



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 6, 2009

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

OR2009-02953

Dear Mr. Wood:

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# 336683.

The Northside Independent School District (the "district"), which you represent, received a request for any e-mails sent to or received from a named individual during the month of September 2006. You have redacted some of the submitted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>1</sup> You claim that some of the submitted e-mails are not subject to the Act. You claim that portions of the remaining e-mails are excepted from disclosure under sections 552.101, 552.102, 552.107, 552.117, and 552.137 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we address your contention that e-mail Nos. AG-0079 through AG-0089 are not subject to the Act. The Act is only applicable to "public information." See Gov't Code § 552.021. Section 552.002(a) defines public information as "information that is collected,

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<sup>1</sup>The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA 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/open/20060725usdoe.pdf>.

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.” *Id.* § 552.002(a). Thus, virtually all information that is in a governmental body’s physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Upon review, we agree e-mail Nos. AG-0079 through AG-0089 do not constitute “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for the district. *See* Gov’t Code § 552.021; *see also* 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). Thus, we conclude that e-mail Nos. AG-0079 through AG-0089 are not subject to the Act and need not be released in response to this request.

We now turn to your arguments regarding the e-mails that are subject to the Act. We first address your argument under section 552.107 of the Government Code, as this is the most encompassing exception to disclosure you raise. Section 552.107(1) 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. *See* 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). 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 the e-mail Nos. AG-0001 through AG-0052 constitute confidential communications between district attorneys and district officials, all of whom you have identified. You state that these e-mails 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 e-mail Nos. AG-0001 through AG-0052 constitute privileged attorney-client communications. Accordingly, the district may withhold e-mail Nos. AG-0001 through AG-0052 under section 552.107 of the Government Code.<sup>2</sup>

You claim that e-mail Nos. AG-0090 through AG-0092 constitute a confidential administrator evaluation. 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 exception encompasses information that other statutes make confidential. You raise section 552.101 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. In Open Records Decision No. 643 (1996), this office 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. 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 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.).

Upon review, we find that e-mail No. AG-0090 merely documents a communication between district employees and does not evaluate the performance of a district administrator. Thus, this e-mail is not subject to section 21.355 of the Education Code, and it may not be withheld under section 552.101 on this basis. We agree that e-mail Nos. AG-0091 through AG-0092 constitute an evaluation of a district administrator. Further, we assume the individual whose evaluation is at issue held an administrator’s certificate or permit under chapter 21 of the Education Code and was performing the functions of an administrator at the time of the evaluation. Accordingly, the district must withhold e-mail Nos. AG-0091 through AG-0092 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of these e-mails.

You also assert e-mail No. AG-0073 contains information subject to the Medical Practice Act (the "MPA"), which governs access to medical records and is encompassed by section 552.101 of the Government Code. See Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

*Id.* § 159.002(b)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. See Open Records Decision No. 598 (1991). You assert that the e-mail No. AG-0073 contains information that must be withheld under section 552.101 and the MPA. However, this e-mail does not constitute a medical record. Furthermore, you do not state that any information contained within this e-mail was obtained from a medical record. Accordingly, you have failed to demonstrate how the MPA applies to e-mail No. AG-0073, and it may be not be withheld on this basis.

You assert that some the remaining e-mails at issue are subject to common-law privacy as encompassed by sections 552.101 and 552.102 of the Government Code. Section 552.101 encompasses the doctrine of common-law privacy, while section 552.102(a) excepts from public 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). Section 552.102 is applicable 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 section 552.101 and section 552.102(a) privacy claims together.

Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be

satisfied. *Id.* at 681-82. Although this office has found that certain, specific medical information or information indicating disabilities or specific illnesses is protected by common-law privacy, you have failed to demonstrate how any of the remaining e-mails are subject to this aspect of common-law privacy. *See* Open Records Decision No. 455 (1987) (information pertaining to specific prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure under common-law privacy). Furthermore, although we agree that some of the remaining e-mails contain potentially intimate or embarrassing information, there is a legitimate public interest in the conduct of a district employee that occurs within the scope of her employment. *See generally* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Because we find that there is a legitimate public interest in the remaining e-mails, none of this information may be withheld under section 552.101 in conjunction with common-law privacy or section 552.102.

Section 552.117(a)(1) 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. 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). Therefore, the district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You state that the district employees whose information is at issue "may have elected that such information be kept confidential prior to the date the instant request was received." Based on your representation, we are forced to rule conditionally. To the extent the employees at issue timely elected confidentiality, we agree that you must withhold the information we have marked under section 552.117(a)(1). To the extent the employees at issue did not timely elect confidentiality under section 552.024, none of the information at issue may be withheld under section 552.117(a)(1).

You assert that some of the remaining information is subject to 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 by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses you have marked are not of a type specifically excluded by section 552.137(c). Further, you represent that the owners of the email addresses at issue have not consented to their release. Therefore, the district must withhold the e-mail addresses you marked under section 552.137 of the Government Code.

In summary, e-mail Nos. AG-0079 through AG-0089 are not subject to the Act and need not be released in response to this request. The district may withhold e-mail Nos. AG-0001 through AG-0052 under section 552.107 of the Government Code. The district must withhold e-mail Nos. AG-0091 through AG-0092 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. To the extent the employees at issue timely elected confidentiality, the district must withhold the information we have marked under section 552.117(a)(1). Finally, the district must withhold the e-mail addresses you marked under section 552.137 of the Government Code. The remaining 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](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,



Reg Hargrove  
Assistant Attorney General  
Open Records Division

RJH/eeg

Ref: ID# 336683

Enc. Submitted documents

c: Requestor  
(w/o enclosures)