OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

March 3, 2003

Mr. Dan Junell
General Counsel
State Board for Educator Certification
4616 West Howard Lane, Suite 120
Austin, Texas 78728

OR2003-1324

Dear Mr. Junell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177386.

The State Board for Educator Certification (the "board") received a request for twelve categories of information. You claim that portions of the requested information are excepted from disclosure under sections 552.026, 552.101, 552.102, 552.107, 552.111, 552.114, 552.136, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.[1] We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

Initially, we note that you have included a document entitled "State Board of Educator Certification Consolidated Answers and Counterclaims." You do not address this document in your brief. Because you make no arguments for withholding this document and it is not otherwise confidential, it must be released. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must provide written comments stating reasons why stated exceptions apply that would allow information to be withheld).

[1]We assume that the 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.

You assert that to the extent Exhibit C contains telephone numbers of students at schools that receive government funds, such numbers are excepted under sections 552.026 and 552.114 of the Government Code. We note, however, that the board is not an "educational agency or institution" for purposes of these sections. *See* Gov't Code § 552.026 (incorporating Family Educational Rights and Privacy Act of 1974 ("FERPA"), Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g into Public Information Act); Open Records Decision No. 539 (1990) (noting that this office applies same analysis under FERPA and section 552.114); *see also* 20 U.S.C. 1232g(a)(3) (defining "educational agency or institution" as public or private agency receiving federal funds "under any applicable program"). Further, we note that none of the information contained in Exhibit C personally identifies a particular student and therefore none of it would be confidential under FERPA or section 552.114. Open Records Decision Nos. 332 (1982), 206 (1978). (concluding that information must be withheld under FERPA only to extent "reasonable and necessary to avoid personally identifying a particular student"); *see* 20 U.S.C. § 1232g(b)(1), (d) (outlining procedures for designating information as "directory information"); *see also* 20 U.S.C. § 1232g(a)(5)(A) (including student's "telephone listing" among examples of "directory information").

You also assert that portions of the requested information are confidential under federal law. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by section 6103(a) of title 26 of the United States Code, which provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Accordingly, pursuant to section 552.101 of the Government Code and section 6103(a) of title 26 of the United States Code, the board must withhold W-4 forms such as the one we have marked.

You contend that some of the telephone numbers represented by Exhibit C are confidential under section 261.201 of the Family Code because they were provided to the board in reports made pursuant to section 261.406 of the that title. *See* Fam. Code § 261.406(b) (requiring that Department of Protective and Regulatory Services send written report of its investigation to agency responsible for teacher certification if appropriate). Section 261.201(a) of the Family Code, which is also encompassed by section 552.101, provides:

> (a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:
>
> > (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

> (2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

We find that the list of telephone numbers represented by Exhibit C does not identify persons who reported abuse or neglect, nor does it constitute a file, report, record, communication, or working paper used or developed in an investigation under chapter 261. Further, the list of telephone numbers gives no indication of the source of the numbers or the context in which they were used. We therefore conclude that none of the information represented by Exhibit C is confidential under section 261.201 and none of it may be withheld on that basis.

You also assert that portions of Exhibit C are protected by the common law informer's privilege. Section 552.101 of the Government Code also encompasses information made confidential by judicial decisions. Texas courts have long recognized the informer's privilege. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which a governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The privilege excepts an informer's statement only to the extent necessary to protect the informer's identity. Open Records Decision No. 549 at 5 (1990).

You assert that some telephone numbers contained in Exhibit C reveal the identities of informants. You contend that release of these numbers would undermine the board's ability to get the cooperation of other similarly situated individuals. However, you have not indicated which telephone numbers belong to individuals who reported violations of law, do not specify what laws were allegedly violated, or state that such violations are subject to criminal or civil penalties. We therefore conclude that the board may not withhold any information pursuant to section 552.101 of the Government Code and the informer's privilege.

In addition, you contend that portions of the submitted information are excepted under the privacy principles embodied by sections 552.102 and 552.101. Section 552.102 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). In *Hubert*

v. Harte-Hanks Texas Newspapers, 652 S.W.2d 546 (Tex. App.–Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. We will therefore consider your claims regarding section 552.101 and section 552.102 together.

