



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 23, 2005

Ms. Laura C. Rodriguez
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P.O. Box 460606
San Antonio, Texas 78246

OR2005-02492

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 220726.

The Judson Independent School District (the "district"), which you represent, received a request from the State Board of Educator Certification ("SBEC") for information relating to a former district employee and investigation. You indicate that a portion of the submitted information, which you have redacted, will be withheld because it is non-responsive to the request. Because you have determined that the information is non-responsive, we do not address the required public disclosure of such information in this ruling. You claim that the requested information is excepted from disclosure pursuant to sections 552.026, 552.101, 552.107, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we address your contention that a portion of the submitted information is confidential under article 20.02 of the Code of Criminal Procedure and thus must be withheld from the public pursuant to section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either

¹ We note that you have also redacted some of the submitted responsive information that you seek to withhold from the requestor. Because we are able in this instance to discern the nature of the information at issue, we will determine whether it is excepted from public disclosure. In the future, you should refrain from redacting any information that you submit to this office in seeking an open records ruling. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

constitutional, statutory, or by judicial decision.” This section encompasses confidentiality provisions such as article 20.02 of the Code of Criminal Procedure, which provides that “[t]he proceedings of the grand jury shall be secret.” Thus, information that reveals the proceedings of the grand jury is confidential under article 20.02(a) of the Code of Criminal Procedure and is excepted from disclosure under section 552.101 of the Government Code. Having reviewed the submitted information at issue, we conclude that none of it reveals the grand jury’s proceedings. Therefore, the district may not withhold any of the submitted information under section 552.101 in conjunction with article 20.02 of the Code of Criminal Procedure.

Section 552.101 also encompasses the Family Educational Rights and Privacy Act of 1974 (“FERPA”), which provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student’s education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student’s parent. *See* 20 U.S.C. § 1232g(b)(1). Section 552.114 of the Government Code provides a similar prohibition against public release of student records from an educational institution funded wholly or in part by state funds. “Education records” means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 U.S.C. § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990); *see* Gov’t Code § 552.026 (providing that Act only requires release of information from education records in conformity with FERPA). Information must be withheld from required public disclosure under FERPA only to the extent “reasonable and necessary to avoid personally identifying a particular student.” *See* Open Records Decision Nos. 332 (1982), 206 (1978). This includes information that directly identifies a student or parent, as well as information that, if released, would allow the student’s identity to be easily traced. *See* Open Records Decision No. 224 (1979) (finding student’s handwritten comments protected under FERPA because they make identity of student easily traceable through handwriting, style of expression, or particular incidents related). Having reviewed the responsive information, we have marked the information that identifies students of the district. The district must not release the marked information unless it has authorization under FERPA to do so.

We note that a governmental body may treat a request for information by another governmental body such as the SBEC as a request for information under the Act. However, a governmental body that receives such a request is not required to do so. *See* Attorney General Opinion JM-119 at 2 (1983). A transfer of information between governmental bodies is not necessarily a release to the public for purposes of chapter 552. *See id.* For example, an official or employee of a governmental body who, in an official capacity, requests information held by another governmental body does not act as a member of the public in doing so. Thus, an official or employee of one governmental body may review

records of another governmental body without implicating the prohibition of selective disclosure under chapter 552 of the Government Code. *See* Attorney General Opinion JM-119 at 2 (1983); *see also* Open Records Decision No. 468 at 4 (1987).

An interagency transfer of requested information is prohibited, however, if a confidentiality statute enumerates the specific entities to which confidential information may be disclosed, and the enumerated entities do not include the requesting governmental body. *See* Open Records Decision Nos. 655 at 8-9 (1997), 516 at 4-5 (1989), 490 at 2 (1988); *see also* Attorney General Opinions DM-353 at 4 n. 6 (1995), JM-590 (1986). In this instance, the applicable confidentiality statute is FERPA. FERPA authorizes the transfer of information to enumerated persons, agencies, and organizations for certain specified purposes. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.31. Under FERPA, the SBEC is not one of the persons, agencies, or organizations to which the school district may transfer the information that is at issue here. Therefore, the marked information that is confidential under FERPA must not be released to the requestor.

