



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 19, 2012

Mr. Mike Leasor
Harris Cook, L.L.P.
309 East Broad Street
Mansfield, Texas 76063

OR2012-16769

Dear Mr. Leasor:

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# 468324.

The Kennedale Independent School District (the "district"), which you represent, received a request for the requestor's personnel file and information pertaining to a specified investigation. You state you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.135 of the Government Code and privileged under Texas Rule of Evidence 503.¹ Additionally, you state you have notified a third party of the request. *See* Gov't Code § 552.304 (interested third party may submit comments stating why information should or should not be released). We have considered your arguments and reviewed the submitted information. We have also received and considered comments submitted by the requestor and comments submitted by an attorney representing a third party. *See id.*

The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

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.² 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”). In this instance, you have submitted for our review redacted and unredacted education records of a student for whom the district has not received written consent from a parent to release.³ Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to any of the submitted documents. Such determinations under FERPA must be made by the educational authority in possession of the education records.⁴ We will, however, address the applicability of the district’s remaining arguments for this information.

Section 552.022(a)(3) of the Government Code provides for the required public disclosure of “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body” unless it is “made confidential under [the Act] or other law[.]” Gov’t Code § 552.022(a)(3). Exhibit D contains executed contracts between the requestor and the district, which are subject to section 552.022(a)(3). This information, which we have marked, must be released unless it is confidential under the Act or other law. Although you assert this information is excepted from disclosure under section 552.107 of the Government Code, this section is discretionary and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 6 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district may not withhold the information subject to section 552.022(a)(3) under section 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your argument under Texas Rule of Evidence 503 for the information in Exhibit D that is subject to section 552.022(a)(3).

²A copy of this letter may be found on the Office of the Attorney General’s website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

³We note the third party has submitted a copy of a parent’s written consent to release the information pertaining to her two children to this requestor. *See* 20 U.S.C. § 1232g(b)(1) (“No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records . . . of students without the written consent of their parents to any individual . . .”).

⁴In the future, if the district does obtain parental or an adult student’s consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

We next address your argument under section 552.107(1) of the Government Code for the information in Exhibit D that is not subject to section 552.022(a)(3). Section 552.107(1) 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. *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 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 in Exhibit D constitutes notes and communications between district personnel and district attorneys 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. Based on your representations and our review, we find the information in Exhibit D that is not subject to section 552.022(a)(3) consists of privileged attorney-client communications that the district may generally withhold under section 552.107(1). We note, however, some of these e-mail strings include e-mails and attachments received from or sent to non-privileged parties. Furthermore, if the e-mails and attachments received from or sent to non-privileged parties are removed from the e-mail

strings in which they appear and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails and attachments, which we have marked, are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold these non-privileged e-mails and attachments under section 552.107(1).

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

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:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (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;
- (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 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).

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* ORD 676 at 6-7. Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that 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 that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the

rendition of professional legal services to the client. *Id.* Upon a demonstration of all three factors, the entire communication is 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). *Huie*, 922 at 923; *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege extends to entire communication, including factual information).

As previously discussed, you state the information in Exhibit D consists of communications between district personnel and attorneys for 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 attachments subject to section 552.022(a)(3) may generally be withheld under Texas Rule of Evidence 503. However, the attachments subject to section 552.022(a)(3) reveal communications with a non-privileged party. Furthermore, if the attachments are removed from the e-mail to which they are attached and stand alone, they are responsive to the request for information. Therefore, to the extent the attachments subject to section 552.022(a)(3) are maintained by the district separate and apart from the otherwise privileged e-mail to which they are attached, then the district may not withhold them under Texas Rule of Evidence 503.

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 the common-law right of 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. 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. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of common-law privacy to information relating to an investigation of alleged sexual harassment in an employment context. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *See* 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public’s interest was sufficiently served by the disclosure of such documents. *Id.* The *Ellen* court held that “the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.” *Id.* However, common-law privacy does not protect information about a public employee’s alleged misconduct on the

job or complaints made about a public employee's job performance. See Open Records Decision Nos. 438 (1986), 405 (1983).

The information in Exhibit C pertains to the allegation of an improper relationship between a district employee and a district student. Upon review, we find this investigation does not constitute a sexual harassment investigation in the employment context of the district for the purposes of *Ellen*. Therefore, the common-law privacy protection afforded in *Ellen* is not applicable to the information at issue and the district may not withhold it under section 552.101 on that basis.

You also argue the identifying information of witnesses and informers should be protected under common-law privacy. This office has found that names, telephone numbers, and addresses are not excepted from public disclosure under common-law privacy. See Open Records Decision No. 455 at 7 (1987). Upon review, we find you have failed to demonstrate that any of the information you seek to withhold in Exhibit C is highly intimate or embarrassing and not of legitimate public concern. Accordingly, the district may not withhold any of the information at issue under section 552.101 on this basis.

