



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 14, 2012

Mr. William M. Buechler  
Counsel for Andrews Independent School District  
Buechler & Associates, P.C.  
3660 Stoneridge Road, Suite D-101  
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OR2012-14663

Dear Mr. Buechler:

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# 465045.

The Andrews Independent School District (the "district"), which you represent, received a request for a named employee's entire personnel file, including all complaints and commendations; any notes, e-mails, or other correspondence between the named employee, two named individuals, and members of the district school board regarding the named employee from June 1, 2012 to the date of the request; and a copy of all names, job titles, and employers of all the people who have applied for or have been contacted by the district regarding the district's head football coach and athletic director positions. You state a substantial portion of the information requested was provided to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.117, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is not responsive to the instant request because it was created after the date the district received the request. We have marked this non-responsive 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 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 section encompasses information protected by other statutes, including section 1324a of title 8 of the United States Code. Section 1324a governs I-9 forms and their

related documents. This section provides an I-9 form and “any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the submitted I-9 form in this instance would be “for purposes other than enforcement” of the referenced federal statutes. Accordingly, we conclude the submitted I-9 form and attached identification documents in Exhibit E are confidential pursuant to section 1324a of title 8 of the United States Code and must be withheld under section 552.101 of the Government Code.<sup>1</sup>

Section 552.101 also encompasses 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 (1996). We have determined that, 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 id.* at 4. Additionally, the courts have 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 seek to withhold the information contained in Exhibit C under section 21.355. Upon review, we find the information in Exhibit C pertains to the named employee in his capacity as a coach. Therefore, we find you have failed to demonstrate how any of the information in Exhibit C constitutes an evaluation of the performance of a teacher or an administrator for the purposes of section 21.355 of the Education Code. *See* Educ. Code § 21.353 (teachers shall be appraised only on basis of classroom teaching performance and not in connection with extracurricular activities). Accordingly, the district may not withhold any of the submitted information under section 552.101 of the Government Code on this basis.

Section 552.101 of the Government Code also encompasses criminal history record information (“CHRI”) protected by chapter 411 of the Government Code. Chapter 411 authorizes the Texas Department of Public Safety (“DPS”) to compile and maintain CHRI from law enforcement agencies throughout the state and to provide access to authorized persons to federal criminal history records. *See* Gov’t Code §§ 411.042, .087. Section 411.0845 provides in relevant part:

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<sup>1</sup>As our ruling is dispositive, we need not address your remaining arguments for this information.

(a) [DPS] shall establish an electronic clearinghouse and subscription service to provide [CHRI] to a particular person entitled to receive [CHRI] and updates to a particular record to which the person has subscribed under this subchapter.

(b) On receiving a request for [CHRI] from a person entitled to such information under this subchapter, [DPS] shall provide through the electronic clearinghouse:

(1) the [CHRI] reported to [DPS] or the Federal Bureau of Investigation relating to the individual who is the subject of the request; or

(2) a statement that the individual who is the subject of the request does not have any [CHRI] reported to [DPS] or the Federal Bureau of Investigation.

...

(d) [DPS] shall ensure that the information described by Subsection (b) is provided only to a person otherwise entitled to obtain [CHRI] under this subchapter. Information collected under this section is confidential and is not subject to disclosure under [the Act].

*Id.* § 411.0845(a)-(b), (d). Section 411.097(b) of the Government Code provides in part, “[a] school district . . . is entitled to obtain from [DPS CHRI] maintained by [DPS] that the district . . . is required or authorized to obtain under Subchapter C, Chapter 22, Education Code, that relates to a[n] . . . employee of the district[.]” *Id.* § 411.097(b). Section 22.083(a) of the Education Code requires a school district to obtain CHRI of a district employee. *See* Educ. Code § 22.083(a). Section 411.097(d) provides, in relevant part:

(d) [CHRI] obtained by a school district . . . in the original form or any subsequent form:

(1) may not be released to any person except:

(A) the individual who is the subject of the information;

(B) the Texas Education Agency;

(C) the State Board for Educator Certification;

(D) the chief personnel officer of the transportation company,  
if the information is obtained under Subsection (a)(2); or

(E) by court order [and]

(2) is not subject to disclosure as provided by Chapter 552[.]

Gov't Code § 411.097(d). You contend the information contained in Exhibit F consists of CHRI that is confidential under chapter 411 of the Government Code. Upon review, we find the information contained in Exhibit F is confidential under section 411.097(d) of the Government Code and must be withheld under section 552.101 of the Government Code.<sup>2</sup>

Section 552.101 encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82.

