



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 6, 2012

Ms. Sarah Orman  
Walsh, Anderson, Gallegos, Green, and Trevino, P.C.  
P.O. Box 2156  
Austin, Texas 78768

OR2012-17791

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# 470316.

The Dripping Springs Independent School District (the "district"), which you represent, received a request for the following ten categories of information: (1) information pertaining to any meetings, telephone calls, or interviews with the requestor's child in connection with a specified investigation; (2) information referencing the requestor's child created or obtained as part of a specified investigation; (3) any notes or summary by two named individuals regarding public comments made by the requestor's child at a specified meeting; (4) the recording of a specified grievance meeting; (5) any notes or summary by a named individual of the specified grievance meeting; (6) application information and hiring information for a specified job position with the district; (7) correspondence involving five named individuals for a specified time period; (8) information provided by any of eleven named individuals to the district regarding a named individual; (9) the investigation file, any report, and any recommendation provided by a named individual regarding a specified investigation; and (10) a copy of the investigation notebook or notes made by a named individual regarding a specified investigation. 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).<sup>1</sup> You also state you have redacted social security numbers subject to section 552.117(a)(1) pursuant to section 552.024 of the Government Code and some social security numbers pursuant to section 552.147(b) of the Government Code.<sup>2</sup> ~~You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.135 of the Government Code.~~<sup>3</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.

Initially, we note you have not submitted any information responsive to categories four, five, seven, or ten of the request for information, and have submitted only college transcripts in response to category six of the request. You state you have submitted a representative sample of information; however, no portion of the submitted representative sample pertains to the requested recording of a specified grievance meeting, notes or summary by a named individual of the specified grievance meeting, correspondence involving five named individuals for a specified time period, copy of the investigation notebook or notes made by a named individual regarding a specified investigation, or information other than the submitted applications responsive to the portion of the request seeking application information and hiring information for a specified job position with the district. Thus, we find the submitted information is not representative of all the information sought in the request for information. Please be advised this ruling applies to only the types of information you have submitted for our review. Therefore, this ruling does not authorize the withholding of any other requested records to the extent those records contain substantially different types of information than that submitted to this office. *See* Gov't Code § 552.302 (where request for attorney general decision does not comply with requirements of section 552.301, information at issue is presumed public). To the extent any information responsive to categories four, five, seven, or ten or the remaining information sought in category six of the

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<sup>1</sup>Open Records Decision No. 684 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.

<sup>2</sup>Section 552.024 authorizes a governmental body to redact from public release a current or former employee's home address and telephone number, emergency contact information, and social security number excepted from disclosure under section 552.117(a)(1) without the necessity of requesting a decision from this office under the Act, if the employee timely elected to withhold such information. *See* Gov't Code §§ 552.024(a)-(c), .117(a)(1). Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *Id.* § 552.147(b).

<sup>3</sup>Although you also raise Texas Rule of Evidence 503, we note that, in this instance, 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* Open Records Decision No. 676 at 1-2 (2002). Additionally, although you also claim Texas Rule of Civil Procedure 192.5, you have provided no arguments for the applicability of this rule. Because you have not submitted arguments concerning rule 192.5, we assume you no longer urge it. *See* Gov't Code §§ 552.301(b), (e), .302.

request existed and were maintained by the district on the date the district received the request for information, we assume the district has released it. If the district has not released any such information, it must do so at this time. *See id.* §§ 552.301-302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release information as soon as possible).

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.<sup>4</sup> 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”). You state you have redacted confidential student information in Exhibits 3 and 4 under FERPA. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to the information at issue. However, we note a student’s parent has a right of access to a child’s education records, and this right of access prevails over inconsistent provisions of state law, such as the district’s assertion of section 552.135 of the Government Code. *See Equal Employment Opportunity Comm’n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995); 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. Determinations under FERPA must be made by the educational authority in possession of the education record. The DOE also has informed this office, however, that a right of access under FERPA to information about a child does not prevail over an educational institution’s right to assert the attorney-client privilege. Therefore, we will consider the district’s assertion of this privilege under section 552.107(1) of the Government Code. We will also consider the district’s claimed exceptions to the extent the student’s parent does not have a right of access to the submitted information under FERPA.

