



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 14, 2009

Ms. Mari M. McGowan
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P.O. Box 1210
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OR2009-00597

Dear Ms. McGowan:

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# 332233.

The Mansfield Independent School District (the "district"), which you represent, received a request for (1) a named former employee's resignation letter; (2) communications, investigations, and the settlement agreement pertaining to the resignation; and (3) the named former employee's personnel file. You state the district has released some of the requested information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.117, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by a representative of the named former employee. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you claim the submitted settlement agreement is confidential. We note information is not confidential under the Act simply because the party that submits the information

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See Attorney General Opinion JM-672* (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”). Consequently, the settlement agreement must be released unless it falls within an exception to disclosure, notwithstanding any expectation or agreement to the contrary.²

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. This section encompasses information protected by the informer’s privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer’s privilege protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer’s identity. *See Open Records Decision Nos. 515 at 3* (1998), 208 at 1-2 (1978). The informer’s privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 2 (1981) (citing Wigmore, *Evidence*, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See Open Records Decision Nos. 582 at 2* (1990), 515 at 4-5 (1988). The privilege excepts the informer’s statement only to the extent necessary to protect the informer’s identity. *See Roviario v. United States*, 353 U.S. 53, 60 (1957); Open Records Decision No. 549 at 5 (1990).

Although you raise the informer’s privilege for a portion of Exhibit C, you have not identified the laws that were allegedly violated, nor have you explained whether the alleged violations carry any civil or criminal penalties. Further, you have not identified the individuals whose identities you believe are protected by the informer’s privilege. Accordingly, you have failed to demonstrate the informer’s privilege is applicable to the information at issue. Thus, we conclude the district may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the informer’s privilege.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*,

²In addition, we note a settlement agreement to which a governmental body is a party is public unless it is expressly confidential under other law. *See Gov’t Code § 552.022(a)(18)*.

Inc., 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the test to be applied to information protected under section 552.102 is the same test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we will consider your privacy claims under both sections 552.101 and 552.102.

Common-law privacy protects information 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 legitimate concern to the public. *See Indus. Found.*, 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. The types 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. In addition, this office has found certain kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). Upon review, we agree some of the information in Exhibit C is protected by common-law privacy. Thus, the district must withhold the information we have marked under section 552.101 on that basis. However, we find most of the submitted information consists of employment information that is of legitimate public interest. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 470 at 4, 444 at 5-6 (1986) (public has legitimate interest in public employee's qualifications, work performance, and circumstances of employee's resignation or termination); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, the district may not withhold any of the remaining submitted information under either section 552.101 or section 552.102 on the basis of common-law privacy.

Section 552.102(b) 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). However, this section further provides that "the degree obtained or the curriculum on a transcript in the personnel file of the employee" is not excepted from disclosure. Accordingly, except for the information that reveals the degree obtained and the courses taken, the district must withhold the submitted transcript in Exhibit C under section 552.102(b) of the Government Code.

Next, section 552.107(1) of the Government Code protects information that comes 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 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* 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, 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 seek to withhold a portion of Exhibit C pursuant to the attorney-client privilege. You state the communications at issue constitute confidential correspondence between attorneys for the district and district representatives. You also state these communications were made in confidence and have remained confidential. Based on your representations and our review of the information at issue, we agree the e-mails we have marked constitute privileged attorney-client communications. Accordingly, the district may withhold this information under section 552.107 of the Government Code.

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 of the Government Code. *See* Gov't Code §§ 552.117(a)(1), .024. We note section 552.117 also encompasses a personal cellular telephone number, unless the service is paid for by a governmental body. *See* Open Records

Decision Nos. 670 at 6 (2001), 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cell phone numbers provided and paid for by governmental body and intended for official use). 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). Exhibit D contains documentation showing the named former employee elected to keep his personal information confidential before the district received the instant request for information. Accordingly, the district must withhold this employee's personal information, which we have marked in Exhibits C and D, under section 552.117 of the Government Code.³ We note Exhibit C contains personal information of other district employees, which we have also marked. If these individuals made timely elections under section 552.024, the district must withhold their personal information under section 552.117(a)(1). The district may not withhold this information under section 552.117(a)(1), however, if these individuals did not make timely elections to keep their information confidential.

Next, 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). Gov't Code § 552.137(a)-(c). We note, however, section 552.137 does not apply to the work e-mail addresses of officers or employees of a governmental body. You do not inform us this member of the public has affirmatively consented to the release of his e-mail address. Accordingly, the district must withhold the e-mail address we have marked under section 552.137 of the Government Code.

The named former employee claims some of the submitted information may be protected from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code, which 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). In Open Records Decision No. 643, we determined 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 also concluded the word "administrator" in section 21.355 means a person who is required to and does in fact hold an administrator's certificate under subchapter B of chapter 21 of the Education Code

³As our ruling for this information is dispositive, we need not address your argument under section 552.147 of the Government Code, except to note section 552.147(b) 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.

and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *See id.*; *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364, 367 (Tex. App.—Austin 2006, no pet.).

The submitted information contains employment contracts between the named former employee and the district. We note these contracts state the employee was employed as a “noncertified administrator.” Because the submitted information pertains to a noncertified administrator, rather than a certified administrator, we find section 21.355 of the Education Code is not applicable to any of the submitted information, and none of the remaining information may be withheld on that basis.

Section 552.101 also encompasses section 1324a of title 8 of the United States Code, which provides that an Employment Eligibility Verification Form I-9 “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). Further, prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms). The named former employee objects to the disclosure of his I-9 and W-4 forms; however, upon review, we find the submitted information does not contain a W-4 or I-9 form.⁴

In summary, the district must withhold (1) the information we have marked in Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the transcript in Exhibit C under section 552.102(b) of the Government Code, except for the information that reveals the degree obtained and the courses taken; (3) the named former employee’s personal information we have marked in Exhibits C and D under section 552.117(a)(1) of the Government Code; (4) the other employees’ personal information, which we have also marked, under section 552.117(a)(1), if these employees made a timely election under section 552.024 of the Government Code; and (5) the e-mail address we have marked under section 552.137 of the Government Code. The district may withhold the information we have marked under section 552.107 of the Government Code. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php.

⁴We note this decision is applicable only to the information submitted to this office by the district. *See* Gov’t Code § 552.301(e)(1)(D).

or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



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Assistant Attorney General
Open Records Division

KMK/eeg

Ref: ID# 332233

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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