



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 24, 2012

Ms. LeAnne Lundy  
Counsel for Girls & Boys Preparatory Academy  
Rogers, Morris & Grover, L.L.P.  
5718 Westheimer Road, Suite 1200  
Houston, Texas 77057

OR2012-17029

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# 468849.

The Girls and Boys Preparatory Academy (the "academy"), which you represent, received a request for information pertaining to United States Department of Labor investigations and findings. You claim some of the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.136 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

We will first address your claim under section 552.107(1) of the Government Code for Exhibit B. 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

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<sup>1</sup>Although you raise section 552.101 of the Government Code in conjunction with Rule 503 of the Texas Rules of Evidence, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). 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 of the Government Code. *See* ORDs 676, 677.

<sup>2</sup>We 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.

elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies to only communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies to only a confidential communication, *id.*, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state Exhibit B constitutes communications between academy employees and attorneys for the academy, which you have identified, that were made for the purpose of facilitating the rendition of professional legal services to the academy. You also state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the academy may withhold Exhibit B under section 552.107(1) of the Government Code.

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, such as section 825.507 of the Government Code, which provides in relevant part:

- (a) Records of a participant that are in the custody of the [Teachers] [R]etirement [S]ystem [(the “retirement system”)] or of an administrator, carrier, attorney, consultant, or governmental agency acting in cooperation

with or on behalf of the retirement system are confidential and not subject to public disclosure in a form that would identify an individual and are exempt from the public access provisions of Chapter 552, except as otherwise provided by this section[.]

...

(c) The records of a participant remain confidential after release to a person as authorized by this section. This section does not prevent the disclosure or confirmation, on an individual basis, of the status or identity of a participant as a member, former member, retiree, deceased member or retiree, beneficiary, or alternate payee of the retirement system.

...

(g) In this section, "participant" means a member, former member, retiree, annuitant, beneficiary, or alternate payee of the retirement system.

*Id.* § 825.507(a), (c), (g). You state some of the information in Exhibit C is deduction information concerning retirement system participants. Upon review, we find you have failed to demonstrate any of the information in Exhibit C consists of records of a participant in the retirement system that are in the custody of the academy in cooperation with the retirement system. Accordingly, we have no basis to conclude any of the information in Exhibit C is confidential under section 825.507 of the Government Code, and the academy may not withhold it on that basis under section 552.101 of the Government Code.

Section 552.101 also 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. This office has also found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. See Open Records Decision No. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. See ORD Nos. 600 at 9 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law

privacy). This office has also determined that a public employee's net pay is protected by common-law privacy even though it involves a financial transaction between the employee and the governmental body. *See* Attorney General Opinion GA-0572 at 3-5 (2007) (stating that net salary necessarily involves disclosure of information about personal financial decisions and is background financial information about a given individual that is not of legitimate concern to the public). However, 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* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of public employee's resignation or termination), 423 at 2 (1984).

Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the academy must withhold the information we have marked in Exhibit C pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The academy has failed to demonstrate how the remaining information in Exhibit C is highly intimate or embarrassing and not of legitimate public interest. Therefore, the academy may not withhold any of the remaining information in Exhibit C under section 552.101 in conjunction with common-law privacy.

Section 552.136 of the Government Code states "[n]otwithstanding any other provision of this chapter, 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." Gov't Code § 552.136. Accordingly, we find the academy must withhold the bank account and routing numbers you have marked under section 552.136 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, 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.<sup>3</sup> *See id.* § 552.117(a); Open Records Decision No. 622 (1994). We note a post office box number is not a "home address" for purposes of section 552.117. *See* Open Records Decision No. 622 at 6 (legislative history makes clear purpose of section 552.117 is to protect public employees from being harassed at home). 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). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. We have marked the personal information of academy employees. If the employees whose personal information is at issue timely

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<sup>3</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).

elected to keep their information confidential pursuant to section 552.024, the academy must withhold the information we have marked under section 552.117(a)(1). The academy may not withhold this information under section 552.117(a)(1) if the employees did not timely elect to keep their information confidential pursuant to section 552.024.

In summary, the academy may withhold Exhibit B under section 552.107(1) of the Government Code. The academy must withhold the information we have marked in Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy. The academy must withhold the information you have marked under section 552.136 of the Government Code. If the employees whose personal information is at issue timely elected to keep their information confidential pursuant to section 552.024 of the Government Code, the academy 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](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/som

Ref: ID# 468849

Enc. Submitted documents

c: Requestor  
(w/o enclosures)