



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 9, 2012

Ms. LeAnne Lundy
Counsel for the Klein ISD
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5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2012-16107

Dear Ms. Lundy:

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# 467810.

The Klein Independent School District (the "district"), which you represent, received a request for twenty categories of information pertaining to district employees; district administrative guidelines, requirements, and procedures for certain types of incidents; documents pertaining to utilization and layout of security cameras on a specific school campus during specified time periods; all documents pertaining to verification and approval of specified invoices; specified course materials; documents presented at a specified board meeting; all documents pertaining to payments by the district to a named individual during a specified time period; and all expense reports submitted by members of the district's board of trustees to the district for reimbursement during a specified time period and any records of such payments.¹ You state you made some of the requested information

¹You state the district sought and received clarification of the request. See Gov't Code § 552.222(b) (stating if information requested is unclear or large amount has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); see also *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

available to the requestor. We note you have redacted information subject to sections 552.117, 552.130(c), 552.136(c), 552.137, and 552.147 of the Government Code.² You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, and 552.107 of the Government Code.³ We have considered the exceptions you claim and reviewed the submitted representative sample of information.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. This exception encompasses information other statutes make confidential. You claim section 552.101 in conjunction with section 418.182 of the Government Code, which was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act. Section 418.182 provides in part:

(a) Except as provided by Subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

²Section 552.024 of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov’t Code § 552.024(c)(2). Section 552.130 of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the motor vehicle record information described in subsections 552.130(a)(1) and (a)(3). *See id.* § 552.130(c); *see also id.* § 552.130(d)-(e) (requestor may appeal governmental body’s decision to withhold information under section 552.130(c) to attorney general and governmental body withholding information pursuant to section 552.130(c) must provide certain notice to requestor). However, we note you may not redact the state of issuance under section 552.130(c). Section 552.136 of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, access device numbers subject to section 552.136(b). *See id.* § 552.136(c); *see also id.* § 552.136(d)-(e) (requestor may appeal governmental body’s decision to withhold information under section 552.136(c) to attorney general and governmental body withholding information pursuant to section 552.136(c) must provide certain notice to requestor). Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold specified 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. Section 552.147(b) of the Government Code authorizes a governmental body to withhold a living person’s social security number without requesting a decision under the Act. Gov’t Code § 552.147(b).

³We note that the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107. *See* Open Records Decision No. 676 at 1-2 (2002). Although you raise section 552.103 of the Government Code as an exception to disclosure, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim this section applies to the submitted information.

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 that those records contain substantially different types of information than that submitted to this office.

Id. § 418.182(a). The fact information may generally be related to a security system does not make the information *per se* confidential under section 418.182. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any confidentiality provision, a governmental body asserting section 418.182 must adequately explain how the responsive information falls within the scope of the statute. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You argue Exhibit B is confidential under section 418.182(a). You explain the information at issue depicts the location and position of security cameras at a specified school. You inform us one of the purposes of the security camera system is to deter criminal activity, including acts of terrorism. You state release of Exhibit B would make it much easier for someone intent on committing acts of terrorism to determine the location of and avoid the security cameras. You also state release of Exhibit B would jeopardize the safety of district students. Thus, you argue Exhibit B relates to the location of a security system used to protect a district school from acts of terrorism or related criminal activity. Based on your representations and our review of the information at issue, we conclude the district must withhold Exhibit B under section 552.101 of the Government Code in conjunction with section 418.182(a) of the Government Code.

