



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

July 13, 2009

Ms. Emily Hollenbeck
Henslee Schwartz
306 West 7th Street, Suite 1045
Fort Worth, Texas 76102

OR2009-09623

Dear Ms. Hollenbeck:

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# 348745.

The Marshall Independent School District (the "district"), which you represent, received a request for the complete personnel file of a named district employee and any documents relating to her employment. You state that the district will release some of the responsive information. You claim that a portion of the submitted information is not subject to the Act. You claim that the remainder of the submitted information is excepted from disclosure under sections 552.107 and 552.139 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.²

Initially, we address your contention that Exhibit C is not subject to the Act. Section 552.002(a) of the Act provides:

(a) In this chapter, "public information" means information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

¹We note that you no longer assert section 552.135 of the Government Code.

²You state that the district has withheld or redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. We note our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made. Therefore, we will not address the applicability of FERPA to any of the submitted information.

- (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(a). 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. *See* Open Records Decision No. 635 (1995). You state Exhibit C consists of personal notes of a district employee that were maintained in the employee's sole possession for use as a memory aid. In support of your position that the notes may be withheld, you cite to Open Records Decision No. 77 (1975) where we concluded that personal notes made by individual faculty members for their own use as memory aids were not subject to the Act. We note that since issuing Open Records Decision No. 77, this office has issued numerous rulings concluding that information collected, assembled, or maintained in connection with the transaction of official business, including "personal" notes, is subject to the Act. *See e.g.*, Open Records Decision Nos. 635 (1995) (public official's or employee's appointment calendar, including personal entries, may be subject to act), 626 (1994) (handwritten notes taken during oral interview by Texas Department of Public Safety promotion board members are public information), 327 (1982) (notes made by school principal and athletic director relating to teacher "were made in their capacities as supervisors of the employee" and constitute public information), 120 (1976) (faculty members' written evaluations of doctoral student's qualifying exam subject to predecessor of Act).

You acknowledge that the notes at issue relate to school matters. Thus, this information was created as part of the district's official business. *See* Gov't § 552.002. Accordingly, we find that the notes in Exhibit C are subject to the Act and may only be withheld from disclosure if an exception under the Act applies.

Next, you assert the attorney-client privilege for the submitted e-mails in Exhibit A. Section 552.107(1) of the Government Code protects information coming 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. *See* 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. *See 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). 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. See 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. See *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).

We understand you to argue that Exhibit A consists of confidential communications between the district and its attorneys. You state that the communications were made for the purpose of facilitating the rendition of professional legal services and that the communications have remained confidential. You have identified the parties to the communications. Based on your representations and or review, we find that you have demonstrated the applicability of the attorney-client privilege to this information. Accordingly, the district may withhold Exhibit A pursuant to section 552.107 of the Government Code.

You assert that the information you have marked in Exhibit B is excepted from disclosure under section 552.139 of the Government Code. Section 552.139 provides that information is excepted from required public disclosure “if it is information that relates to computer network security or to the design, operation, or defense of a computer network.” Gov’t Code § 552.139(a). You indicate that Exhibit B contains computer usernames and passwords used to access a computer network. Therefore, the district must withhold the information you have marked in Exhibit B under section 552.139 of the Government Code.

We note that a portion of the remaining information contains e-mail addresses subject to section 552.137 of the Government Code.³ 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

³The Office of the Attorney General will raise a mandatory exception like section 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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). We have marked the e-mail addresses that are subject to section 552.137. Unless the district receives consent from the owner of the e-mail addresses for their release, the district must withhold the e-mail addresses we have marked pursuant to section 552.137. *See id.* § 552.137(b).

In summary, the district may withhold Exhibit A under section 552.107 of the Government Code. The district must withhold the information you have marked under section 552.139 of the Government Code. The district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the district receives consent from the owners of the addresses for their release. 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, 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,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/jb

Ref: ID# 348745

Enc. Submitted documents

c: Requestor
(w/o enclosures)