



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 29, 2014

Mr. Joseph E. Hoffer
Counsel for Trinity Charter Schools
Schulman, Lopez & Hoffer, L.L.P.
517 Soledad Street
San Antonio, Texas 78205

OR2014-01742

Dear Mr. Hoffer:

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# 512401.

Trinity Charter Schools ("Trinity"), which you represent, received a request for information pertaining to (1) student disciplinary incidents, (2) campus disciplinary policy, (3) staff and student policy handbooks, (4) parent directory information, (5) staff information, (6) disciplinary action and complaints against employees, and (7) terminated employees during specified time periods. You state you will release some of the requested information to the requestor. We understand you will redact certain information pursuant to section 552.130 of the Government Code, section 552.147 of the Government Code, and Open Records Decision No. 684 (2009).¹ You state you have not submitted information

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten specified categories of information without the necessity of requesting an attorney general decision. However, the Texas legislature amended section 552.130 to allow a governmental body to redact the information described in subsection 552.130(a) of the Government Code without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d),(e). Thus, the statutory amendment to section 552.130 supercedes Open Records Decision No. 684. Therefore, a governmental body may redact information subject to section 552.130(a) only in accordance with section 552.130, not Open Records Decision No. 684. 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. *See id.* § 552.147(b).

Trinity has deemed excepted from disclosure pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1332(a).² You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

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 of the Government Code encompasses section 21.355 of the Education Code. Section 21.355(a) provides that "[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 an 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. 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 North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You contend the information at issue evaluates the performance of certified teachers. We understand you to assert the employees concerned were acting in those capacities when the evaluative documents were created. You state the employees held valid certifications at the time of these evaluations. Based on your representations and our review, we conclude Trinity must withhold the information we have marked in Exhibit 2 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, we find none of the remaining information consists of teacher evaluations for the

²The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA 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. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>

³We 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 those records contain substantially different types of information than that submitted to this office.

purposes of section 21.355. Accordingly, none of the remaining information may be withheld under section 552.101 of the Government Code on this basis.

Section 552.101 also encompasses section 181.006 of the Health and Safety Code, which provides the following:

[F]or a covered entity that is a governmental unit, an individual's protected health information:

- (1) includes any information that reflects that an individual received health care from the covered entity; and
- (2) is not public information and is not subject to disclosure under [the Act].

Health & Safety Code § 181.006. Section 181.001(b)(2)(A) defines "covered entity" to include any person who:

(A) for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site[.]

Id. § 181.001(b)(2)(A). Although you assert Trinity is a covered entity, you have not explained how the submitted information consists of protected health information. Thus, you have not demonstrated the applicability of section 181.006 of the Health and Safety Code. Accordingly, Trinity may not withhold any of the submitted information under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses chapter 411 of the Government Code which pertains to criminal history record information ("CHRI"). Chapter 411 of the Government Code authorizes the Texas Department of Public Safety (the "DPS") to compile and maintain CHRI from law enforcement agencies throughout the state and to provide access to authorized persons to federal criminal history records. *See* Gov't Code §§ 411.042, .087.

In 2007, the Legislature enacted section 411.0845 of the Government Code, which provides in relevant part:

(a) The [DPS] shall establish an electronic clearinghouse and subscription service to provide [CHRI] to a particular person entitled to receive [CHRI] and updates to a particular record to which the person has subscribed under this subchapter.

(b) On receiving a request for [CHRI] from a person entitled to such information under this subchapter, the [DPS] shall provide through the electronic clearinghouse:

(1) the [CHRI] reported to the [DPS] or the Federal Bureau of Investigation relating to the individual who is the subject of the request; or

(2) a statement that the individual who is the subject of the request does not have any [CHRI] reported to the [DPS] or the Federal Bureau of Investigation.

...

(d) The [DPS] shall ensure that the information described by Subsection (b) is provided only to a person otherwise entitled to obtain [CHRI] under this subchapter. Information collected under this section is confidential and is not subject to disclosure under [the Act].

Id. § 411.0845(a)-(b), (d). Section 411.097(b) of the Government Code provides in part, “[a] charter school . . . is entitled to obtain from the [DPS CHRI] maintained by the [DPS] that the school . . . is required or authorized to obtain under Subchapter C, Chapter 22, Education Code, that relates to a[n] . . . employee of the school[.]” *Id.* § 411.097(b). Pursuant to section 22.083(a-1) of the Education Code, an open-enrollment charter school is authorized to obtain CHRI from the DPS’s electronic clearinghouse. *See* Educ. Code § 22.083(a-1)(1). Section 22.08391(d) of the Education Code states that any CHRI received by a charter school is subject to section 411.097(d) of the Government Code. *Id.* § 22.08391(d). Section 411.097(d) provides, in part, that “[CHRI] obtained by a . . . charter school . . . in the original form or any subsequent form . . . (1) may not be released to any person except: (A) the individual who is the subject of the information; (B) the Texas Education Agency; (C) the State Board of Educator Certification; (D) the chief personnel officer of the transportation company, if the information is obtained under Subsection (a)(2); or (E) by court order[.]” Gov’t Code § 411.097(d)(1)(B). You state Exhibit 4 consists of CHRI obtained from the DPS criminal history clearinghouse by Trinity pursuant to section 411.097. Based on your representations and our review, we find Trinity must

withhold Exhibit 4 under section 552.101 of the Government Code in conjunction with sections 411.0845 and 411.097(d) of the Government Code.⁴

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find the information we have marked in Exhibit 5 satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, Trinity must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.102(b) of the Government Code excepts from disclosure higher education transcripts of professional public school employees, but does not except the employee's name, the courses taken, and the degree obtained from disclosure. Gov't Code § 552.102(b); *see also* Open Records Decision No. 526 (1989). Thus, with the exception of the employees' names, courses taken, and degrees obtained, Trinity must withhold the submitted college transcripts in Exhibit 3 pursuant to section 552.102(b) of the Government Code.

Section 552.107(1) of the Government Code protects information that comes 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. *See* 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. *See* 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. *See 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 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

⁴As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

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). 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. *See 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 claim Exhibit 6 is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications involving Trinity employees and an attorney for Trinity. You state the communications were made in confidence for the purpose of facilitating the rendition of professional legal services to Trinity and that these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to Exhibit 6. Thus, Trinity may withhold Exhibit 6 under section 552.107(1) of the Government Code.

In summary, Trinity must withhold the information we have marked in Exhibit 2 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code; the entirety of Exhibit 4 under section 552.101 of the Government Code in conjunction with sections 411.0845 and 411.097(d) of the Government Code; the information we have marked in Exhibit 5 under section 552.101 of the Government Code in conjunction with common-law privacy; and, with the exception of the employees’ names, courses taken, and degrees obtained, the submitted college transcripts in Exhibit 3 pursuant to section 552.102(b) of the Government Code. Trinity may withhold Exhibit 6 under section 552.107(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.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,

A handwritten signature in cursive script that reads "Megan G. Holloway". The signature is written in black ink and is positioned above the typed name.

Megan G. Holloway
Assistant Attorney General
Open Records Division

MGH/dls

Ref: ID# 512401

Enc. Submitted documents

c: Requestor
(w/o enclosures)