Section 552.101 also encompasses the federal Fair Credit Reporting Act (the "FCRA"), 15 U.S.C. § 1681 *et seq.* We find some of the submitted information, specifically, criminal history information obtained from the Safe Schools Project, is subject to the FCRA. Section 22.083 of the Education Code permits the district to obtain criminal history record information from a private entity that is a consumer reporting agency governed by the FCRA. *See* Educ. Code § 22.083(a-1)(3). We understand that the Safe Schools Project is a consumer reporting agency that furnishes reports to the district to be used for employment purposes. *See* 15 U.S.C. § 1681a(f) (defining "consumer reporting agency"), (h) (defining "employment purposes"). A criminal history report compiled by a private consumer reporting agency is a "consumer report" under the FCRA. *See id.* § 1681a(d) (defining "consumer report"). Section 1681b of the FCRA permits a consumer reporting agency to furnish a consumer report to a person that the consumer reporting agency has reason to believe intends to use the information for employment purposes. *See id.* § 1681b(a)(3)(B); *see also id.* § 1681a(b), (d) (defining "person" and "consumer report"). Section 1681b further provides that "[a] person shall not use or obtain a consumer report for any purpose unless the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; . . . and . . . the purpose is certified in accordance with section 1681e of this title by a prospective user of the report through a general or specific certification." *Id.* § 1681b(f)(1)-(2). Section 1681e provides for the maintenance of compliance procedures by consumer reporting agencies under which prospective users of consumer reports must identify themselves, certify the purposes for which they seek information, and certify that the information will be used for no other purpose. *See id.* § 1681e(a); *see also* Open Records Decision No. 373 at 2 (1983) (federal law strictly limits distribution of consumer credit

reports by credit reporting agencies). We find the submitted Safe Schools Project records are a consumer report for purposes of section 1681b of the FCRA. We note the FCRA does not permit the disclosure of information in a consumer report for the purpose of responding to a request for information under the Act. We therefore conclude the Safe Schools Project records, which we have marked, are confidential under section 552.101 of the Government Code in conjunction with the FCRA.⁵

Section 552.101 also encompasses section 21.048 of the Education Code, which is applicable to information relating to teacher certification examinations. Section 21.048(c-1) states:

The results of an examination administered under this section are confidential and are not subject to disclosure under Chapter 552, Government Code, unless:

- (1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or
- (2) the educator has failed the examination more than five times.

Educ. Code § 21.048(c-1). You state Exhibit C consists of ExCET exam results of a teacher that are confidential under section 21.048. You also state subsections 21.048(c-1)(1) and (2) do not apply in this instance. Upon review, we find portions of Exhibit C, which we have marked, consist of the teacher's ExCET exam results. Therefore, the district must withhold this information under section 552.101 in conjunction with section 21.048(c-1). We note, however, the remaining information in Exhibit C does not consist of the teacher's exam results. Consequently, the district may not withhold any of the remaining information in Exhibit C under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code.

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." *See id.* § 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)*. In *Open Records Decision No. 643*, we determined for the purposes of section 21.355, the word "teacher" means a person who is required to, and does in fact, hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* We also have determined the word "administrator" in section 21.355 means a person who is required to and does in fact hold an administrator's certificate under

⁵As our ruling on this information is dispositive, we need not address your argument against its disclosure.

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 contend the documents submitted as Exhibit D evaluate the performance of certified teachers and administrators. You state the employees concerned were acting in those capacities when the evaluative documents were created. Based on your representations and our review of the information at issue, we conclude the district must withhold the information we have marked in Exhibit D under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.⁶ However, upon review, we determine none of the remaining information in Exhibit D evaluates the performance of a teacher or administrator for purposes of section 21.355. Accordingly, you have not demonstrated the remaining information at issue is subject to section 21.355 and the district may not withhold the remaining information in Exhibit D under section 552.101 on that basis.

Section 552.101 also encompasses section 22.08391 of the Education Code. Subchapter C of chapter 22 of the Education Code addresses criminal history records of school district employees and volunteers. Section 22.08391 provides in part:

(a) Information collected about a person to comply with this subchapter, including the person's name, address, phone number, social security number, driver's license number, other identification number, and fingerprint records:

(1) may not be released except:

(A) to comply with this subchapter;

(B) by court order; or

(C) with the consent of the person who is the subject of the information;

(2) is not subject to disclosure as provided by [the Act]; and

(3) shall be destroyed by the requestor or any subsequent holder of the information not later than the first anniversary of the date the information is received.

Educ. Code § 22.08391(a). Thus, except in the specified circumstances, section 22.08391 prohibits the release of information about a person collected in order to conduct a criminal history record search. We note the district used a portion of the information submitted in

⁶As our ruling for this information is dispositive, we do not address your remaining arguments against its disclosure.

