



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 26, 2013

Ms. Elisabeth D. Nelson
For the Garland Independent School District
Law Offices of Robert E. Luna, P.C.
4411 North Central Expressway
Dallas, Texas 75205

OR2013-10909

Dear Ms. Nelson:

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# 491424.

The Garland Independent School District (the "district"), which you represent, received a request for all information pertaining to a specified student and the student's parent for a specified time period. You state you have released some information to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information, a portion of which you state is a representative sample.²

Initially, you inform us the district asked the requestor to clarify the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also* *City of Dallas v. Abbott*, 304

¹Although you raise Texas Rule of Evidence 503, we note 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).

²We 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.

S.W.3d 380, 387 (Tex. 2010). You state the district has not received a response to its request for clarification. However, a governmental body must make a good-faith effort to relate a request for information to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). In this case, as you have submitted responsive information for our review and raised exceptions to disclosure for this information, we consider the district to have made a good-faith effort to identify the information that is responsive to the request, and we will address the applicability of the claimed exceptions to the submitted information.

Next, the requestor contends, as a representative of the parents of the child to whom the requested information relates, she has a right of access to the requested information under the Individuals with Disabilities Education Act (“IDEA”), section 1400 of title 20 of the United States Code. *See* 20 U.S.C. § 1400; *see also* 34 C.F.R. § 300.613. We will assume, without deciding, the information at issue is subject to IDEA. Section 1417 of IDEA requires that personally identifiable information of participants be treated as prescribed by the Family Educational Rights and Privacy Act of 1974 (“FERPA”), 20 U.S.C. § 1232g. *See* 20 U.S.C. § 1417(c). Under FERPA, a student and the student’s parents have an affirmative right of access to the student’s own education records. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. We note our office is prohibited from reviewing education records to determine whether FERPA applies. Thus, we will not address the applicability of FERPA to the submitted records. As noted above, however, the requestor, as a representative of the parents of the child to whom the requested information relates, has a right of access under FERPA to her clients’ child’s education records and the right of access prevails over claims under sections 552.101 and 552.117 of the Government Code. *See* 20 U.S.C. § 1232g(a)(1)(A) (no funds shall be made available to educational agency that prevents parents of students, who have been in attendance at school, review of student’s education records); 34 C.F.R. § 99.3; *see also* *Equal Employment Opportunity Comm’n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (holding FERPA prevails over inconsistent provision of state law). However, the Family Policy Compliance Office of the United States Department of Education has informed this office that a parent’s right of access under FERPA does not prevail over an educational institution’s right to assert the attorney-client privilege. Thus, we will address your argument under section 552.107 of the Government Code. Additionally, we will consider all of the claimed exceptions to the extent FERPA does not apply to the submitted information.

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. Section 552.101 encompasses information protected by section 21.355 of the Education Code. Section 21.355 provides, in relevant part, “[a] document evaluating the performance of a teacher or administrator is confidential.” 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 administrator. *See* Open Records Decision No. 643 (1996). We have determined that for purposes of section 21.355, “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 or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. We also have determined that “administrator,” for purposes of section 21.355, means a person who is required to and does in fact hold an administrator’s certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.* The Third Court of Appeals has concluded a written reprimand constitutes an evaluation for purposes of section 21.355, because “it reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *See Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You contend the information contained in Exhibit B evaluates the performance of teachers and an administrator. You state, and have provided documentation showing, the individuals were certified as teachers and were acting as teachers at time the evaluations were made. Based on your representations and our review, we find the information we have marked constitute teacher evaluations for the purposes of section 21.355. Thus, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, we find the remaining information in Exhibits B-1 and B-3 does not constitute documents evaluating the performance of a teacher for the purposes of section 21.355 of the Education Code. Further, we find the information in Exhibit B-4 evaluates a certified teacher who was acting as an administrator at the time the information was created; however, you inform us this individual does not have an administrator certificate. Thus, the district may not withhold any of the remaining information in Exhibit B under section 552.101 of the Government Code on this basis.

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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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). 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.*, 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 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 explain the information you have marked in Exhibit C constitutes confidential communications between the district’s attorney and representatives of the district that were made in furtherance of the rendition of professional legal services. You also assert the communications have not been, nor were they intended to be, disclosed to third parties. After reviewing your arguments and the submitted information, we agree the information at issue constitutes privileged attorney-client communications. Accordingly, the district may withhold the information you have marked in Exhibit C under section 552.107 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 this information be kept confidential under section 552.024 of the Government Code.³ 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 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 on which the request for this information was made. Therefore, to the extent the individual whose information we have marked timely requested confidentiality under section 552.024 prior to the date the district

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

received receipt of the request for information, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code.

In summary, the district must withhold the information we have marked under section 552.101 of the Government in conjunction with section 21.355 of the Education Code. The district may withhold the information you have marked under section 552.107 of the Government Code. To the extent the individual whose information we have marked, timely requested confidentiality under section 552.024 prior to the date the district received receipt of the request for information, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The remaining information must be released. This ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consists of "education records" that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/som

Ref: ID# 491424

Enc. Submitted documents

c: Requestor
(w/o enclosures)