



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 21, 2009

Mr. Robb D. Decker
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2009-00855

Dear Mr. Decker:

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# 333309.

The Northside Independent School District (the "district") received a request for all e-mails sent or received by district deputy superintendent Jim Miller during August 2006. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.117, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address your contention that the e-mails you have marked as AG-0123 through AG-0129, AG-0134, AG-0135, and AG-0138 through AG-0140 are not public information subject to the Act. The Act applies to "public information," which is defined under section 552.002 of the Government Code as:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002; *see also id.* § 552.021. Information is generally subject to the Act when it is held by a governmental body and it relates to the official business of a governmental body or is used by a public official or employee in the performance of official duties. You represent that the e-mails at issue are personal in nature and are not connected with the transaction of official business. *See* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). After reviewing the information at issue, we agree that the documents you have marked AG-0123 through AG-0129, AG-0134, and AG-0135 are not subject to the Act. Accordingly, the city may withhold these documents. We also note that this office has determined that certain computer information, such as source codes, documentation information, and other computer programming that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. *See* Open Records Decision No. 581 (1990). Based on the reasoning in that decision and our review of the information at issue, we determine that the password information marked on document AG-0137 does not constitute public information under section 552.002. Accordingly, this information is also not subject to the Act and may be withheld.¹ However, we find that the documents marked as AG-0138 through AG-0140 were created in connection with the transaction of official business. Therefore, these documents constitute "public information" as defined by section 552.002(a) and are subject to the Act.

We next address your arguments against disclosure of the submitted information that is subject to the Act. 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. We note that section 552.101 encompasses the Americans with Disabilities Act (the "ADA"), which provides for the confidentiality of certain medical records of employees and applicants. Specifically, the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. In addition, an employer's medical examination or inquiry into the ability of an employee to perform job-related functions is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission (the "EEOC") determined medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as, general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Federal regulations define "disability" for the purposes of the ADA as "(1)

¹In light of this conclusion, we need not address your section 552.136 argument against disclosure of this information.

a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.” 29 C.F.R. § 1630.2(g). The regulations further provide that physical or mental impairment means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. *See id.* § 1630.2(h). Upon review of the submitted information, we find that documents AG-0090 through AG-0099, AG-0102, AG-0103, and AG-0106 through AG-108 are confidential records under the ADA and must be withheld under section 552.101 of the Government Code.²

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. Additionally, Texas courts have concluded that a written reprimand constitutes an evaluation for purposes of section 21.355 as it “reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). 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 or an administrator. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we concluded that a “teacher” for purposes of section 21.355 means a person who (1) is required to and does in fact hold a certificate or permit required under chapter 21 of the Education Code and (2) is teaching at the time of his or her evaluation. *Id.* You contend that the documents labeled AG-0119 through AG-0122 evaluate the performance of a teacher and should therefore be withheld from disclosure under section 21.355. You indicate, and the documents reflect, that this teacher required and did hold a teaching certificate and was teaching at the time of the evaluation. Based on your representations and our review, we agree that the documents labeled AG-0119 through AG-0122 are teacher evaluations made confidential by section 21.355 of the Education Code. Accordingly, the district must withhold these documents under section 552.101 of the Government Code.

We next consider your common-law privacy and section 552.102(a) arguments against disclosure of documents AG-0099 through AG-0101, AG-0104, AG-0105, and AG-0109 through AG-0118. Section 552.101 of the Government Code encompasses the doctrine of common-law privacy, while 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[.]” *Id.* § 552.102(a). Section 552.102 is applicable

²In light of our conclusion as regards documents AG-0090 through AG-0093, we need not address your section 552.107(1) arguments against disclosure of these documents.

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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the common-law privacy test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). Accordingly, we will consider your common-law privacy and section 552.102(a) claims together.