Exhibit G to collect information about an employment applicant for purposes of conducting a criminal history record search. Accordingly, we conclude the information we have marked in Exhibit G must be withheld under section 552.101 of the Government Code in conjunction with section 22.08391 of the Education Code.⁷

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and, (2) 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 satisfied. *Id.* at 681-82. The type of information considered intimate and 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. This office has also found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and handicaps). However, this office has found information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest, and, therefore, generally not protected from disclosure under common-law privacy. *See, e.g.*, Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 455 (public employee's job performance or abilities generally not protected by privacy), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 423 at 2 (1984) (scope of public employee privacy is narrow).

Upon review, we find the information we have marked in Exhibit H is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the district must withhold the information we have marked in Exhibit H under section 552.101 in conjunction with common-law privacy.⁸

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 agree the district must withhold the educational transcripts submitted as Exhibit E under section 552.102(b) of the Government Code, except for the information that reveals the employee's name, the degree obtained, and

⁷As our ruling for this information is dispositive, we do not address your remaining arguments against its disclosure.

⁸As our ruling is dispositive, we need not address your remaining arguments for this information.

the courses taken.⁹ See Open Records Decision No. 526 (1989) (addressing statutory predecessor). We also note you seek to withhold information in Exhibit F under section 552.102(b). However, this information is contained in personnel forms and employment applications. We find the district has failed to demonstrate that this information consists of a transcript from an institution of higher education maintained in the personnel file of a professional public school employee. Accordingly, the district may not withhold any portion of Exhibit F under section 552.102(b) of the Government Code.

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). The Texas Supreme Court recently 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 the district must withhold the dates of birth you have marked under section 552.102(a) of the Government Code.

You assert Exhibit I is protected by the attorney-client privilege. 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. ORD 676 at 6-7. 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.

⁹As our ruling for this information is dispositive, we do not address your remaining arguments against its disclosure.

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 Exhibit I consists of communications between an attorney for the district and district employees and officials in their capacity as clients that were made for the purpose of providing legal services to the district. You state the communications were intended to be confidential and have remained confidential. As such, we find the district has demonstrated Exhibit I is privileged, and it may withhold Exhibit I under section 552.107(1) of the Government Code.

We note the remaining information contains information that may be subject to section 552.117 of the Government Code.¹⁰ Section 552.117(a)(1) excepts from disclosure the current and former 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 this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a). Whether 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). The district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the individuals whose information we have marked timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1). Conversely, if the individuals at issue did not timely request confidentiality under section 552.024, the district may not withhold the marked information under section 552.117(a)(1) of the Government Code.¹¹

In summary, the district must withhold Exhibit B under section 552.101 of the Government Code in conjunction with section 418.182(a) of the Government Code. The district must withhold the Safe Schools Project records we have marked under section 552.101 of the Government Code in conjunction with the FCRA. The district must withhold the ExCET exam results we have marked in Exhibit C under section 552.101 of the Government Code

¹⁰The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

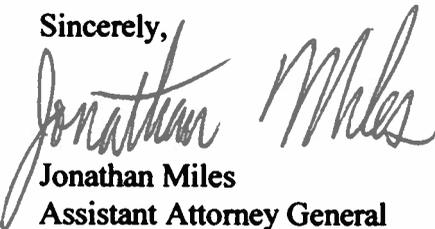
¹¹We note even if an employee did not make a timely confidentiality election under section 552.024, section 552.147(b) of the Government Code permits a governmental body to withhold a living person's social security number without the necessity of requesting an opinion from this office. Gov't Code § 552.147(b).

in conjunction with section 21.048(c-1) of the Education Code. The district must withhold the information we have marked in Exhibit D under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold the information we have marked in Exhibit G under section 552.101 of the Government Code in conjunction with section 22.08391 of the Education Code. The district must withhold the information we have marked in Exhibit H under section 552.101 of the Government Code in conjunction with common-law privacy. Except for the information that reveals the employee's name, the degree obtained, and the courses taken, the district must withhold the educational transcripts submitted as Exhibit E under section 552.102(b) of the Government Code. The district must withhold the dates of birth you have marked under section 552.102(a) of the Government Code. The district may withhold Exhibit I under section 552.107(1) of the Government Code. If the individuals whose information we have marked timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) 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# 467810

Enc. Submitted documents

c: Requestor
(w/o enclosures)