



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 30, 2016

Ms. Elizabeth Nelson  
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P.O. Box 168046  
Irving, Texas 75016

OR2016-19613

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# 624527.

The Ennis Independent School District (the "district"), which you represent, received a request for certain e-mail correspondence between named individuals and certain information pertaining to a named former employee.<sup>1</sup> You state you do not have information responsive to portions of the request.<sup>2</sup> You state you will make some information available to the

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<sup>1</sup>We note the district sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). We further note the district subsequently sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us, in response to the requirement of a deposit, the requestor modified his request on June 16, 2016, agreeing to seek access to, instead of copies of, the requested information. Thus, June 16, 2016, is the date on which the district is deemed to have received the request. *See id.* § 552.263(e-1) (modified request is considered received on the date the governmental body receives the written modification).

<sup>2</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

requestor. You state you will redact information pursuant to the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g(a).<sup>3</sup> You indicate you will redact information pursuant to sections 552.136(c) and 552.147(b) of the Government Code and information pursuant to section 552.137 of the Government Code in accordance with Open Records Decision No. 684 (2009).<sup>4</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.107 of the Government Code and privileged under Texas Rule of Evidence 503.<sup>5</sup> We have considered the submitted arguments and reviewed the submitted information, a portion of which constitutes a representative sample.<sup>6</sup>

Initially, we note you have marked a portion of the submitted information as not responsive to the instant request for information. This ruling does not address the public availability of non-responsive information, and the district need not release non-responsive information to the requestor.

Next, we note some of the responsive information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

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<sup>3</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.texasattorneygeneral.gov/open/20060725usdoe.pdf>.

<sup>4</sup>Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See* Gov’t Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). 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). Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

<sup>5</sup>Although you raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code and Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass other exceptions found in the Act or discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

<sup>6</sup>We 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.

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The responsive information contains court-filed documents that are subject to section 552.022(a)(17). This information must be released unless it is made confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022(a)(17), which we have marked, under section 552.107 of the Government Code. However, section 552.107 is discretionary in nature and does not make information confidential under the Act. *See Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions).* Therefore, the court-filed documents may not be withheld under section 552.107 of the Government Code. However, we note the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the court-filed documents. We will also consider your arguments against disclosure of the information not subject to section 552.022(a)(17).

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You claim the court-filed documents are attachments to a communication between attorneys for the district and district officials, employees, and representatives. You state the communication was made for the purpose of facilitating the rendition of professional legal services to the district. You indicate this communication was intended to be confidential and has remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the district may withhold the court-filed documents we have marked under rule 503 of the Texas Rules of Evidence.<sup>7</sup>

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov’t Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed above for rule 503. 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. 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*, 922 S.W.2d at 923.

You claim the remaining information you marked in Exhibit C is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications between attorneys for the district and district officials, employees, and representatives. You state the communications were made for the purpose of facilitating the

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<sup>7</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

rendition of professional legal services to the district. You indicate these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the district may withhold the remaining information you marked in Exhibit C under section 552.107(1) of the Government Code.<sup>8</sup>

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 the Americans with Disabilities Act of 1990 (the “ADA”). *See* 42 U.S.C. §§ 12101 *et seq.* Title I of the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a “fitness for duty examination” conducted to determine whether an employee is still able to perform the essential functions of his or her job is to be treated as a confidential medical record as well. *See* 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the “EEOC”) has determined that medical information for the purposes of the ADA includes “specific information about an individual’s disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual.” *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Federal regulations define “disability” for the purposes of the ADA as “(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.” 29 C.F.R. § 1630.2(g). The regulations further provide that physical or mental impairment means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. *See id.* § 1630.2(h). Upon review, we find the information we have marked is confidential under the ADA and the district must withhold that information under section 552.101 of the Government Code.<sup>9</sup> However, we conclude you have failed to demonstrate the ADA is applicable to any portion of the remaining information at issue, and none of the remaining responsive information may be withheld under section 552.101 on that basis.

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<sup>8</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

<sup>9</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Section 552.102(a) of the Government Code 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). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code. Section 552.101 of the Government Code encompasses 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). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert’s* interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. See *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. See *id.* at 348. Accordingly, the district must withhold the date of birth we have marked under section 552.102(a) of the Government Code. However, we find no portion of the remaining information at issue is subject to section 552.102(a) of the Government Code. Accordingly, the district may not withhold any of the remaining responsive information on that basis.

As stated above, section 552.101 of the Government Code encompasses the doctrine of common-law privacy, which protects the specific types of information the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Indus. Found.*, 540 S.W.2d at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). However, we note the public generally has a legitimate interest in information that relates to public employment and public employees. See Open Records Decision Nos. 542 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 432 at 2 (1984) (scope of public employee privacy is narrow). Furthermore, information pertaining to leave of public employees is generally a matter of legitimate public interest. See Open Records Decision No. 336 at 2 (1982) (names of employees taking sick leave and dates of sick leave taken not private).

Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the remaining information is not highly intimate or embarrassing information or is of legitimate public interest. Therefore,

none of the remaining responsive information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

You state you will redact certain information subject to section 552.117(a)(1) of the Government Code as permitted by section 552.024(c) of the Government Code.<sup>10</sup> Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code, except as provided by section 552.024(a-1). *See* Gov't Code §§ 552.117(a)(1), .024. Section 552.024(a-1) of the Government Code provides, "A school district may not require an employee or former employee of the district to choose whether to allow public access to the employee's or former employee's social security number." *Id.* § 552.024(a-1). Thus, a school district may only withhold under section 552.117 the home address and telephone number, emergency contact information, and family member information of a current or former employee or official of the district who requests this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We note the remaining responsive information contains additional information subject to section 552.117(a)(1). Accordingly, if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024 and the cellular telephone service is not paid for by a governmental body, the district must withhold the additional information we have marked under section 552.117(a)(1) of the Government Code. However, if the individual whose information is at issue did not make a timely election under section 552.024 or the cellular telephone service is paid for by a governmental body, the district may not withhold the information we have marked under section 552.117(a)(1) of the Government Code.

In summary, the district may withhold the court-filed documents we have marked under rule 503 of the Texas Rules of Evidence. The district may withhold the remaining information you marked in Exhibit C under section 552.107(1) of the Government Code.

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<sup>10</sup>Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). If a governmental body redacts such information, it must notify the requestor in accordance with subsections 552.024(c-1) and (c-2). *See id.* § 552.024(c-1)-(c-2).

The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the ADA. The district must withhold the date of birth we have marked under section 552.102(a) of the Government Code. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, and the cellular telephone service is not paid for by a governmental body, the district must withhold the additional information we have marked under section 552.117(a)(1) of the Government Code. The district must release the remaining responsive 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.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,



Kenny Moreland  
Assistant Attorney General  
Open Records Division

KJM/som

Ref: ID# 624527

Enc. Submitted documents

c: Requestor  
(w/o enclosures)