Section 552.101 of the Government Code also encompasses information protected by the common-law informer's privilege, which has long been recognized by Texas courts. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law enforcement authority, provided the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law* § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5.

You generally argue the names and identifying information of all informers and witnesses in Exhibit C should be withheld under the informer's privilege. We note witnesses who provide information in the course of an investigation but do not make the initial report of the violations are not informants for the purposes of claiming the informer's privilege. You state the information relates to alleged violations of the Educator Code of Ethics, section 247.2 of title 19 of the Texas Administrative Code, and a violation of the district's policies. However, we note the Educator Code of Ethics is enforced by the Texas State Board for Educator Certification (the "SBEC"). See 19 T.A.C. 247.1. The district does not inform us any violation of the Educator Code of Ethics was reported to the SBEC or that the district is authorized to enforce the code of ethics. Likewise, the district does not inform us of any

alleged violation of a district policy that would be punishable by a civil or criminal penalty. See ORDs 582, 515. Therefore, we conclude the district may not withhold any of the information at issue in Exhibit C under section 552.101 on the basis of the common-law informer's privilege.

You also claim the information in Exhibit C is excepted from disclosure under section 552.102 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). You assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, 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 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 its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court then considered the applicability of section 552.102, and has 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. *Id.* at 347. Having carefully reviewed the submitted information, we find that none of the information is excepted under section 552.102(a) and, therefore, none of it may be withheld on that basis.

Section 552.135 of the Government Code provides in part:

- (a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.
- (b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].
- (c) Subsection (b) does not apply:
 - (1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

Gov't Code § 552.135(a)-(c). Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under the exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* § 552.301(e)(1)(A). Additionally, individuals who provide information in the course of an investigation, but do not make the initial report are not informants for the purposes of section 552.135.

In this instance, you state that the information in Exhibit C reveals the identities of district employees who reported possible violations of section 247.2 of title 19 of the Texas Administrative Code and district policy and witnesses to those possible violations. *See* Educ. Code § 21.041(b) (Texas Education Agency shall propose rules providing for disciplinary proceedings); 19 T.A.C. § 247.2 (Code of Ethics and Standard Practices for Texas Educators). We understand the individuals at issue have not consented to disclosure of their identities. Based on your representations and our review, we conclude the district must withhold the identifying information of the district employee who reported the possible violations, which we have marked, under section 552.135. However, we find the district has failed to demonstrate how any of the remaining information reveals the identity of an individual who made an initial report of a possible violation to the school district or the proper regulatory enforcement authority and, thus, has not demonstrated the remaining information reveals the identity of an informer for the purposes of section 552.135. Therefore, the district may not withhold any portion of the remaining information under section 552.135.

We note portions of the remaining information are subject to sections 552.117 and 552.137 of the Government Code.⁵ Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former 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

⁵The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information under section 552.117 on behalf of a current or former employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024, the information we have marked under section 552.117 must be withheld under section 552.117(a)(1). The district may not withhold the marked information under section 552.117 if the individual did not make a timely election to keep the information confidential.

We note Exhibit D contains an e-mail address of a member of the public. 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). Gov’t Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail address we have marked is not a type specifically excluded by section 552.137(c). Accordingly, the district must withhold the e-mail address we have marked under section 552.137 unless the owner of the address affirmatively consents to its release.⁶

In summary, the district may withhold the information in Exhibit D that is not subject to section 552.022(a)(3) of the Government Code under section 552.107(1) of the Government Code, to the extent the non-privileged e-mails and attachments we have marked are not maintained separate and apart from the otherwise privileged e-mail strings in which they appear. To the extent the non-privileged e-mails and attachments we have marked are maintained separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code. The district may withhold the attachments we have marked that are subject to section 552.022(a)(3) under Texas Rule of Evidence 503 to the extent the attachments are not maintained separate and apart from the otherwise privileged e-mail to which they are attached. To the extent the attachments subject to section 552.022(a)(3) are maintained by the district separate and apart from the otherwise privileged e-mail to which they are attached, then the district may not withhold them under Texas Rule of Evidence 503. The district must withhold the information we have marked under section 552.135 of the Government Code. The district must withhold the information we have marked under section 552.117(a)(1) of the Government Code if the individual whose information is at issue timely requested confidentiality. The district must withhold

⁶We note this office issued Open Records Decision No. 684 (2009), 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.

the e-mail address we have marked under section 552.137 of the Government Code unless the owner affirmatively consents to its release. The district must release the remaining information.

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,



Lindsay E. Hale
Assistant Attorney General
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LEH/tch

Ref: ID# 468324

Enc. Submitted documents

c: Requestor
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