ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 20, 2006

Ms. Mia M. Martin
General Counsel
Richardson Independent School District
400 South Greenville Avenue
Richardson, Texas 75081-4198

OR2006-10084A

Dear Ms. Martin:

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# 258645.

The Richardson Independent School District (the "district") received a request for information related to two named teachers and any complaints filed against one of those teachers. The district sought a ruling from this office as to whether some of the requested information was excepted from disclosure under the Act and, in response, this office issued Open Records Letter No. 2006-10084 (2006). We have reexamined our ruling in that decision and have determined that an error was made in its issuance. When this office determines that an error was made in the decisional process under sections 552.301 and 552.306 of the Government Code and that the error resulted in an incorrect decision, we will correct the previously issued ruling. As we have determined that Open Records Letter 2006-10084 is incorrect, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2006-10084 and serves as the correct ruling.

You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.117, 552.135, and 552.137 of the Government

Code.[1] We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the United States Department of Education Family Compliance Office recently informed this office that the Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, does not permit state and local education authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. Consequently, state and local education authorities that receive a request for education records 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 that the district will withhold the redacted information, which consists of personally identifiable information, 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." Section 552.101 encompasses information protected by other statutes, such as section 21.355 of the Education Code. Section 21.355 provides that "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). The Third Court of Appeals has also held that a written reprimand constitutes an evaluation for purposes of section 21.355. *See Abbott v. North East Indep. Sch. Dist.*, No. 03-04-00744-CV (Tex. App.—Austin 2006, no pet. h.). This office has 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. Open Records Decision No. 643. You contend that some of the submitted information constitutes teacher evaluations for purposes of section 21.355. You also state that the teachers at issue each hold a certificate under chapter 21 of the Education Code. Upon review, we find that one of the submitted documents constitutes an evaluation for purposes of section 21.355. This information, which we have marked, must be withheld under section 552.101 of the Government Code. We find, however, that the district has not demonstrated that the remaining information constitutes an evaluation for purposes of section 21.355. Therefore, none of the remaining information may be withheld on that basis.

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[1]Although you initially raised section 552.111 of the Government Code, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we assume you have withdrawn your claim under this exception. *See* Gov't Code §§ 552.301, .302.

Section 552.101 of the Government Code also encompasses the doctrine of common law privacy. Section 552.102(a) of the Government Code excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The privacy analysis under section 552.102(a) is the same as the common law privacy standard under section 552.101. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). We will therefore consider the applicability of common law privacy under section 552.101 together with your claim regarding section 552.102.

In *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), the Texas Supreme Court held that information is protected by common law privacy if 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 a legitimate concern to the public. *See* 540 S.W.2d at 685. To demonstrate the applicability of common law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and therefore generally not protected from disclosure under common law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). We have reviewed the remaining documents and marked the information that is highly intimate or embarrassing and of no legitimate concern to the public. This marked information is confidential under the doctrine of common law privacy and must be withheld under sections 552.101 and 552.102. We find, however, that the remaining information pertains to the work conduct of district employees and is of a legitimate public interest. Therefore, none of the remaining information is confidential under the doctrine of common law privacy, and it may not be withheld under either section 552.101 or section 552.102.

Next, we address your arguments 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 Tex. 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).

You state that the remaining information includes the hand written notes of the district's attorney. You explain that these notes were "made in connection with the rendering of [the attorney's legal] advice to the" district. We note, however, that you have not demonstrated that these notes constitute attorney-client communications or documentation of such communications. *See* Open Records Decision No. 676 at 7 (governmental body must demonstrate that information constitutes or documents a communication). Therefore, we find that the district has not demonstrated the applicability of the attorney-client privilege in this instance, and none of the information at issue may be withheld under section 552.107 of the Government Code.

Next, we address your arguments under section 552.117(a)(1) of the Government Code, which excepts from disclosure the home address and telephone number, social security number, and family member information of current or former employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). 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). The district may only withhold information under section 552.117(a)(1) on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this

information was made. We note that the remaining documents contain the two named teachers' personal information. You state that one of the teachers timely elected under section 552.024 to keep her personal information confidential. Therefore, this teacher's personal information, which we have marked, must be withheld under section 552.117 of the Government Code. As for the remaining teacher's information, we note that the requestor is his attorney. Therefore, the requestor has a right of access to her client's personal information and it must be released to her. Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on grounds that information is considered confidential by privacy principles).

Next, you assert that some of the remaining information is excepted under section 552.135 of the Government Code, which provides the following:

> (a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.
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> (b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Id. § 552.135(a), (b). Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under that exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* § 552.301(e)(1)(A). You state that the remaining information contains identifying information of a district employee who reported possible violations of criminal and regulatory law to the district. We note, however, that the incident in question was reported to the district by a member of the public. Therefore, we find that you have not demonstrated that the employee at issue is an informant for purposes of section 552.135(a). Therefore, the information which identifies this employee is not excepted from disclosure under section 552.135(b).

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 id.* § 552.137(a)-(c). We note that 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. In this instance, most of the e-mail addresses you have marked do not appear to be of a type specifically excluded by section 552.137(c). Therefore, the district must withhold such e-mail addresses in accordance with section 552.137 unless the district receives consent for their release. We

note, however, that one of the submitted addresses is the work e-mail address of a government employee. This e-mail address, which we have marked, is not excepted from disclosure under section 552.137 and it must be released.

In summary, the district must withhold the evaluation we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must also withhold the information we have marked under sections 552.101 and 552.102 of the Government Code in conjunction with the doctrine of common law privacy. The personal information we have marked must be withheld under section 552.117 of the Government Code. With the exception of the e-mail address we have marked, the district must withhold the e-mail addresses you have marked under section 552.137 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,

James A. Person III
Assistant Attorney General
Open Records Division

JAP/dh

Ref: ID# 258645

Enc. Submitted documents

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