of the rendition of professional legal services to Uplift and that these communications 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 you have marked in Exhibit D under section 552.107(1). However, we note some of the individual e-mails and attachments contained in otherwise privileged e-mail strings are communications with a non-privileged party. If these non-privileged communications, which we have marked, exist separate and apart from the otherwise privileged e-mail strings in which they appear, Uplift may not withhold them under section 552.107(1) 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 Uplift must withhold the date of birth, which you have marked in Exhibit D, under section 552.102(a) of the Government Code.

Section 552.117 of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code.⁵ Gov’t Code § 552.117(a). 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 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 the information be kept confidential. We have marked information that is subject to section 552.117 of the Government Code. To the extent the employee whose information we have marked timely requested confidentiality under section 552.024, Uplift must withhold the information we marked under section 552.117(a)(1) of the Government Code. If the employee whose information we have marked did not make a timely election under section 552.024, Uplift may not withhold the information we marked under section 552.117(a)(1) 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). Gov’t Code § 552.137. We note

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

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 provisions of section 552.137(a) by section 552.137(c)(4). *Id.* § 552.137(c)(4). Accordingly, with the exception of the e-mail addresses we have marked for release, Uplift must withhold the e-mail addresses you have marked under section 552.137 of the Government Code.

In summary, Uplift must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. Uplift may generally withhold the information you have marked in Exhibit D under section 552.107(1) of the Government Code. However, if the non-privileged communications we have marked exist separate and apart from the privileged communications in which they were included, Uplift may not withhold them under section 552.107(1). Uplift must withhold the birth date you have marked under section 552.102 of the Government Code. To the extent the individual whose information we have marked timely requested confidentiality under section 552.024, Uplift must withhold the information we marked under section 552.117(a)(1) of the Government Code. With the exception of the e-mail addresses we have marked for release, Uplift must also withhold the personal e-mail addresses you have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The remaining 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,



Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/dls

Ref: ID# 457887

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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