



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 4, 2012

Ms. Heather M. Castillo
Counsel for the Arlington Independent School District
Hill Gilstrap
1400 West Abram Street
Arlington, Texas 76013

OR2012-13915

Dear Ms. Castillo:

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# 463823.

The Arlington Independent School District (the "district"), which you represent, received a request for e-mails sent to or from a named former employee during a specified time period and the named former employee's personnel file. You state the district will release some of the requested information to the requestor upon her response to a cost estimate letter. You state some of the submitted information has been redacted pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim some of the submitted information is excepted from disclosure

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 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>.

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

Initially, we note the requestor has excluded names of students, e-mail addresses, and social security numbers from the scope of her request. Thus, those types of information are not responsive to the request. This request does not address the public availability of any such information, and the district need not release any such 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 section encompasses information protected by other statutes, such as section 21.355 of the Education Code. Section 21.355 of the Education Code 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 for purposes of section 21.355, “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 id.* We also have determined “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 inform us Exhibit A consists of teacher and administrator evaluations pertaining to the named former employee. You state the named former employee was required to hold, and did hold, the appropriate certifications under subchapter B of the Education Code and was performing the functions of a teacher or administrator at the time of the respective evaluations. Based on your representations and our review, we agree Exhibit A constitutes evaluations as contemplated by section 21.355 of the Education Code. Accordingly, Exhibit A must be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

²We note that although you raise section 552.111 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim this section applies to the submitted information. Although you also raise section 552.101 of the Government Code in conjunction with the attorney-client privilege under Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). You also claim this information is protected under the attorney-client privilege based on Texas Rule of Evidence 503. In this instance, however, the information is properly addressed here under section 552.107, rather than rule 503. Open Records Decision No. 676 at 3 (2002).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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). 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 to only 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 to only 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 information you have marked in Exhibit B constitutes communications between attorneys for the district and district employees that were made for the purpose of facilitating the rendition of professional legal services to the district. You also state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the district may withhold the information you have 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 information you have 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 463823

Enc. Submitted documents

c: Requestor
(w/o enclosures)