



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 18, 2009

Ms. Ylise Janssen
Senior School Law Attorney
Austin Independent School District
1111 West Sixth Street
Austin, Texas 78703

OR2009-11859A

Dear Ms. Janssen:

This office issued Open Records Letter No. 2009-11859 (2009) on August 24, 2009. Since that date, you have provided new information that affects the facts on which this ruling was based. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on August 24, 2009. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID# 360248.

The Austin Independent School District (the "district") received a request for e-mails sent or received by six specified district employees on September 3-8, 2008, and any log book pages or visitor logs for two specified district employees for September 5, 2008. You state the majority of the responsive information has been made available to the requestor. You claim the submitted e-mails are excepted from disclosure under sections 552.101, 552.107, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that an interested third party may submit comments stating why information should or should not be released).

¹Although you raise section 552.101 of the Government Code in conjunction with sections 552.107 and 552.117, this office has concluded that section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information unless the governmental body has received a previous determination for the information at issue. Gov't Code §§ 552.301(a), .301(e)(1)(D). One e-mail address within the information you submitted to this office has been redacted. You do not assert, nor does our review of the records indicate, that you have been authorized to withhold e-mail addresses without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2001) (discussing standard for issuance of previous determinations). In accordance with section 552.301, responsive information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted e-mail address; thus, being deprived of this information does not inhibit our ability to make a ruling. In the future, however, the district should refrain from redacting, unless authorized to do so, any information it submits to this office in seeking an open records ruling. Redaction of such information may result in a determination that the information must be released. *See Gov't Code § 552.302; Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

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 the doctrine of common-law privacy, which 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 satisfied. *Id.* at 681-82.

You assert Exhibits F and G contain financial information excepted under section 552.101. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9-10 (1992), 523 at 3-4 (1989). The e-mail submitted in Exhibit F reflects that the employee provided her personal financial information to the district for the purpose of receiving financial assistance. Thus, based on our review, we find Exhibit F pertains to a financial transaction between the district and a district employee. Because there is a legitimate public interest in this transaction, the information in Exhibit F generally may not be withheld on the basis of common-law privacy. However, Exhibit F also contains a personal financial detail that is not an essential fact about this transaction with the district. Upon review, we find that release of this detail, which we find to be intimate and embarrassing, would not serve any legitimate public interest in this transaction. Accordingly, the information we marked in Exhibit F must be withheld under section 552.101 in conjunction with common-law privacy.

Exhibit G is an e-mail from a district employee discussing financial matters which she suggests may affect her work as an employee of the district. This office has held that information pertaining to an employee's performance as a public servant generally cannot be considered to be beyond the realm of legitimate public interest. *See* Open Records Decision No. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find most of the information in Exhibit G directly pertains to the work performance of a district employee. Because there is a legitimate public interest in this information, it may not be withheld under common-law privacy. However, some portions of Exhibit G do not relate to the employee's work performance and reveal personal financial details unrelated to a financial transaction with the district. As stated above, personal financial information unrelated to a financial transaction with the government is generally intimate and embarrassing. *See* ORD 523 at 3. Upon review, we find the information we marked in Exhibit G to be intimate and embarrassing information of no legitimate public concern, and the district must withhold this information under section 552.101 in conjunction with common-law privacy.

The information you marked under common-law privacy in Exhibit I pertains to an allegation of criminal conduct made against a district employee. Although such information may be embarrassing, allegations of criminal activity made against a public employee necessarily relate to that employee's job qualifications and fitness for public employment. This office has found the public has a legitimate interest in the job qualifications of public employees and in how governmental bodies investigate and resolve employment issues. *See* ORD 470 at 4, 423 at 2; *c.f.* Open Records Decision Nos. 484 at 4 (1982) (public interest in knowing how police department resolved complaints against officers outweighs officers' interest in withholding most unfounded complaints), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). We therefore conclude that there is legitimate public interest in the allegation made against the district employee, and that information must be released. However, based on the additional information you have provided this office, we find that there is no legitimate public interest in the some of the documents submitted in Exhibit I. Accordingly, the district must withhold the information we marked in Exhibit I under section 552.101 in conjunction with common-law privacy.

Finally, the information you marked under common-law privacy in Exhibit E pertains to a district employee's request for vacation leave. Information pertaining to leave of public employees is generally a matter of legitimate public interest. *Cf.* Open Records Decision No. 336 at 2 (1982) (names of employees taking sick leave and dates of sick leave taken not private). Thus, this information may not be withheld under section 552.101 in conjunction with common-law privacy.