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). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Upon review, we find that the information we have marked on page AG-0101 is highly intimate or embarrassing information for the purposes of common-law privacy and are not of legitimate public interest. Consequently, the district must withhold this information under sections 552.101 and 552.102(a) of the Government Code. However, we find that the information in documents AG-0100 and AG-0109 through AG-0118 consists of employment information that is not highly intimate and embarrassing and is of a 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 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Thus, documents AG-0100 and AG-0109 through AG-0118 may not be withheld under common-law privacy or section 552.102(a) of the Government Code.

We next address your section 552.107(1) arguments with regard to the documents marked AG-0001 through AG-0089. 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 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 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 state that documents AG-0001 through AG-0089 are communications between employees or officials of the district and attorneys with a law firm retained by the district. You state that these communications were made in furtherance of the rendition of legal services to the district and you inform this office that these communications have remained confidential. Based on your representations and our review, we agree that the attorney-client privilege is generally applicable to these documents. However, we note that documents AG-0053 and AG-0054 and any attachments thereto were forwarded to an educational consultant who is not identified in your brief as an employee or official of the district or as a representative with a law firm retained by the district. We therefore find that the district has waived its section 552.107 claims with regard to these documents. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, only documents AG-0001 through AG-0052 and AG-0055 through AG-0089 may be withheld under section 552.107 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from 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 the information be

kept confidential under section 552.024 of the Government Code. Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cell phone service. *See* Open Records Decision No. 506 at 5-6 (1988) (Gov't Code § 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). 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 be withheld under section 552.117(a)(1) only 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. Therefore, the district must withhold the telephone number you have marked on page AG-0136 under section 552.117(a)(1) to the extent that the employee concerned paid for his mobile telephone service and timely elected under section 552.024 to keep his home telephone number confidential. The district also must withhold the information we have marked on pages AG-0137 through AG-0139 to the extent that the employee concerned timely elected under section 552.024 to keep his family member information confidential.

Finally, we address your argument that the e-mail addresses you have marked on pages AG-0110, AG-0111, AG-0113, and AG-0131 are excepted from disclosure by section 552.137 of the Government Code. Section 552.137 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 from protection by subsection (c). Gov't Code § 552.137(a)-(c). You state that the e-mail addresses on documents AG-0118 and AG-0131 are personal e-mail addresses of employees of the district and the e-mail addresses on documents AG-0110, AG-0111, AG-0113 are personal e-mail addresses of members of the public. These e-mail addresses are not of a type specifically excluded from protection by section 552.137(c). You state that the owners of these e-mail addresses have not consented to their public disclosure. Therefore, we agree that the district must withhold the e-mail addresses you have marked on pages AG-0110, AG-0111, AG-0113, AG-0118, and AG-0131.

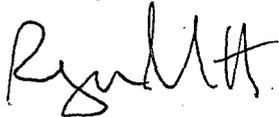
In summary, the district: (1) may withhold documents AG-0123 through AG-0129, AG-0134, and AG-0135 and the marked portion of document AG-0137, which are not subject to the Act, (2) must withhold documents AG-0090 through AG-0099, AG-0102, AG-0103, and AG-0106 through AG-0108 under section 552.101 of the Government Code in conjunction with the ADA, (3) must withhold documents AG-0119 through AG-0122 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code, (4) must withhold the marked portion of document AG-0101 under section 552.102(a) of the Government Code and section 552.101 of the Government Code in conjunction with common-law privacy, (5) may withhold documents AG-0001 through AG-0052 and AG-0055 through AG-0089 under section 552.107 of the Government Code, (6) must withhold the marked portions of documents AG-0136 through AG-0139 under

section 552.117(a)(1) of the Government Code, and (7) must withhold the marked portions of documents AG-0110, AG-0111, AG-0113, AG-0118, and AG-0131 under section 552.137 of the Government Code. The remainder of the submitted information must be released.

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, 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,



Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/jb

Ref: ID# 333309

Enc. Submitted documents

cc: Requestor
(w/o enclosures)