



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 4, 2014

Ms. Leticia D. McGowan  
School Attorney  
Dallas Independent School District  
3700 Ross Avenue  
Dallas, Texas 75204

OR2014-15604

Dear Ms. McGowan:

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# 536148 (DISD ORR# 13127).

The Dallas Independent School District (the "district") received a request for the report related to a specified incident. You state you will release some information to the requestor with redactions pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state some of the requested information was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2014-13228 (2014). In that ruling, we determined the district (1) may withhold certain information under rule 503 of the Texas Rules of Evidence; (2) must withhold certain

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<sup>1</sup>The 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 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. The DOE has determined FERPA determinations must be made by the educational authority in possession of the educational records. We have posted a copy of the letter from the DOE on the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

<sup>2</sup>Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 677 (2002), 676 at 1-2 (2002), 575 at 2 (1990). Furthermore, we note the proper exceptions to raise when asserting the attorney-client privilege and the attorney work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111 of the Government Code, respectively. ORDs 677, 676 at 1-2.

information under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code; (3) must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code; (4) must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code; (5) must withhold certain information under section 552.101 of the Government Code in conjunction with the MPA; (6) must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy and the court's holding in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied); (7) must withhold certain information under section 552.101 of the Government Code in conjunction with common-law privacy; (8) must withhold certain information under section 552.101 in conjunction with constitutional privacy; (9) must withhold certain information under section 552.102(a) of the Government Code; (10) must withhold certain information under section 552.117(a)(2) of the Government Code, but may only withhold the cellular telephone numbers to the extent the cellular telephone service is not paid for by a governmental body; (11) must withhold certain information under section 552.117(a)(1) of the Government Code, to the extent the employees whose information is at issue timely elected to keep their information confidential pursuant to section 552.024 of the Government Code, and the cellular telephone service is not paid for by a governmental body; (12) must withhold certain information under section 552.130 of the Government Code; (13) must withhold certain information under section 552.135 of the Government Code; (14) must withhold certain information under section 552.137 of the Government Code, unless the e-mail addresses are subject to subsection (c) or the owners affirmatively consent to their public disclosure; (15) must withhold certain information under section 552.147(a-1) of the Government Code; and (16) must release the remaining information. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, the district must continue to rely on Open Records Letter No. 2014-13228 as a previous determination, and withhold or release the requested information that is identical to the information that was at issue in Open Records Letter No. 2014-13228 in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not encompassed by the previous ruling, we address your arguments against disclosure.

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. Section 21.355 of the Education Code 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). In Open Records Decision No. 643, we determined 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 in

the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4.

You contend the submitted information includes confidential evaluations of a teacher by an administrator. You inform us the individuals were employed as either a teacher or principal and were required to and did hold the appropriate certifications. Upon review, we find the information we have marked is confidential under section 21.355 of the Education Code. Therefore, 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.<sup>3</sup> However, we find you have failed to demonstrate how any of the remaining information consists of documents evaluating the performance of a teacher for purposes of section 21.355 of the Education Code. Accordingly, none of the remaining information may be withheld under section 552.101 of the Government Code on that basis.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See* 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. *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 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. Finally, the attorney-client privilege applies only to a confidential communication, 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

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<sup>3</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

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. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the remaining information includes communications between district legal counsel and district representatives. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the district and these communications have remained confidential. Based on these representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the remaining information. Thus, the district may withhold the remaining information under section 552.107(1) of the Government Code.<sup>4</sup>

In summary, the district must continue to rely on Open Records Letter No. 2014-13228 as a previous determination, and withhold or release the requested information that is identical to the information that was at issue in Open Records Letter No. 2014-13228 in accordance with that ruling. To the extent the submitted information is not encompassed by the previous ruling, 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 and may withhold the remaining information under section 552.107(1) of the Government Code.

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](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,



Tim Neal  
Assistant Attorney General  
Open Records Division

TN/bhf

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<sup>4</sup>As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

Ref: ID# 536148

Enc. Submitted documents

c: Requestor  
(w/o enclosures)