ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 4, 2005

Ms. Ellen B. Huchital
McGinnis, Lochridge & Kilgore, L.L.P.
3200 One Houston Center
1221 McKinney Street
Houston, Texas 77010

OR2005-09004

Dear Ms. Huchital:

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# 233619.

The Eanes Independent School District (the "district"), which you represent, received a request for (1) the personnel file of a named former district principal, and (2) the "[t]otal number of grievances filed each of the past five years with the district, broken down by levels one, two and three." You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.107, 552.114, 552.117, and 552.137 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted information.[2]

Section 552.101 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 made confidential by other statutes. Section 21.355 of the

[1]Although you also raise rule 503 of the Texas Rules of Evidence as a potential exception to disclosure, the submitted information is not subject to section 552.022 of the Government Code; therefore, rule 503 does not apply in this instance. *See* Open Records Decision No. 676 at 4 (2002).

[2]We note that the district has redacted social security numbers in the submitted information. 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 under the Act.

Education Code, which provides that "[a] document evaluating the performance of a teacher or administrator is confidential." 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. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined that the word "teacher" for purposes of section 21.355 means a person who (1) 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 (2) is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. We also concluded that the word "administrator" in section 21.355 means a person who is required to and does in fact hold an administrator's certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

You contend that portions of the submitted information consist of evaluations of a certified administrator who was performing the duties of an administrator at the time of the evaluations. Based on the reasoning set out in Open Records Decision No. 643, we conclude that documents labeled B81-98 constitute evaluations of a certified administrator that are confidential under section 21.355 of the Education Code and must therefore be withheld pursuant to section 552.101 of the Government Code. However, this office is currently involved in litigation styled *North East Independent School District v. Abbott*, Cause No. GN304566 (345th Dist. Ct., Travis County, Tex.), *appeal filed*, No. 03-04-00744-CV (Tex. App.—Austin Nov. 15, 2004). Your arguments and the information that you have submitted in the documents labeled B66-71 are similar to the issues and information involved in the pending litigation. Accordingly, this ruling does not address the documents B66-71 and we will allow the court to determine whether the type of information at issue must be released to the public.

We note that the submitted documents include an I-9 form (Employment Eligibility Verification) and an attachment to the form. Section 552.101 of the Government Code encompasses section 1324a of title 8 of the United States Code, which provides that an I-9 form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the I-9 form in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we determine that the I-9 form and its attachment are confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 of the Government Code encompasses the doctrine of common law privacy. Information must be withheld from disclosure under the common law right to privacy when 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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types 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. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked the information that must be withheld under section 552.101 of the Government Code in conjunction with common law privacy.[3]

You contend that some of the submitted information is confidential under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g(b)(1).[4] FERPA 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). "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. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

> This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.206. In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA,

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[3]As we are able to make this determination, we need not address your remaining claims against disclosure for this information.

[4] Section 552.026 incorporates FERPA into the Act. *See* Gov't Code § 552.026 (Act does not require release of information contained in education records of educational agency or institution, except in conformity with FERPA).

without the necessity of requesting an attorney general decision as to that exception. In this instance, however, you have submitted the requested information to this office for consideration. Therefore, we will consider whether the information is protected by 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). We have marked the student-identifying information that must be withheld under section 552.114 and FERPA.[5]

You also claim that the submitted transcripts are excepted from disclosure under section 552.102(b) of the Government Code. Section 552.102(b) excepts from disclosure all information from transcripts of professional public school employees other than the employee's name, the courses taken, and the degree obtained. Gov't Code § 552.102(b); Open Records Decision No. 526 (1989). Thus, with the exception of the former employee's name, the courses taken, and the degrees obtained, the district must withhold the submitted transcripts pursuant to section 552.102(b).

You claim that the documents labeled B41-55 are excepted from disclosure under section 552.107 of the Government Code, which 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,

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[5]As we are able to make this determination, we need not address your remaining claim against disclosure for this information.

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).

In this instance, you assert that the documents labeled B41-55 consist of communications between an attorney for the district and district employees made for the purpose of rendering professional legal advice. Furthermore, you assert that these communications were intended to be confidential and confidentiality has been maintained. Based on these representations and our review of the information at issue, we agree that documents B41-55 are privileged attorney-client communications that the district may withhold under section 552.107.

You also claim that portions of the submitted information are excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the 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(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). In this instance, the submitted documentation indicates that the former employee at issue elected, prior to the district's receipt of this request, to keep his home address and home telephone number confidential. However, this documentation does not indicate that the former employee timely elected to keep his family member information confidential. Therefore, to the extent that the former employee elected prior to the district's receipt of this request to keep his family member information confidential, such information, in addition to the former employee's home address and home telephone number, must be withheld under section 552.117(a)(1). However, if the former employee did not timely elect to keep his family member information confidential, such information may not be withheld pursuant to section 552.117(a)(1).

The remaining submitted documents include information that is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by

an agency of this state[.]" Gov't Code § 552.130(a)(1). Accordingly, the district must withhold the Texas-issued motor vehicle record information we have marked under section 552.130.

In summary, the district must withhold the evaluations submitted as B81-98 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. We do not, however, address the applicability of section 21.355 of the Education Code to the documents submitted as B66-71. The marked I-9 form and its attachment are confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system. The information we have marked must be withheld under section 552.101 of the Government Code in conjunction with common law privacy. The student-identifying information we have marked must be withheld under section 552.114 and FERPA. With the exception of the former employee's name, the courses taken, and the degrees obtained, the district must withhold the submitted transcripts pursuant to section 552.102(b) of the Government Code. The documents labeled B41-55 may be withheld from disclosure under section 552.107 of the Government Code. The district must withhold the former employee's home address and telephone number under section 552.117(a)(1) of the Government Code. If the former employee made a timely election to keep his family member information confidential, such information must also be withheld under section 552.117(a)(1) of the Government Code. The marked Texas-issued motor vehicle record information must be withheld under section 552.130 of the Government Code. The remaining information must be released.

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

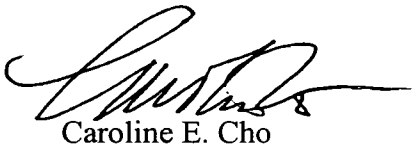
requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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); *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 Office of the Attorney General 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. 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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CEC/sdk

Ref: ID# 233619

Enc. Submitted documents

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