



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 25, 2012

Ms. Sarah Orman
Counsel for Dripping Springs Independent School District
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P.O. Box 2156
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OR2012-17075

Dear Ms. Orman:

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# 468917.

The Dripping Springs Independent School District (the "district"), which you represent, received a request for all information and summaries of information provided to any district official as part of an investigation into a named individual. The district received a second request from a different requestor for information regarding the investigation into the named individual, including any statements provided regarding the requestor, any notes containing the requestor's name or denoting the requestor as a person who provided input, and any notes summarizing any information the requestor has provided. The district has released some of the requested information to the requestors. You state you have redacted personal e-mail addresses in accordance with section 552.137 of the Government Code and Open Records Decision No. 684 (2009).¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.135 of the Government Code.² We have

¹Open 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 opinion.

²Although you also raise rule 503 of the Texas Rules of Evidence, we note section 552.107 of the Government Code is the proper exception to raise for asserting the attorney-client privilege in this instance. See Open Records Decision No. 676 (2002).

considered the submitted arguments and reviewed the submitted information. We have also received and considered comments from the first requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the first requestor's argument that the district has not submitted all the responsive information. We note a governmental body must make a good-faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). We assume the district has made a good-faith effort to relate the request to information held by the district. Therefore, we will address the submitted arguments against disclosure of the information represented by the submitted documents.

Next, we note 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"), 20 U.S.C. § 1232g, does not permit state and local 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.³ 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"). Although the first requestor asserts the district has improperly redacted information under FERPA, our office is prohibited from reviewing these records to determine the applicability of FERPA, and we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of such records.⁴ We will, however, address the applicability of the claimed exceptions to the submitted information.

Section 552.101 of the Government Code exempts 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, such as section 21.355 of the Education Code, which provides in part that "[a] document evaluating the performance of a teacher or administrator is confidential." *See* 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

³A 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>.

⁴In the future, if the district does obtain parental 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.

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* ORD 643 at 4. Additionally, a court has 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 state, and provide documentation demonstrating, the teacher at issue held the appropriate certification at the time of the evaluations. Therefore, we find the information we have marked constitutes evaluations of a teacher that are generally confidential under section 21.355 of the Education Code. However, we find you have not established how the remaining information in Exhibit 2, which includes employment requirements and restrictions, policies, and communications from the teacher, constitutes evaluations of a teacher’s performance as contemplated by section 21.355. Accordingly, the district may not withhold any of the remaining information in Exhibit 2 under section 552.101 on that basis.

We note section 21.352(c) of the Education Code provides that “[e]ach teacher is entitled to receive a written copy of the evaluation on its completion.” Educ. Code § 21.352(c); *see id.* § 21.352(a) (prescribing appraisal process and performance criteria each school district shall use). In this instance, the first requestor states, and submits an affidavit from the individual named in the request confirming, the first requestor is requesting the evaluations at issue on behalf of the individual named in the request. Therefore, to the extent the evaluations we have marked are of the type contemplated by section 21.352, the first requestor has a right of access to this information under section 21.352(c) of the Education Code. However, if the first requestor does not have a right of access under section 21.352(c), then the evaluations we have marked are confidential under section 21.355 of the Education Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Medical records must be released upon the patient's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *Id.* § 159.004. Section 159.002(c) also requires any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). You assert the information submitted in Exhibit 3 is subject to the MPA. However, upon review, we find none of the information at issue consists of medical records. Therefore, the district may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.135 of the Government Code provides the following:

(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 or persons' 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].

Gov't Code § 552.135. We note the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of civil, criminal, or regulatory law. *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 purposes of section 552.135 of the Government Code. You state the information at issue contains identifying information of current or former students of the district or those students' parents. You also state these individuals have not consented to the release of their identity. Upon review, however, we find you have failed to demonstrate how the information at issue reveals the identity of a student or former student or employee or former employee of the district who reported another person's possible violation of criminal, civil, or regulatory law and, thus, have not demonstrated the information at issue reveals the identity of an informer for purposes of section 552.135. Accordingly, none of the information at issue may be withheld under section 552.135 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 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 only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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.* 503(b)(1), 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 the information submitted in Exhibit 5 consists of confidential communications made in furtherance of professional legal services rendered to the district. You state these communications contain legal advice and opinions of attorneys for the district regarding the district’s investigation of an employee. You state these communications were intended to be confidential and that the confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information in Exhibit 5. Accordingly, the district may withhold the information in Exhibit 5 under section 552.107(1) of the Government Code.

Section 552.101 of the Government Code 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. The type of information considered highly 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 found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the information we have marked in the remaining information constitutes information that is highly intimate or embarrassing and of no legitimate concern to the public. Accordingly, the district must withhold this marked information under section 552.101 of the Government Code in conjunction with common-law privacy.

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 officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code.⁵ 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, 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. To the extent the employee timely elected to keep such information confidential under section 552.024, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. If the employee did not make a timely election under section 552.024, the district may not withhold the information we have marked under section 552.117(a)(1) of the Government Code.

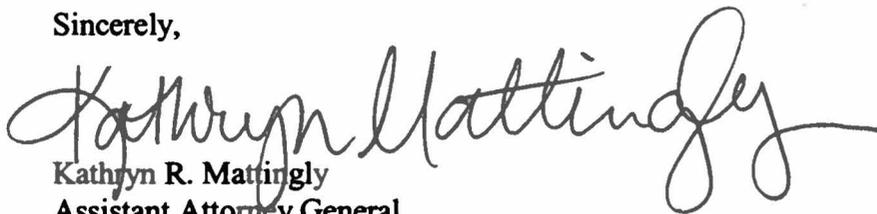
In summary, if the first requestor does not have a right of access under section 21.352(c), then the evaluations we have marked must be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district may withhold the information in Exhibit 5 under section 552.107(1) of the Government Code. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district must withhold the information we have marked under section 552.117(a)(1) of the Government Code, to the extent the employee timely elected to keep such information confidential under section 552.024. 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.

⁵The 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).

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,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/dls

Ref: ID# 468917

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)