Common-law privacy encompasses certain financial information. Financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities). Thus, there is a legitimate public interest in an employee's participation in an insurance or retirement program funded in whole or in part by a governmental body. *See id.* Accordingly, information relating to such programs does not constitute confidential personal financial information. On the other hand, a public employee's allocation of part of the employee's salary to a voluntary investment, health or other program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See, e.g.*, ORDs 600 (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (deferred

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments for this information.

compensation information, participation in voluntary investment program, and election of optional insurance coverage). However, information pertaining to leave of public employees is generally a matter of legitimate public interest. See Open Records Decision No. 336 at 2 (1982) (names of employees taking sick leave and dates of sick leave taken not private). Additionally, this office has found information about a public employee's qualifications, disciplinary action, and background is also of legitimate public interest and therefore generally not protected by common-law privacy. See Open Records Decision No. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of his resignation or termination).

Upon review, we find the financial information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. You contend the e-mails in Exhibit G "would certainly cause substantial embarrassment and distress to the [d]istrict employee if released." Upon review, we find the information at issue to be of legitimate public concern. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.102(a) 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). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed above. See *Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert's* interpretation of section 552.102(a), and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. See *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The Supreme Court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. See *id.* at 348. Upon review, we find the district must withhold the date of birth we have marked under section 552.102(a) of the Government Code. However, you have failed to demonstrate the applicability of section 552.102(a) to any of the remaining information, and the district may not withhold any of the remaining information on this basis.

Section 552.102(b) of the Government Code excepts from disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee[.]" Gov't Code § 552.102(b). This exception further provides, however, "the degree obtained or the curriculum on a transcript in the personnel file of the employee" are not excepted from disclosure. *Id.* Upon review, we find the district must withhold the

educational transcript contained in Exhibit H under section 552.102(b) of the Government Code, except for the information that reveals the employee's name, the degree obtained, and the courses taken. *See* Open Records Decision No. 526 (1989) (addressing statutory predecessor).

Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. We note a post office box number is not a "home address" for the purposes of section 552.117(a)(1). *See* Open Records Decision No. 622 at 6 (1994) (legislative history makes clear purpose of section 552.117 is to protect public employees from being harassed at home) (citing House Committee on State Affairs, Bill Analysis, H.B. 1979, 69th Leg. (1985)). You have provided documentation showing that prior to the date of the request, the employee elected to keep his home address and telephone number, and information that reveals whether he has family members confidential. Accordingly, the district must withhold the information we have marked under section 552.117 of the Government Code. However, the form provides no means for the employee to request his social security number be withheld from disclosure. Thus, because the employee did not elect confidentiality for his social security number, the district may not withhold this information under section 552.117.<sup>3</sup> Furthermore, we find none of the remaining information is subject to section 552.117. Therefore, the district may not withhold any of the remaining information under section 552.117 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

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<sup>3</sup>Regardless of the applicability of section 552.117 of the Government Code, we note section 552.147(b) of the Government Code permits a governmental body to redact a living person's social security number without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

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, 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).

The e-mail you have marked reflects a communication between the district’s superintendent and district board members regarding legal advice received from the district’s attorney pertaining to the named employee’s employment status with the district. Based on your representation and our review, we find the information you have marked is protected by the attorney-client privilege. Therefore, the district may withhold the marked information under section 552.107(1) of the Government Code.

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator’s license or driver’s license issued by an agency of this state or another state or country is excepted from public release. Gov’t Code § 552.130(a)(1). Accordingly, the district must withhold the driver’s license number we have marked under section 552.130 of the Government Code.

We note the submitted information contains a bank account number that is subject to section 552.136(b) of the Government Code.<sup>4</sup> Section 552.136 provides in part that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”).

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<sup>4</sup>The 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).*

Therefore, the district must withhold the bank account number we have marked under section 552.136 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). *Id.* § 552.137(a)-(c). The district must withhold the e-mail addresses it has marked under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release.<sup>5</sup> *See id.* § 552.137(b).

In summary, the district must withhold the I-9 form and attached identification documents in Exhibit E under section 552.101 in conjunction with section 1324a of title 8 of the United States Code, and the information contained in Exhibit F under section 552.101 in conjunction with section 411.097(d) of the Government Code. The district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy and section 552.102(a) of the Government Code. Except for the information that reveals the employee’s name, the degree obtained, and the courses taken, the district must withhold the transcript in Exhibit H under section 552.102(b) of the Government Code. The district must withhold the information we have marked under section 552.117 of the Government Code. The district may withhold the information it has marked under section 552.107(1) of the Government Code. The district must withhold the driver’s license number we have marked under section 552.130 of the Government Code, and the bank account number we have marked under section 552.136 of the Government Code. Unless the owners of the addresses have affirmatively consented to their release, the district must withhold the e-mail addresses it has marked under section 552.137 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.

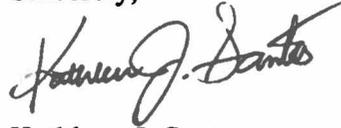
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), 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

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<sup>5</sup>Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,

A handwritten signature in cursive script, appearing to read "Kathleen J. Santos".

Kathleen J. Santos  
Assistant Attorney General  
Open Records Division

KJS/dls

Ref: ID# 465045

Enc. Submitted documents

c: Requestor  
(w/o enclosures)