



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 11, 2012

Mr. Stephen H. Weller
Counsel for the Weimar Independent School District
Bickerstaff Heath Delgado Acosta LLP
3711 South MoPac Expressway
Building One, Suite 300
Austin, Texas 78746

OR2012-10737

Dear Ms. Weller:

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# 458723.

The Weimar Independent School District (the "district"), which you represent, received a request for a specified disciplinary policy and investigative procedures and information pertaining to a specified incident. You state the district has released some of the requested information. You claim the submitted information is excepted from disclosure under

sections 552.101 and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note the United States Department of Education Family Policy Compliance Office has informed this office the 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 or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.³ 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 have submitted unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records, except to note parents and their legal representatives have a right to their own child's education records. See 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. The DOE has informed this office if a state law prohibits a school district from providing a parent or the parent's legal representative with access to the education records of his or her child and an opportunity to inspect and review the record, then the state statute conflicts with FERPA, and an educational agency or institution must comply with FERPA if it wishes to continue to receive federal education funds. Letter advisement from Ellen Campbell, Family Compliance Office, U.S. Department of Education to Robert Patterson, Open Records Division, Office of the Texas Attorney General (April 9, 2001); see also *Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (holding FERPA prevails over inconsistent provision of state law); Open Records Decision

¹Although you raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code and the attorney-client privilege found in rule 503 of the Texas Rules of Evidence, this office has concluded section 552.101 does not encompass other exceptions found in the Act, nor does it encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, section 552.101 does not encompass rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. Accordingly, we will not address your claim the submitted information is confidential under section 552.101 in conjunction with section 552.107 or either of these rules. Further, we note the proper exception to raise when asserting the attorney-client privilege in this instance is section 552.107 of the Government Code. See ORD 676 at 1-2.

²We 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.

³A copy of this letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

No. 431 (1985) (FERPA prevails when in conflict with state law). However, the DOE has also informed our office a parent's or a parent's legal representative's right of access under FERPA to information about the parent's child does not prevail over an educational institution's right to assert the attorney-client privilege. Because the educational authority in possession of the education records is now responsible for determining the applicability of FERPA, we will consider the claimed exceptions under the Act for the requested information.

Next, we note a portion of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the district received the request for information. This ruling does not address the public availability of any information that is not responsive to the request and the district is not required to release such information in response to this request.

Section 552.101 of the Government Code excepts from public 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 21.355 of the Education Code, which provides, in relevant part, "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355(a). This section applies 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). 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." *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). In Open Records Decision No. 643, we determined 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 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.

You argue some of the submitted information is confidential pursuant to section 21.355 of the Education Code. You indicate the teacher at issue held the appropriate teaching certificate at the time of the creation of the information at issue. You inform us Exhibit A consists of a disciplinary document that evaluates a teacher's conduct, contains the principal's judgment regarding the teacher's actions, and outlines corrective actions taken with respect to the specified incident. You further contend some of the responsive information in Exhibit B, which consists of an incident summary related to the specified incident, constitutes a teacher evaluation. Based on your representation and our review of the information, we conclude the information in Exhibit A constitutes a teacher evaluation for purposes of section 21.355. Therefore, the district must withhold Exhibit A under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, we find you have not demonstrated how the information at issue

in Exhibit B consists of a teacher evaluation for purposes of section 21.355. Accordingly, no portion of Exhibit B may be withheld under section 552.101 in conjunction with section 21.355.

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). 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. *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 state the information you have marked in Exhibit B consists of communications involving district employees in their capacities as clients and attorneys with the Texas Association of School Boards, which you state serves as legal counsel to the district. You state these communications were made in furtherance of the rendition of professional legal services to the district. You state these communications were confidential, and you do not indicate the district has waived the confidentiality of the information at issue. Based on your

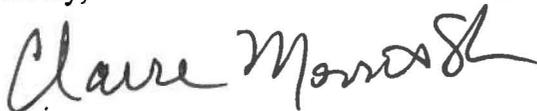
representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the responsive information you marked in Exhibit B. Accordingly, the district may withhold the responsive information you marked in Exhibit B under section 552.107(1) of the Government Code.

In summary, the district must withhold Exhibit A under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district may withhold the responsive information you marked in Exhibit B 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 458723

Enc. Submitted documents

c: Requestor
(w/o enclosures)