You next assert that the e-mails submitted as Exhibit H must be withheld under section 552.101 because they contain criminal history record information ("CHRI") made

confidential under sections 411.084 and 411.097 of the Government Code.² These sections restrict access to CHRI, which is defined in section 441.082 as “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2). The e-mails in Exhibit H discuss school districts’ retention of criminal history records, but do not contain any CHRI collected about a person. Accordingly, we conclude sections 411.084 and 411.097 are inapplicable to the information in Exhibit H, and no information in these e-mails may be withheld on that basis.

You next assert the information you marked in Exhibits H, I, and J is excepted under section 552.107 of the Government Code as privileged attorney-client communications. Gov’t Code § 552.107(1). 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 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. 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.*, 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

²Although you also assert this information is made confidential under section 411.0901(b) of the Government Code as added by Act of June 3, 2009, 81st. Leg., R.S., H.B. 2730, § 9A.03, we note this provision does not take effect until September 1, 2009. See Act of June 3, 2009, 81st. Leg., R.S., H.B. 2730, § 23.01. Thus, we find this section is inapplicable.

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 marked the submitted communications which were sent between and among district attorneys and employees, and that were made in the furtherance of legal services to the district. You inform this office there has been no voluntary waiver of the attorney-client privilege with regard to this information. Upon review, we agree the district may withhold the information we marked as attorney-client communications in Exhibits H and I, as well as Exhibit J its entirety, under section 552.107. However, the remaining information you marked in Exhibit H was communicated to individuals who are not employed by the district. Because you have not explained the nature of the district's relationship with these individuals and how they are privileged parties, we find that you have failed to establish how this communication was between or among district employees and attorneys for the purposes of section 552.107; we therefore conclude this communication is not privileged under section 552.107. ~~See ORD 676 at 8 (governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made).~~ To the extent that this non-privileged e-mail, which we marked, exists separate and apart from the submitted e-mail chain, it may not be withheld under section 552.107.

You claim that portions of the remaining information are excepted under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former 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 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)*. Pursuant to section 552.117(a)(1), the district must withhold the personal information that pertains to a current or former employee of the district who elected, prior to the district's receipt of the request for information, to keep such information confidential. Although you do not provide the election form for the individual whose personal information is at issue in Exhibit D, you specifically represent that this individual timely chose to not allow public access to her personal information.³ Based on this representation, the information we marked in Exhibit D must be withheld under section 552.117. Exhibit E also contains personal information related to a current or former district employee. You do not provide the election form for this individual, nor do you represent that she properly elected to keep her personal information confidential. Thus, if

³You provided several employees' personal information election forms to demonstrate that "all of the employees in question have chosen" to keep their personal information confidential. However, the submitted information does not contain the current or former home address, home telephone number, social security number, or family member information of any individual whose election form you provided.

the employee whose information is at issue properly elected to keep the information we marked confidential, the district must withhold the information in Exhibit E we marked under section 552.117. If the employee whose information is at issue in Exhibit E did not so elect, this information must be released. The remaining information you marked as personal family information does not consist of the current or former home addresses or telephone numbers, social security numbers, or family member information of the individuals at issue. Thus, we find section 552.117 does not apply to this remaining information, and it may not be withheld under this section.

Some of the remaining information may be subject to section 552.137, which 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). Subsection (c)(1) states that subsection (a) does not apply to an e-mail address “provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor’s agent[.]” *Id.* § 552.137(c)(1). Accordingly, unless the owners of the e-mail addresses we marked have consented to their release, the district must withhold the e-mail addresses we marked under section 552.137, except to the extent that any such address is the address of a person who has a contractual relationship with the district.

In summary, the district must withhold the information we marked in Exhibits F, G, and I under section 552.101 in conjunction with common-law privacy. The district may withhold the information we marked as attorney-client communications in Exhibits H and I, as well as Exhibit J its entirety, under section 552.107. The district must withhold the personal information we marked under section 552.117 in Exhibit D, and, to the extent the individual whose information is at issue properly elected to keep her information confidential, the district must also withhold the information we marked under section 552.117 in Exhibit E. Finally, the district must withhold the e-mail addresses we marked in Exhibits D, E, F, H, and I under section 552.137 unless the owners of the e-mail addresses have a contractual relationship with the district or have consented to their e-mail address’s 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, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Davis", with a stylized, cursive script.

Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 360248

Enc. Submitted documents

cc: Requestor
(w/o enclosures)