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 information protected by other statutes, such as the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code, which provides in pertinent 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.

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<sup>4</sup>A 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>.

(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). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has determined that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We have also found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990). You assert the information submitted in Exhibit 2 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 in conjunction with the MPA.

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 in Exhibit 5(a) under section 552.102(b), except for the information that reveals the employee’s name, the degree obtained, and the courses taken.<sup>5</sup> *See* Open Records Decision No. 526 (1989) (addressing statutory predecessor). You also seek to withhold information in Exhibit 5(b) under section 552.102(b). However, this information is contained in employment applications for individuals you state were not hired by the district. 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 5(b) under section 552.102(b).

You also claim portions of Exhibit 5(b) are excepted from disclosure under section 552.102(a) 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 held section 552.102(a) excepts from disclosure the dates of birth of state employees

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<sup>5</sup>As our ruling for this information is dispositive, we do not address your remaining arguments against its disclosure.

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). Thus, under *Texas Comptroller*, section 552.102(a) is applicable to the date of birth of an employee of a governmental body in a record maintained by his or her employer in an employment context. In this instance, the dates of birth at issue in Exhibit 5(b) pertain to applicants you state the district did not hire. As such, the information at issue is not excepted under section 552.102(a) and may not be withheld on that basis.

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). However, this office has noted the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. See, e.g., Open Records Decision Nos. 470 at 4 (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest). Additionally, we note dates of birth of members of the public are generally not highly intimate or embarrassing. See ORD 455 at 7 (home addresses, telephone number, dates of birth not protected under privacy).

Upon review, we find the information we have marked in Exhibit 2 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 in conjunction with common-law privacy. However, we find you have failed to establish the dates of birth and transcript grades you seek to withhold in Exhibit 5(b) under common-law privacy is information that is highly intimate or embarrassing and not of legitimate concern to the public. Therefore, this information is not confidential under common-law privacy, and the district may not withhold it under section 552.101 on that ground.

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. *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 in Exhibit 4 consists of a document created by a district employee at the direction of an attorney for the district in furtherance of providing professional legal services to the district. You explain this document was then communicated to the attorney for the district. You state this information was 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 4. *Cf. Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney’s entire investigative report protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, the district may withhold Exhibit 4 under section 552.107(1).

We note portions of the remaining information in Exhibit 2 are subject to section 552.117 of the Government Code.<sup>6</sup> 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. Gov't Code § 552.117(a). Whether a particular piece of information is protected by section 552.117 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 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. If the employee whose information is at issue timely elected to keep such information confidential under section 552.024, the district must withhold the information we have marked in Exhibit 2 under section 552.117(a)(1). If the employee did not make a timely election under section 552.024, the district may not withhold the information we have marked on this basis.

You raise section 552.135 of the Government Code for the information in Exhibit 3. Section 552.135 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 Exhibit 3 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. We note, however, that the parties who reported the possible violations of law were parents of students or volunteers not employed by the district. We, therefore, find that you have failed to demonstrate the reporting parties at issue in this investigation constitute informants for purposes of section 552.135(a). Accordingly, none of the information in Exhibit 3 may be withheld under section 552.135.

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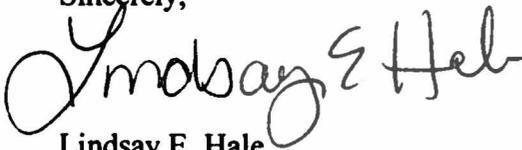
<sup>6</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470.

In summary, the district: (1) must withhold the educational transcripts in Exhibit 5(a) under section 552.102(b) of the Government Code, except for the information that reveals the employee's name, the degree obtained, and the courses taken; (2) must withhold the information we have marked in Exhibit 2 under section 552.101 of the Government Code in conjunction with common-law privacy; (3) may withhold Exhibit 4 under section 552.107(1) of the Government Code; and (4) must withhold the information we have marked in Exhibit 2 under section 552.117(a)(1) of the Government Code if the employee whose information is at issue timely elected to keep such information confidential under section 552.024 of the Government Code. 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](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  
Open Records Division

LEH/tch

Ref: ID# 470316

Enc. Submitted documents

c: Requestor  
(w/o enclosures)