Common law privacy protects information that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* 2) of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. Generally only the information that either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common law privacy. In addition, prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common law privacy but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, a public employee's allocation of his salary to a voluntary investment program or to optional insurance coverage that is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common law right of privacy. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include federal tax Form W-4; designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care). Further, information related to an individual's mortgage payments, assets, bills, and credit history is excepted from disclosure under the common law right to privacy. *See* Open Records Decision Nos. 545 (1990), 523 (1989). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. *See* Open Records Decision No. 600 at 10 (1992).

Having considered your arguments and reviewed the submitted information, we agree that some of the information represented by Exhibit B is protected under common law privacy. We have marked the types of information that must be withheld on this basis under section 552.101. You also contend that portions of Exhibit C are protected by common law privacy. However, we conclude that lists of telephone numbers and cities do not reveal anything highly intimate or embarrassing about any particular person. Thus, none of Exhibit C may be withheld pursuant to traditional notions of common law privacy. *See* Open

Records Decisions Nos. 478 (1987), 455 (1987) (absent special circumstances, names, addresses, and telephone numbers are not "intimate" information).

You also assert that the information submitted as Exhibit C should be withheld due to the existence of "special circumstances." In Open Records Decision No. 169 (1977), this office considered the personal safety concerns of public employees, and we recognized that there may be specific instances where "special circumstances" exist to except from public disclosure some of the employees' addresses. *See* Open Records Decision No. 123 (1976). In Open Records Decision No. 169, the employees demonstrated that their lives would be placed in danger if their addresses were released to the public. ORD 169 at 7. This office further noted that the initial determination of credible threats and safety concerns should be made by the governmental body to which a request for disclosure is directed, and this office will determine whether a governmental body has demonstrated the existence of special circumstances on a case-by-case basis. *Id.*

You express generalized concerns that the release of the lists of phone numbers called might subject the individuals on the list to unwanted calls from the requestor. However, you provide no specific information detailing particularized threats or safety concerns. Thus, the board has failed to articulate how release of information such as that submitted as Exhibit C would present an imminent credible threat to any individual. We therefore conclude that the board has not demonstrated the existence of "special circumstances," and it may not withhold any information on this basis.

You further assert that portions of the submitted information are protected by constitutional privacy, which is also incorporated by section 552.101 of the Government Code. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy and includes only information that concerns the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). We have considered your arguments and reviewed the information at issue. We conclude, however, that you have not shown that any of this information comes within one of the constitutional zones of privacy or involves the most intimate aspects of human affairs. *See* Open Records Decision Nos. 470, 455, 444, 423 at 2. We therefore find that none of the submitted information may be withheld on the basis of constitutional privacy.

You assert that the "legal analyses" represented by Exhibit A are excepted from disclosure under section 552.107 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, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (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 writ). 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). Having considered your arguments and the submitted information, we agree that "legal analyses" such as the ones submitted in Exhibit A may be withheld under section 552.107(1).

You also contend that portions of the requested information are excepted under section 552.117 of the Government Code. Section 552.117(1) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). Therefore, the board may only withhold information under section 552.117 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. For those employees who timely elected to keep their personal information confidential, you must withhold the employees' home addresses and telephone numbers, social security numbers, and any information revealing whether those individuals have family members. We have marked examples of the types of information you must withhold.

You also contend that some of the requested information is excepted under section 552.136 of the Government Code. This section provides:

> (a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:
>
> > (1) obtain money, goods, services, or another thing of value; or
> >
> > (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.
>
> (b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked the information that the board must withhold under section 552.136.

In addition, we note that the submitted information includes email addresses of members of the public. Section 552.137 of the Government Code provides that "[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act]." We note that section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or website address. Unless the individual members of the public have affirmatively consented to release of their e-mail addresses, the board must withhold e-mail addresses such as those we have marked. *See* Gov't Code § 552.137(b).

Finally, we note that a portion of Exhibit C may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials,

the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, we have marked the types of information that must be withheld in accordance with sections 552.101, 552.117, 552.136, and 552.137. Pursuant to section 552.107, the board may withhold "legal analyses" such as those submitted in Exhibit A. All other requested information must be released, subject to copyright laws where applicable.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

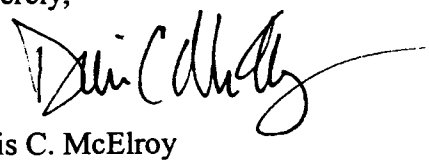
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Enc. Submitted documents

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