You claim that a portion of the remaining submitted information is subject to section 261.201 of the Family Code. This section provides in part:

(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, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You state that documents AG0068 through AG0075 relate to an investigation conducted under chapter 261 of the Family Code by the Child Protective Services Division ("CPS") of the Texas Department of Family and Protective Services. *See* Fam. Code § 261.406(a). Furthermore, you state that this information was provided to the district by CPS. We therefore conclude documents AG0068 through AG0075 are confidential in their entirety under section 261.201 of the Family Code and must be withheld from the requestor under section 552.101 of the Government Code as information made confidential by law.

Next, you contend that portions of the remaining submitted information are excepted from disclosure under section 552.101 in conjunction with common law privacy. Information is

protected under the common law right to privacy when (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (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. *Id.* at 683. Although the documents at issue pertain to allegations of inappropriate conduct of a sexual nature towards students, the names of these students must be withheld pursuant to FERPA. We find that the remaining information does not reveal the identity of any student; thus no student's privacy interest is implicated in this instance. *See* Open Records Decision No. 432 (1985) (common law privacy protects privacy of individual persons). Furthermore, the remainder of the information relates solely to the work conduct and job performance of a district employee, and is therefore subject to a legitimate public interest. *See* Open Records Decision Nos. 542 at 5 (1990) (information regarding public employee's qualifications is of legitimate concern to public), 473 at 3 (1987) (fact that public employee receives less than perfect or even very bad evaluation not protected by common law privacy), 470 at 4 (1987) (public employee's job performance does not generally constitute private affairs), 444 at 4 (1986) (public employee's personnel file information will generally be available to public regardless of whether it is highly intimate or embarrassing), 405 at 2 (1983) (manner in which public employee performed his or her job cannot be said to be of minimal public interest). We therefore determine that the none of the remaining information may be withheld under section 552.101 on the basis of common law privacy.

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). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, 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. Finally, 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 the definition of a confidential communication 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 representations and reviewed the information at issue, we agree that documents AG0039 through AG0053, the marked information in AG0064, and AG0065 through AG0067 constitute privileged attorney-client communications. Therefore, this information may be withheld pursuant to section 552.107(1) of the Government Code.

We note, that a portion of the remaining submitted information may be subject to section 552.117 of the Government Code.² Section 552.117(a)(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 a 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 is received by the governmental body. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, pursuant to section 552.117(a)(1), the district must withhold the information we have marked if the employee and former employee elected under section 552.024, prior to the district’s receipt of this request, to keep that information confidential. The district may not withhold this information under section 552.117(a)(1) if the employees did not make a timely election.

Regardless of whether it is protected under section 552.117, the former employee’s social security number may be confidential under federal law. A social security number must be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. *See Open Records Decision No. 622 (1994)*. These amendments make confidential social security numbers and related records that are obtained or maintained by

² The Office of the Attorney General will raise mandatory exceptions like section 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. *Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security number at issue is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

Finally, we note that the remaining submitted information contains e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov't Code § 552.137(a)-(c).* Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses we have marked do not appear to be of a type specifically excluded by section 552.137(c). Thus, the district must withhold these e-mail addresses under section 552.137 unless their owners have affirmatively consented to their release. *See Gov't Code § 552.137(b).*

In summary, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with FERPA and section 261.201 of the Family Code. The district may withhold the information you seek to withhold pursuant to section 552.107 of the Government Code. Pursuant to section 552.117(a)(1) of the Government Code, the district must withhold the information we have marked if the employees timely elected under section 552.024 to keep that information confidential. Regardless of whether section 552.117 applies, the marked social security number may be confidential under federal law. Unless the district has received affirmative consent to release any of the marked e-mail addresses, you must withhold them pursuant to section 552.137. The remaining information must be released to the requestor.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 220726

Enc. Submitted documents

c: Ms. Tracy Thomas
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(w/o enclosures)