



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 19, 2007

Ms. Carolyn M. Hanahan
Fort Bend Independent School District
16431 Lexington Boulevard
Sugar Land, Texas 77479

OR2007-02959

Dear Ms. Hanahan:

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# 274432.

The Fort Bend Independent School District (the "district") received a request for information pertaining to a former teacher. You state that some of the requested information has been provided to the requestor, but claim that some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.108, 552.130, 552.135, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Recently, the United States Department of Education Family Policy Compliance Office (the "DOE") informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a), 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 purpose of our review in the open records

¹Although the district asserts that the submitted transcripts are excepted from release under section 552.024(b) of the Government Code, we understand the district to assert section 552.102(b) instead. Section 552.024 is not an exception to disclosure under the Act, but it instead permits an employee of a governmental body to choose whether to allow public access to certain information relating to the employee that is held by the employing governmental body.

ruling process under the Act.² Consequently, state and local educational authorities that receive a request for education records from a member of the public under the PIA 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 and unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of the education records.³ We will, however, address the applicability of the claimed exceptions to 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.” This section encompasses information protected by other statutes. Section 261.201(a) of the Family Code provides as follows:

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, 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). Exhibit B-1 pertains to a district police department investigation of alleged sexual abuse of students by the individual at issue. *See id.* §§ 101.003(a) (defining “child” for purposes of section 261.201 as “person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes”), 261.001(1)(E) (definition of child abuse includes sexual assault or aggravated sexual assault under Penal Code sections 22.011 and 22.021). This information consists of files, reports, records, communications, or working papers used or developed in an investigation under chapter 261; therefore, this information is within the scope of

²A copy of this letter may be found on the Office of the Attorney General’s website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

³In the future, if the district does obtain parental consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

section 261.201. You do not indicate that the district has adopted a rule governing the release of this type of information; therefore, we assume that no such regulation exists. Based on this assumption, we conclude that Exhibit B-1 is confidential pursuant to section 261.201 of the Family Code, and the district must withhold it under section 552.101 of the Government Code.⁴ See Open Records Decision No. 440 at 2 (1986) (predecessor statute).

Section 552.101 also encompasses section 21.355 of the 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 a “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 agree that Exhibit B-2 consists of evaluations of the former teacher. Thus, provided the employee at issue was required to hold and did hold the appropriate certificate and was teaching at the time of the submitted teaching evaluations, Exhibit B-2 is confidential under section 21.355 of the Education Code, and the district must withhold it under section 552.101 of the Government Code.

Section 552.101 also encompasses federal law. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. See 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); see also Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Accordingly, the W-4 tax form in the submitted information is confidential under section 6103(a), and the district must withhold it under section 552.101 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information that (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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. See Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, information related to an individual’s mortgage payments, assets, bills, and credit history is generally protected by the common-law right to privacy. See Open Records Decision Nos. 545, 523 (1989); see also Open Records Decision No. 600 (finding personal financial information to include choice of particular insurance carrier). The submitted documents contain personal

⁴As we are able to resolve this under section 261.201, we do not address your other arguments for exception of this information.

financial information, and the public does not have a legitimate interest in it. *See* Open Records Decision Nos. 620 (1993), 600. Thus, we conclude that this information, which we have marked, is confidential under common-law privacy, and the district must withhold it pursuant to section 552.101. The remaining information does not contain private financial information, and the district may not withhold it under section 552.101 on that ground.

You claim that the submitted transcripts are excepted under section 552.102(b). 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 employee's name, courses taken, and degree obtained, the district must withhold the information in the submitted transcripts we have marked pursuant to section 552.102(b) of the Government Code. The remaining information does not contain transcripts for purposes of section 552.102; therefore, the district may not withhold any of the remaining information on that ground.

You assert that Exhibit B-4 is excepted under section 552.107(1) 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). 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). 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.*, 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). Based on your representation and our review of the information at issue, we agree that Exhibit B-4 consists of privileged attorney-client communications that the district may withhold under section 552.107.

You assert that some of the submitted information is excepted under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone 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)*. The submitted information contains the timely election of the employee at issue to keep his home addresses and telephone numbers confidential; therefore, the district must withhold these types of information, which you have marked, under section 552.117. We have also marked information that the district must withhold under section 552.117. However, the employee did not elect to keep confidential his family member information or social security number; therefore, the district may not withhold the family member information or social security number of the employee at issue under section 552.117.

You assert that some of the remaining information is excepted under section 552.130 of the Government Code, which provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). We agree that the district must withhold the Texas motor vehicle record information you have marked under section 552.130.

You contend 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.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.135. 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* Gov't Code § 552.301(e)(1)(A). Upon review, we find you have failed to demonstrate that the remaining information identifies an informer for purposes of section 552.135 of the *Government Code*; therefore, the district may not any of the submitted information on that ground.

The district asserts that some of the remaining information is excepted under section 552.137 of the *Government Code*. Section 52.137 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 at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the district must withhold the e-mail addresses we have marked under section 552.137.

Finally, we note that the former employee's social security number is excepted 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. The district must withhold the social security numbers you have marked under section 552.147.⁵

To conclude, the district must withhold the following information under section 552.101 of the Government Code: Exhibit B-1 under section 261.201 of the Family Code; Exhibit B-2 under section 21.355 of the Education Code; the submitted W-4 tax form under section 6103 of title 26 of the United States Code; and the information we have marked under common-law privacy. With the exception of the employee's name, courses taken, and degree obtained, the district must withhold the marked transcripts pursuant to section 552.102 of the Government Code. The district must also withhold the former employee's home addresses and telephone numbers that you have marked under section 552.117 of the Government Code, the information you have marked under section 552.130 of the Government Code, the information we have marked under section 552.137 of the Government Code, and the marked social security numbers under section 552.147 of the Government Code. The district may withhold Exhibit B-4 under section 552.107 of the Government Code. The district must release the remaining information to the requestor. This ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consists of "education records" that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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).

⁵We note that 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.

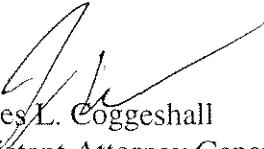
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/jb

Ref:ID# 274432

Enc. Submitted documents

c: Ms. Lauri Ott
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