



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 24, 2007

Mr. Juan J. Cruz
Escamilla & Poneck, Inc.
Falcon International Building
5219 Mcpherson Road, Suite 306
Laredo, Texas 78041

OR2007-04639

Dear Mr. Cruz:

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# 276570.

The United Independent School District (the "district"), which you represent, received a request for all information pertaining to the requestor while he was employed by the district, including the names of students who made allegations against him and investigation information. You state that you will release to the requestor a copy of his main personnel file, but claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.114, and 552.135 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information, which we have marked, was created after the district's receipt of the instant request for information. Because this information was created after the district's receipt of the request, it is not encompassed by the request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3

¹Although you raise section 552.026 of the Government Code as an exception to disclosure, we note that section 552.026 is not an exception to disclosure. Rather, section 552.026 provides that the Act does not require the release of information contained in education records except in conformity with the Family Educational Rights and Privacy Act of 1974. Gov't Code § 552.026.

(1986) (governmental body not required to disclose information that did not exist at the time request was received). Accordingly, we do not address the availability of this non-responsive information, and the district need not release it in response to this request.

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 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 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"). Determinations under FERPA must be made by the educational authority in possession of the education records.³ We note that FERPA is not applicable to law enforcement records maintained by the district police department that were created by the department for a law enforcement purpose. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, 99.8. You state that you have not submitted student handwritten statements to this office. *See* Open Records Decision No. 224 (1979) (student's handwritten comments protected under FERPA because they would make identity of student easily traceable through handwriting, style of expression, or particular incidents related in the comments). Among other things, you have submitted education records that you have redacted pursuant to FERPA for our review. However, some of the submitted education records still contain student information. 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. Accordingly, we also do not address your arguments under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). We will, however, address the applicability of the remaining claimed exceptions to the submitted information.

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

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.

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Exhibit B constitutes two completed investigations made of, for, or by the district. The district must release this information unless it is expressly confidential under other law. However, the district raises section 552.135 for the information in Exhibit B. Because section 552.135 is other law for purposes of section 552.022, we will consider whether it is applicable to the information in Exhibit B.

Section 552.135 provides in relevant part:

(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].

Gov't Code § 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). Furthermore, section 552.135 only protects information that identifies an "informer" as defined by subsection (a). *See id.* § 552.135(a). We find that the information, as redacted, does not contain the informers' identifying information. Accordingly, the district may not withhold any part of the submitted information pursuant to section 552.135.

Next, we note that some of the information contained in Exhibit B may be subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address, home telephone number, social security numbers, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code.⁴ Whether

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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). Therefore, the district may only withhold the information we have marked under section 552.117(a)(1) if the employees at issue 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 requestor has a right to his own section 552.117(a)(1) information. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person whom information relates on grounds that information is considered confidential by privacy principles).

Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with section 552.024 or 552.1175. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. Therefore, to the extent the information we have marked pertains to a peace officer, this information must be withheld under section 552.117(a)(2). If the employees are not peace officers, they must make timely elections under section 552.024.

The district next argues that the information in Exhibit C is excepted from disclosure under section 552.107. Section 552.107 of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107. 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 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 information in Exhibit C consists of confidential communications and documents sent between the district's attorneys and district personnel. You also state that these communications were made for the purpose of providing legal advice and that the district has not waived confidentiality with regard to any of the documents. Upon review, we agree that the information in Exhibit C is protected under the attorney-client privilege and may be withheld under section 552.107 of the Government Code.

Finally, we turn to the district's argument for the information in Exhibit D. 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. Section 552.101 encompasses section 261.201(a) of the Family Code, which provides as follows:

(a) 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). We note that the district is not an agency authorized to conduct a chapter 261 investigation. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). However, you indicate that Exhibit D contains reports of alleged or suspected abuse made to the Child Protective Services Division of the Texas Department of Family and Protective Services ("CPS") and other information used or developed in an investigation by CPS and the district's police department. Upon review, we find that this information is within the scope of section 261.201 of the Family Code. Therefore, the information contained in Exhibit D is confidential pursuant to section 261.201 of the Family Code and must be withheld pursuant to section 552.101.

In summary, the district must withhold the personal information we have marked in Exhibit B under subsection 552.117(a)(1) of the Government Code if the employees at issue timely elected to keep their personal information confidential and (a)(2) for employees who are peace officers. The district may withhold Exhibit C under section 552.107. The district must withhold the information in Exhibit D under section 261.201 of the Family Code in conjunction with section 552.101. 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).

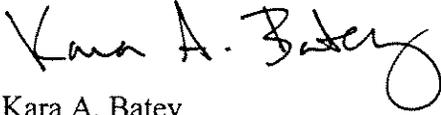
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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

A handwritten signature in black ink that reads "Kara A. Batey". The signature is written in a cursive style with a large, looping 'y' at the end.

Kara A. Batey
Assistant Attorney General
Open Records Division

KAB/mcf

Ref: ID# 276570

Enc. Submitted documents

c: Mr. Tony Gutierrez, III
Teacher
Washington Middle School
7750 Country Club Drive Apt #910
Laredo, Texas 78045
(w/o enclosures)