ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 26, 2012

Ms. Rhonda Crass
Counsel for the Duncanville ISD
Henslee Schwartz LLP
306 West 7th Street
Fort Worth, Texas 76102

OR2012-15371

Dear Ms. Crass:

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# 466078.

The Duncanville Independent School District (the "district"), which you represent, received a request for all documents and reports related to an investigation of a named individual and any correspondence regarding the report. You state you have redacted certain personal information pursuant to section 552.117 of the Government Code as permitted by section 552.024(c) of the Government Code.[1] We note you have redacted e-mail addresses subject to section 552.137 of the Government Code in accordance with the previous determination issued in Open Records Decision No. 684 (2009).[2] You claim the submitted

[1]Section 552.024(c) of the Government Code authorizes a governmental body to redact information protected by section 552.117 of the Government Code without the necessity of requesting a decision from this office if the current or former employee to whom the information pertains properly elected to keep this information confidential. *See* Gov't Code § 552.024(c); *see id.* § 552.024(c-1) (requestor may appeal governmental body's decision to withhold information under section 552.024(c) to attorney general), .024(c-2) (governmental body withholding information pursuant to section 552.024(c) must provide certain notice to requestor).

[2]Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain 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 is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code and privileged under Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure.[3] We have considered your arguments and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

> (a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:
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> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information contains completed evaluations and a portion of a completed investigation that are subject to section 552.022(a)(1) and must be released unless they are either confidential under the Act or other law or are excepted from disclosure under section 552.108 of the Government Code. *See id.* Although you claim sections 552.107 and 552.111 of the Government Code for the information subject to section 552.022, these sections are discretionary and do not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Consequently, the district may not withhold any of the information subject to section 552.022 under section 552.107 or section 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 and your assertion of the attorney work product privilege under Texas Rule of Civil Procedure 192.5 for the information subject to section 552.022 of the Government Code. Additionally, because section 552.101 makes information confidential under the Act, we will address its applicability to the information subject to section 552.022. We will also address your remaining arguments for the information not subject to section 552.022.

Texas Rule of Evidence 503(b)(1) provides:

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[3]We note that the proper exception to raise when asserting the attorney work product privilege for information not subject to section 552.022 of the Government Code is section 552.111 of the Government Code. *See* Open Records Decision No. 676 at 2-1 (2002).

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
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> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> > (B) between the lawyer and the lawyer's representative;
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> > (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
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> > (D) between representatives of the client or between the client and a representative of the client; or
> >
> > (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 426-27 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the portion of the completed investigation at issue constitutes a confidential communication between district staff and an attorney for the district. You also state the communication at issue was intended to be confidential, has remained confidential, and is related to the rendition of legal services. Accordingly, we conclude the district may withhold

the portion of the completed investigation, which we have marked, on the basis of the attorney-client privilege under Texas Rule of Evidence 503.[4]

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. Section 552.101 of the Government Code 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. 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 at 3 (1996). In that opinion, we concluded an administrator is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id.* In addition, the Third Court of Appeals has held a written reprimand constitutes an evaluation for the 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.).

You contend the remaining information is confidential under section 21.355. You state the employee concerned was an administrator who held the appropriate administrator's certificate and assert the employee was performing the functions of an administrator at the time the information was created. Upon review, we determine that the district 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.[5] However, we note the remaining information consists of communications between district employees, personnel documents concerning an employee, and other various documents not relating to the evaluation of an employee. You have not explained how this information consists of "[a] document evaluating the performance of a teacher or administrator" as contemplated by section 21.355. Educ. Code § 21.355. Consequently, we find the remaining information may not be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found that personal financial information not

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[4]As our ruling is dispositive for this information, we need not address your arguments under rule 192.5 of the Texas Rules of Civil Procedure for this information.

[5]As our ruling is dispositive, we need not address your remaining arguments for this information.

relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for rule 503. 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. ORD 676 at 6-7. 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 assert the remaining information consists of communications between attorneys for the district and district employees and officials. You have identified most of the parties to the communications. You state the communications were intended to remain confidential and state they have remained such. Based on your representations and our review, we find the district may withhold the information we have marked under section 552.107(1). However, we find you have not demonstrated how the remaining information you seek to withhold under section 552.107 constitutes communications made between privileged parties for the purpose of facilitating the rendition of professional legal services to the district; thus, the district may not withhold the remaining information on the basis of section 552.107(1).

Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4-8. Rule 192.5 defines work product as:

> (1) [M]aterial prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
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> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that:

> a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You claim the remaining information is protected by the attorney work product privilege. You state this information pertains to potential pending litigation as a result of a personnel matter between the district and the named individual. However, upon review, we find you have failed to demonstrate how the remaining information constitutes material prepared, impressions developed, or a communication made in anticipation of litigation by or for the district. Therefore, the district has failed to establish how the work product privilege is applicable to the remaining information and none of the remaining information may be withheld under section 552.111 of the Government Code on the basis of the attorney work product privilege.

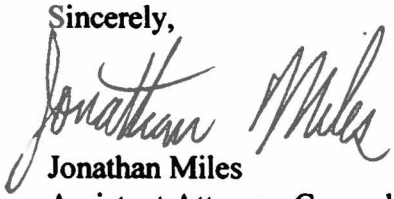
In summary, the district must withhold the completed investigation we have marked under Texas Rule of Evidence 503 and the documents we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must also withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district may withhold the information we have marked under section 552.107 of the Government Code. 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/bhf

Ref: ID# 466078

Enc. Submitted documents

c: Requestor
(w/o enclosures)