



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 4, 2007

Mr. Randall J. Cook  
Hardy & Atherton  
One American Center, Suite 70  
909 Ese Loop 323  
Tyler, Texas 75701

OR2007-15916

Dear Mr. Cook:

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# 296378.

The Tyler Independent School District (the "district"), which you represent, received a request for 12 categories of information pertaining to named current and former employees of the district. You state that you have released a portion of the requested information. You state prior to release of these records, you redacted the personally identifiable student information in accordance with the federal Family Education Rights and Privacy Act ("FERPA").<sup>1</sup> You also state that you redacted social security numbers pursuant to section 552.147 of the Government Code.<sup>2</sup> You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, and 552.107 of

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<sup>1</sup>We note that the United States Department of Education Family Policy Compliance Office (the "DOE") informed this office that 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. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: [http://www.oag.state.tx.us/opinopen/og\\_resources.shtml](http://www.oag.state.tx.us/opinopen/og_resources.shtml).

<sup>2</sup>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.

the Government Code. We have considered the exceptions you claim and reviewed 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 also encompasses state confidentiality provisions, like section 21.048 of the Education Code<sup>3</sup>, which provides in part:

(c-1) The results of an examination administered under this section are confidential and are not subject to disclosure under [the Act] unless:

(1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or

(2) the educator has failed the examination more than five times.

Educ. Code § 21.048(c-1). We note that subsection 21.048(c-1), as added to section 21.048 by the Eightieth Legislature, is a new statute that took effect June 15, 2007. *See* Act of May 28, 2007, 80<sup>th</sup> Leg., R.S., S.B. 9, § 4 (to be codified at Educ. Code Ann. § 21.048(c-1)). The submitted information contains the examination results of an individual who appears to have failed the examination administered under section 21.048 of the Education Code five times or less. If, in fact, the individual failed the examination five times or less, then the district must withhold the information we have marked under section 552.101 in conjunction with section 21.048(c-1) of the Education Code. However, if the individual failed the examination more than five times, the information we have marked under section 21.048(c-1) must be released.

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 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 concluded 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 his or her evaluation. *Id.*

You assert that some of the submitted documents consist of evaluations of an individual who was employed as a teacher at the time of the evaluations. Based on your representation and

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

our review, we agree that the documents at issue are made confidential by section 21.355 and must be withheld under section 552.101. We have marked these documents accordingly.

Section 552.102(b) of the Government Code excepts 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. Thus, except for the information that reveals the degree obtained and the courses taken, the district must withhold the submitted transcripts under section 552.102(b).

You raise section 552.107 of the Government Code for the information contained in Tab 3. Section 552.107(1) protects information within the attorney-client privilege. When asserting the attorney-client privilege under section 552.107, 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 Tab 3 consists of confidential communications between officers and agents of the district and the district's attorney regarding one of the named employees. You also state that the information at issue was made for the purpose of rendering legal services to the district and that these communications were intended to be confidential and the attorney-client privilege has not been waived. Based on your representations and our review, we agree that the information in Tab 3 is protected by the attorney-client privilege and may be withheld under section 552.107 of the Government Code.

We note that a portion of the remaining information may be excepted under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, 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. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. Accordingly, to the extent that the employee to whom this information pertains timely elected confidentiality for this information under section 552.024, the district must withhold the information we have marked under section 552.117(a)(1).

In summary, to the extent the information we have marked consists of the results of an examination administered under section 21.048 of the Education Code that the individual failed five times or less, the district must withhold this information under section 552.101 of the Government Code. The district must withhold the submitted teacher evaluations, which we have marked, under section 552.101 in conjunction with section 21.355 of the Education Code. Other than information that reveals the degree obtained and the courses taken, the submitted transcripts must be withheld under section 552.102(b) of the Government Code. The district may withhold the information in Tab 3 under section 552.107 of the Government Code. Finally, we have marked information that must be withheld under section 552.117(a)(1) of the Government Code if the employee to whom it pertains timely elected confidentiality. The remaining information must be released to the requestor.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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.

Sincerely,



Jordan Johnson  
Assistant Attorney General  
Open Records Division

JJ/jb

Ref: ID# 296378

Enc. Submitted documents

c: Dr. Waymon L. Wesley, Sr.  
5503 Quail Creek  
Tyler, Texas 75703  
(w/o enclosures)