



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 19, 2012

Mr. Andrew B. Thompson  
Assistant General Counsel  
Office of Legal Services  
Corpus Christi Independent School District  
P.O. Box 110  
Corpus Christi, Texas 78403

OR2012-20526

Dear Mr. Thompson:

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# 474390.

The Corpus Christi Independent School District (the "district") received a request for a named former employee's personnel file, all documents regarding the decision to suspend the employee without pay, and all documents regarding the employee's proposed termination, including any investigations. You state the district will redact student identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>1</sup> You claim the submitted information is exempted from disclosure under sections 552.103 and 552.107 of the

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<sup>1</sup>We note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit a state educational agency or institution to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). The DOE has determined that FERPA determinations must be made by the educational institution from which the education records were obtained. A copy of the DOE's letter to this office may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note the submitted information contains information pertaining to an employee other than the one named in the request. This information is not responsive to the instant request for information. This ruling does not address the public availability of nonresponsive information, and the district is not required to release nonresponsive information in response to this request.

Section 552.103 provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

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<sup>2</sup>We assume that 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.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). Furthermore, this office has stated a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You state the requestor is a representative with the Corpus Christi American Federation of Teachers and is representing the employee in the named request. You further state the employee has filed a charge of discrimination against the district with the EEOC, and has also appealed the recommendation for termination and requested the appointment of an independent hearing officer. You inform us the hearing will be conducted under chapter 21 of the Education Code. *See* Open Records Decision No. 588 (1991) (contested case under Administrative Procedure Act, Gov't Code ch. 2001, constitutes litigation for purposes of statutory predecessor to section 552.103). However, upon review, we find that both the EEOC complaint and the appeal were not filed until after the district received the current request. Further, although you have submitted an e-mail from the requestor dated the same day as the request, in which the requestor says he has spoken with the EEOC regarding the employee's case, we find this is not a concrete step towards litigation. Based on our review, we find you have failed to demonstrate that litigation was pending or that the district reasonably anticipated litigation on the date the district received the request for information. Therefore, we conclude the district may not withhold any of the information at issue under section 552.103 of the Government Code.

Section 552.107(1) 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 Texas 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. See TEX. R. EVID. 503(b)(1)(A)-(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, 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 you have marked consists of communications between the district’s legal counsel and the district in its capacity as a client. You state these communications were made in furtherance of the rendition of professional legal services to the district. You also state these communications were not intended to be, and have not been, disclosed to parties other than those encompassed by the attorney-client privilege. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the district may withhold the information you have marked 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.”<sup>3</sup> 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 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.). Upon review, we find the information we have marked constitutes evaluations of a teacher. Therefore, provided the teacher was required to hold and did hold the appropriate certificate and was engaged in the process of teaching at the time of the evaluations at issue, the evaluations are generally confidential under section 21.355 of the Education Code.

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 requestor is the representative for the teacher whose evaluations are at issue. Therefore, to the extent the evaluations we have marked are of the type that is contemplated by section 21.352, the requestor has a right of access to the teacher’s information under section 21.352(c) of the Education Code. However, if the requestor does not have a right of access under section 21.352(c), then provided the teacher was required to hold and did hold the appropriate certificate and was engaged in the process of teaching at the time of the evaluations at issue, 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 encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code, which governs access to medical records. See Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides, in part:

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<sup>3</sup>The 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).

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

*Id.* § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. Upon review, we find the information we have marked consists of records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created by a physician or someone under the supervision of a physician; therefore, the information we have marked is subject to the MPA and must be withheld under section 552.101 of the Government Code.

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)(1). Section 552.117(a)(1) encompasses an employee's personal cellular telephone number as long as the cellular service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 not applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). 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. We have marked a district employee's cellular telephone number. Accordingly, if the district employee whose information is at issue timely elected to keep her information confidential pursuant to section 552.024 and the cellular telephone service is not paid for by the district, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district may not withhold this information under section 552.117 if

the employee did not timely elect to keep her information confidential or if the cellular telephone service is paid for by the district.

Section 552.137 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). *See* Gov’t Code § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the district must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.<sup>4</sup>

In summary, the district may withhold the information you have marked under section 552.107 of the Government Code. To the extent the evaluations we have marked are of the type that is contemplated by section 21.352, the requestor has a right of access to the teacher’s information under section 21.352(c) of the Education Code. However, if the requestor does not have a right of access under section 21.352(c), then provided the teacher was required to hold and did hold the appropriate certificate and was engaged in the process of teaching at the time of the evaluations at issue, 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. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA. The district must withhold the information we have marked under section 552.117(a)(1) of the Government Code, if the employee whose information is at issue timely elected to keep her information confidential pursuant to section 552.024 of the Government Code and the cellular telephone service is not paid for by the district. The district must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner consents to its disclosure. The district must release the remaining information.<sup>5</sup>

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.

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<sup>4</sup>Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>5</sup>We note the requestor has a special right of access to some of the information being released in this instance. Gov’t Code § 552.023 (person or person’s authorized representative has special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person’s privacy interests). Because such information may be confidential with respect to the general public, if the district receives another request for this information from a different requestor, the district must again seek a ruling from this office.

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,



Thana Hussaini  
Assistant Attorney General  
Open Records Division

TH/som

Ref: ID# 474390

Enc. Submitted documents

c: Requestor  
(w/o enclosures)