



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 26, 2006

Ms. Ann Greenberg
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2006-06746

Dear Ms. Greenberg:

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# 252251.

The Lake Travis Independent School District (the "district"), which you represent, received twenty-one requests for information from the same requestor. You state that the district has released a portion of the requested information to the requestor. You claim that the submitted documents, which pertain to the requestor's family, certain e-mail communications, and certain expenditures and reimbursements, are excepted from disclosure under sections 552.026, 552.101, 552.102, 552.103, 552.107, 552.111, 552.114, 552.117, 552.136, and 552.147 of the Government Code.¹ We have considered your arguments and reviewed the submitted information.²

Initially, we note that portions of the submitted information were the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2005-8408 (2005) and 2005-10910 (2005). As the submitted information is identical

¹Although you raise rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure as potential exceptions to disclosure, the information for which you claim these privileges is not subject to section 552.022 of the Government Code. Therefore, rule 503 and rule 192.5 do not apply in this instance. See Open Records Decision No. 676 at 4 (2002).

²We note that you have submitted information to this office that is not responsive to the request and that appears to have been submitted for informational purposes only. We do not address in this ruling the applicability of the Act to this information.

to the information previously requested and ruled upon by this office, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior rulings were based have changed, the district must continue to rely on these rulings as previous determinations and withhold or release the information at issue in accordance with Open Records Letter Nos. 2005-8408 and 2005-10910. *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).

Next, you note that portions of the submitted information consists of education records. 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 made confidential by other statutes such as FERPA. *See* 20 U.S.C. § 1232g(b)(1). Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides:

[t]his 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 § 552.026. 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); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Under FERPA, "education records" are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Generally, FERPA requires that information be withheld only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* 34 C.F.R. § 99.3 ("personally identifiable information" under FERPA includes, among other things, "[o]ther information that would make the student's identity easily traceable"). 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).

However, under FERPA, a student's parents or guardians have an affirmative right of access to their child's education records. *See* 20 U.S.C. § 1232g(a)(1)(A). As the requestor in this

instance is a parent of a student who is identified in the requested information, the requestor has a right of access under FERPA to the records that pertain to his child. However, FERPA does not grant the requestor a right of access to information that identifies students other than his child. See 34 C.F.R. § 99.12(a) (“If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student”). Thus, to the extent that the submitted information identifies students other than the requestor’s child, the district must withhold such information under FERPA. See also Open Records Decision Nos. 332 (1982), 206 (1978) (information must be withheld under FERPA only to extent reasonable and necessary to avoid personally identifying particular student). We have marked information in the submitted documents that identifies district students other than the requestor’s children. The district must withhold the marked information pursuant to FERPA.

We note that the information to which the requestor has a right of access under FERPA may not generally be withheld pursuant to an exception to disclosure under the Act. See *Equal Employment Opportunity Comm’n v. City of Orange, Texas*, 905 F. Supp 381, 382 (E.D. Tex. 1995) (federal law prevails over inconsistent provision of state law); see also Open Records No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to section 552.103). However, since the Family Policy Compliance Office of the United States Department of Education has informed this office that the right of access of a student’s parent under FERPA to information about the student does not prevail over an educational institution’s right to assert the attorney-client privilege or work product privilege, we will address your claims that information pertaining to the requestor’s child is excepted from disclosure pursuant to section 552.107 of the Government Code and the work product privilege as encompassed by section 552.111 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). 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). Based on your representations and our review, we conclude the district may withhold the documents we have marked in the remaining information under section 552.107. However, you have not established that the remaining communications at issue were intended to be confidential, or that the confidentiality of the communications has been maintained. Therefore, the district may withhold only the documents we have marked under section 552.107 of the Government Code.

You also claim that the remaining information in Exhibits 3-10 is protected under section 552.111 of the Government Code. Section 552.111 excepts from public disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2 (1993)*. The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); *Open Records Decision No. 538 at 1-2 (1990)*.

In *Open Records Decision No. 615 (1993)*, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect the policymaking processes of the governmental body. *See Open Records Decision No. 615 at 5*.

Further, section 552.111 can encompass communications between a governmental body and a third party consultant. *See Open Records Decision Nos. 631 at 2 (1995)* (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body’s request and performing task that is within governmental body’s authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with

which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* Open Records Decision No. 561 at 9 (1990).

You argue that the "documents in question consist of communications between the [d]istrict personnel and communications between [d]istrict personnel and counsel." However, we note that these documents were shared with outside parties. In this instance, you have not submitted any arguments explaining how the district shares a privity of interest or common deliberative process with these outside parties. Therefore, the district has failed to establish the applicability of section 552.111 to the information at issue. *See* Gov't Code § 552.301(e)(1) (requiring the governmental body to explain the applicability of the raised exception). Thus, these documents may not be withheld under section 552.111 of the Government Code

You assert that some of the remaining information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). Contested cases

conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991).

You inform us that the requestor filed suit against the district on January 18, 2006, and you have provided our office with a copy of Plaintiff's Original Complaint in Civil Action No. A-06-CA-0416-SS before the United States District Court for the Western District of Texas. You further state and provide documentation demonstrating that the requestor has filed several complaints against district representatives before the State Board for Educator Certification. Upon review, we find that the district was involved in the pending litigation prior to the date the district received the present requests. Additionally, we agree that portions of the information at issue, which we have marked, relate to the pending litigation. Accordingly, the district may withhold the information we have marked pursuant to section 552.103 of the Government Code. However, the district has not established that the remaining information at issue relates to the pending litigation. Thus, it may not be withheld on this basis.

