



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 27, 2009

Ms. Melanie L. Hollmann
Atkins, Hollmann, Jones, Peacock & Lyons
3800 East 42nd Street, Suite 500
Odessa, Texas 79762

OR2009-10326

Dear Ms. Hollmann:

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# 350217:

The Ector County Independent School District (the "district"), which you represent, received a request for the personnel file of a named teacher, as well as any complaints or investigations involving the named teacher. You state the district has released some of the requested information. You further state that some of the requested information has been redacted, or withheld entirely, pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.117 of the Government Code.² 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. This section encompasses information protected by other statutes, such as

¹The 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>.

²You also raise section 552.102 of the Government Code in conjunction with section 21.355 of the Education Code. However, section 552.101 is the proper exception to raise with section 21.355.

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 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 determined for purposes of section 21.355, the word “teacher” means a person who 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 who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* ORD 643 at 4. We also determined 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. *Id.*

You assert the documents in Category 3 consist of evaluations of the named employee. We agree that most of the documents in Category 3 are evaluations for purposes of section 21.355. However we are unable to determine if the district employee whose evaluations are at issue held a teaching or administrator’s certificate under subchapter B of chapter 21 of the Education Code at the time of the evaluations. Furthermore we are unable to determine if the district employee at issue was engaged in the process of teaching or performing the functions of an administrator at the time of the evaluations. Thus, if the employee at issue held a teaching or administrator’s certificate and was engaged in the process of teaching or performing the functions of an administrator at the time of the evaluations, the submitted performance evaluations we have marked are confidential under section 21.355 of the Education Code, and must be withheld under section 552.101 of the Government Code. To the extent this employee did not hold a requisite certificate, or was not engaged in the process of teaching or performing the functions of an administrator, the submitted performance evaluations are not confidential under section 21.355, and may not be withheld under section 552.101 of the Government Code. The remaining information in Category 3 does not constitute an evaluation for purposes of section 21.355; thus, it may not be withheld under section 552.101 in conjunction with section 21.355.

Section 552.102 of the Government Code excepts from disclosure all information in transcripts of a professional public school employee other than the employee’s name, the courses taken, and the degree obtained. Gov’t Code § 552.102(b); Open Records Decision No. 526 (1989). Thus, with the exception of the employee’s name, courses taken, and degree obtained, the district must withhold the submitted transcripts in Category 4 pursuant to section 552.102(b) of the Government Code.

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. 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 a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. 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, *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 claim that Category 1 contains communications protected by the attorney-client privilege. You state that the communications were intended to be confidential. However, we note that all of the submitted communications in Category 1 were sent to non-privileged parties, and thus are not privileged. Therefore, the district may not withhold any of the remaining information under section 552.107 of the Government Code.

Next, 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. Gov’t Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. The district may only withhold information under section 552.117(a)(1) if the individual at issue elected confidentiality under section 552.024 prior to the date on which the request for this information was made. You inform us that the individual at issue timely elected to keep her personal information confidential. Thus, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The remaining information you have marked does not constitute the

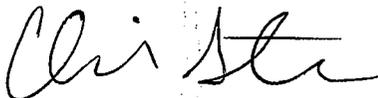
employee's home address or telephone number, social security number, or family member information; therefore the district may not withhold any of the remaining information under section 552.117.

In summary, (1) to the extent the employee at issue held a teaching or administrator's certificate and was engaged in the process of teaching or performing the functions of an administrator at the time of the evaluations, the district must withhold the information we have marked in Category 3 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code; (2) with the exception of the employee's name, courses taken, and degree obtained, the district must withhold the submitted transcripts in Category 4 pursuant to section 552.102(b) of the Government Code; and (3) the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The remaining 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, 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,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 350217

Enc. Submitted documents

c: Requestor
(w/o enclosures)