



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 28, 2006

Ms. Marquette Maresh  
Walsh, Anderson, Schulze & Aldridge, P.C.  
P.O. Box 2156  
Austin, Texas 78768

OR2006-09966

Dear Ms. Maresh:

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# 257785.

The Austin Independent School District (the "district"), which you represent, received nine requests for information pertaining to a named former teacher of the district. You inform us that some of the requested information has been released to the requestors. You state that the district will redact social security numbers from the requested information pursuant to section 552.147 of the Government Code. *See Gov't Code § 552.147(b)* (governmental body may redact social security number from public release without necessity of requesting decision from this office under the Act). You claim that portions of the remaining requested information are exempted from disclosure under sections 552.101, 552.102, 552.107, 552.114, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that recently, the United States Department of Education Family Policy Compliance Office (the "DOE") informed this office that the Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purposes of our review in the open records ruling process under the Act. Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See 34 C.F.R. § 99.3* (defining

“personally identifiable information”). You have submitted, among other things, redacted education records for our review. You state you will withhold the identifying information of students from the requested documents pursuant to FERPA. Accordingly, we will address the applicability of the claimed exceptions to the remainder of the submitted information.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses federal statutes. Exhibit 7 contains an I-9 form (Employment Eligibility Verification), which is governed by section 1324a of Title 8 of the United States Code. This section 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 form in this instance would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that the I-9 form is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 also encompasses section 21.355 of the Education Code, which provides, “a document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also determined that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of the evaluation. *Id.* Upon review, we agree that most of the information submitted as Exhibit 5, which we have marked, falls within the scope of section 21.355 and must be withheld under section 552.101. We find, however, that the remaining information in Exhibit 5 does not evaluate the performance of a teacher as provided by section 21.355 of the Education Code. Therefore, the district may not withhold any of the remaining information in Exhibit 5 on that basis.

Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy protects information if (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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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. You assert that the release of the submitted photographs and their written descriptions would violate the named former teacher’s expectation of privacy. You acknowledge, however, that the photographs at issue were obtained from publicly available websites. We find that, as these photographs

were obtained from the public domain, the individuals pictured have no reasonable expectation of privacy. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (action for invasion of privacy cannot be maintained where information is in public domain); *Star Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (law cannot recall information once in public domain). Furthermore, this information relates to the former teacher's employment with the district, which is of legitimate public interest. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and circumstances of his resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Accordingly, none of the submitted information may be withheld under section 552.101 of the Government Code on the basis of common law privacy.

The district seeks to withhold portions of the submitted transcripts in Exhibit 6 pursuant to section 552.102 of the Government Code. Section 552.102(b) of the Government Code exempts from disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee." Gov't Code § 552.102(b). This section further provides, however, that "the degree obtained or the curriculum on a transcript in the personnel file of the employee" are not excepted from disclosure. *Id.* Thus, except for the information that reveals the degrees obtained and the courses taken, which you state you have released, the district must withhold the submitted transcripts pursuant to section 552.102(b) of the Government Code.

Next, you claim that the information submitted as Exhibit 4 is protected by the attorney-client privilege. Section 552.107(1) of the Government Code 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 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).

In this instance, you assert that Exhibit 4 consists of communications between an attorney representing the district and a district employee made for the purpose of rendering professional legal advice. Furthermore, you assert that these communications were intended to be confidential and their confidentiality has been maintained. Based on these representations and our review of the information at issue, we agree that the information submitted as Exhibit 4 consists of a privileged attorney-client communication that the district may withhold under section 552.107(1). Accordingly, the district may withhold the information submitted as Exhibit 4 under section 552.107.

Section 552.117(a)(1) of the Government Code 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. *See Gov't Code* § 552.117. 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). In this instance, you provide documentation showing that the employees whose information is at issue timely elected confidentiality under section 552.024 for their information. Accordingly, the district must withhold the information we have marked under section 552.117(a)(1).

The district raises section 552.130 of the Government Code for portions of the remaining submitted information. In relevant part, section 552.130 provides:

(a) Information is excepted from required public disclosure 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). Upon review, we agree that you must withhold the Texas-issued motor vehicle record information we have marked under section 552.130 of the Government Code.

Finally, we note that some of the information at issue appears to 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, the district must withhold: 1) the submitted I-9 form under section 552.101 of the Government Code in conjunction with section 1324a of Title 8 of the United States Code; 2) the teacher evaluations we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code; 3) with the exception of the courses taken and the degree obtained, the submitted transcripts under section 552.102(b) of the Government Code; 4) the information we have marked under section 552.117 of the Government Code; and 5) the Texas motor vehicle record information we have marked under section 552.130 of the Government Code. The district may withhold the information we have marked under section 552.107 of the Government Code. The remaining information at issue must be released; however, in releasing information that the protected by copyright, the district must comply with applicable copyright laws.

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,



Lisa V. Cubriel  
Assistant Attorney General  
Open Records Division

LVC/eb

Ref: ID# 257785

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