The district seeks to withhold portions of the submitted personnel records pursuant to section 552.102 of the Government Code. Section 552.102(a) excepts from required public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This exception applies when the release of information would result in a violation of the common-law right to privacy. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.). The common-law right to privacy is violated if (1) the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person, and (2) the information is of no legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex.—1976). The common-law right to privacy encompasses personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990). The common-law right to privacy encompasses certain types of personal financial information. This office has determined that financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (financial information not excepted from public disclosure by common-law privacy generally includes those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body). Thus, a public employee's allocation of part of the employee's salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See, e.g.*, Open Records Decision Nos. 600 at 9-12 (1992)

(participation in TexFlex), 545 at 3-5 (1990) (deferred compensation plan). Likewise, the details of an employee's enrollment in a group insurance program, the designation of the beneficiary of an employee's retirement benefits, and an employee's authorization of direct deposit of the employee's salary are protected by common-law privacy. *See* Open Records Decision No. 600 at 9-12. But where a transaction is funded in part by a governmental body, it involves the employee in a transaction with the governmental body, and the basic facts about that transaction are not private. *See id.* at 9 (basic facts of group insurance provided by governmental body not protected by common-law privacy).

We note that a portion of the financial information that you have marked pertains to child support payroll deductions. To the extent the child support payroll deductions are required because of a garnishment order through the Office of the Attorney General's Child Support Division, the information is not private and must be released. However, if the child support payroll deductions are a voluntary choice by the employee, the information is private and must be protected under section 552.102.

Upon review, we agree that some of the information you have marked is personal financial information that must be withheld under section 552.102. However, some of the information at issue pertains to transactions funded by the district. This information is not private because there is a legitimate public interest in the information. Therefore, the district must withhold the information we have marked under section 552.102. The remaining information at issue may not be withheld on this basis.

You also assert that portions of the submitted information must be withheld 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 timely request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). We note that a post office box number is not a "home address" for purposes of section 552.117.³ However, information that is responsive to a request may not be withheld from disclosure under section 552.117(a)(1) if the employee did not request confidentiality for this information in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). If an employee depicted in the submitted documents timely elected to keep personal information confidential, the district must withhold the information you have marked and the additional information we have marked under section 552.117(a)(1) of the Government Code. However, the district may not withhold any

³See Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of Gov't Code § 552.117 is to protect public employees from being harassed *at home*) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)) (emphasis added).

information under section 552.117(a)(1) if the employees did not make timely elections to keep their information confidential.

Regardless of whether section 552.117 applies, the social security numbers in the submitted information are confidential under section 552.147 of the Government Code which provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Gov’t Code § 552.147. Therefore, the district must withhold the social security numbers contained in the remaining submitted information under section 552.147.

We note that the remaining information includes license plate numbers. Section 552.130 of the Government Code provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator’s or driver’s license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Gov’t Code § 552.130(a)(1), (2). We are unable to determine if the license plate numbers that we have marked were issued by the State of Texas. To the extent the license plate numbers were issued by the State of Texas, they must be withheld under section 552.130. If they were not issued by the State of Texas, they must be released.

Next, you claim that portions of the submitted information are excepted from disclosure under section 552.136 of the Government Code. Section 552.136 states that “[n]otwithstanding 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. The district must withhold the account numbers you have marked pursuant to section 552.136.

The remaining information includes personal e-mail addresses. Section 552.137 of the Government Code 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). We note that section 552.137 does not apply to the work e-mail addresses of officers or employees of a governmental body. The e-mail addresses at issue are generally not of the type specifically excluded by section 552.137(c). Therefore, unless the relevant individual has consented to its release, the district must withhold the e-mail addresses we have marked in accordance with section 552.137 of the Government Code.

In summary, the district must continue to rely on Open Records Letter Nos. 2005-8408 and 2005-10910 as previous determinations with regard to the submitted information that is identical to the information previously requested and ruled upon by this office in those prior rulings. The student-identifying information we have marked must be withheld under section 552.101 of the Government Code in conjunction with FERPA. The confidential attorney-client communications that we have marked may be withheld under section 552.107 of the Government Code. The information that we have marked may be withheld under section 552.103 of the Government Code. The personal financial information that we have marked must be withheld under section 552.102 of the Government Code. The information you have marked and the additional information we have marked must be withheld under section 552.117(a)(1) of the Government Code to the extent it pertains to employees who timely elected confidentiality. Regardless of the applicability of section 552.117, the submitted social security numbers must be withheld under section 552.147 of the Government Code. The license plate numbers that we have marked must be withheld under section 552.130 of the Government Code if they were issued by an agency of the State of Texas. The account numbers that you have marked must be withheld under section 552.136 of the Government Code. The personal e-mail addresses that we have marked must be withheld under section 552.137 of the Government Code. The remaining submitted 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); *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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Assistant Attorney General
Open Records Division

LJJ/sdk

Ref: ID# 252251

Enc. Submitted documents

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(w/o enclosures)