



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 26, 2011

Ms. Alicia Currin-Moore
Underwood, Wilson, Berry, Stein & Johnson, P.C.
P.O. Box 9158
Amarillo, Texas 79105-9158

OR2011-01369

Dear Ms. Currin-Moore:

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# 407070.

The Big Spring Independent School District (the "district"), which you represent, received a request for twenty categories of information regarding the bible course that was offered or will be offered by the district during a specified time period. The request includes, among other items, all published and unpublished curricula considered; all curricula, lesson plans, quizzes, tests, or teacher notes regarding oral exams, assignments, and workbooks; all vendor invoices for materials ordered by the district for any bible course taught; information identifying the source or amount of all outside, non-district funds applied toward teachers' salaries, books or other expenses related to any bible course taught; and any agreements the district has with non-district organizations regarding the bible course. You claim that some of the requested information was previously released in connection with a prior request to the district. You state that you have released additional information, BISD 16-150, responsive to this request. You state that student-identifying information has been redacted from some of the released records pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. You also indicate that some of the requested information does not exist.¹ You claim that the submitted information is excepted from disclosure pursuant to section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

Initially, we note the submitted attachments include unredacted education records. 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 or adult student 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.² Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. ~~See 34 C.F.R. § 99.3 (defining "personally identifiable information").~~ Because our office is prohibited from reviewing the submitted education records to determine the applicability of FERPA, we will not address FERPA with respect to these records. Such determinations under FERPA must be made by the educational authority in possession of the education record.³ However, we will consider your exception to disclosure of the submitted information under the Act.

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.*, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the

²A copy of the DOE's letter to this office is posted on the Attorney General's website at: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

³In the future, if the district does obtain parental consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

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 pet.). 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 the submitted e-mails and their attachments, found in BISD 151-652, consists of attorney-client communications that were made between district’s attorneys, employees, and administrators in connection with the rendition of professional legal services to the district. You have identified the parties to the communications. You state the communications were intended to be confidential, and you indicate that the communications have maintained their confidentiality. Based upon your representations and our review, we conclude that the district may withhold some of the information you seek to withhold under section 552.107(1) of the Government Code. However, we find that some of the attachments to the otherwise privileged e-mails consist of documents within the district’s records that exist separate and apart from the attorney-client communications. We note that these documents on their own are responsive to the request. You have not demonstrated how these documents that exist separate and apart from the attorney-client communications constitute confidential communications between privileged parties. We therefore conclude the district may not withhold the non-privileged attachments, which we have marked, under section 552.107. However, the remaining information you seek to withhold may be withheld under section 552.107(1).

We note that some of the attachments not protected under section 552.107 include information that is excepted from disclosure under section 552.102(a) of the Government Code.⁴ Section 552.102(a) excepts from 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). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010) (Dec. 20, 2010, motions for reconsideration and rehearing pending). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code.

⁴The Office of the Attorney General will raise mandatory exceptions like section 552.102, 552.117, 552.136, and 552.137 on behalf of a governmental body but will not raise other exceptions.

We note a portion of the attachments subject to release are protected by common-law privacy. 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. Section 552.101 encompasses the doctrine of common-law privacy, which 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. *See Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we find the information we have marked in BISD 196 and BISD 411 is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district must withhold this information pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

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). We note section 552.117 encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We also note that a post office box number is not a "home address" for purposes of section 552.117.⁵ 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). 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 information was made. Thus, if the individual whose information is at issue timely elected confidentiality, the district must withhold the marked personal information pursuant to section 552.117(a)(1); however, the district may only withhold the personal cellular telephone number we have marked if the cellular service was paid for with personal

⁵*See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of Gov't Code § 552.117 is to protect public employees from being harassed *at home*) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)) (emphasis added).

funds. The district may not withhold this information under section 552.117(a)(1), however, if the individual at issue did not make a timely election to keep the information confidential.

We note that some of the attachments subject to release also contain a bank account number. Section 552.136 of the Government Code provides “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *See id.* § 552.136(a) (defining “access device”). Accordingly, the district must withhold the bank account number we have marked under section 552.136.

We also note that a portion of the remaining submitted information contains e-mail addresses 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 id.* § 552.137(a)-(c). We have marked personal e-mail addresses that are not of types specifically excluded by section 552.137(c). Therefore, the district must withhold the personal e-mail addresses we have marked under section 552.137, unless the owners of the e-mail addresses affirmatively consent to their public disclosure.⁶

Finally, we note that some of the remaining information at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the district may generally withhold the e-mails and attachments submitted as BISD 151-652. However, the district must release the non-privileged attachments we have marked that exist separate and apart from the privileged e-mail chains. Before releasing any documents, the district must withhold the information we have marked under

⁶We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including: bank checking account and routing numbers under section 552.136 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

sections 552.101 in conjunction with common-law privacy, 552.102, 552.136, and 552.137 of the Government Code. The information we have marked under section 552.117(a)(1) of the Government Code must also be withheld, to the extent the marked information pertains to an employee of the district who timely requested confidentiality for the information under section 552.024 of the Government Code and to the extent this employee personally paid for his cellular telephone service. The remaining attachments we have marked must be released, but any information protected by copyright must be released in accordance with copyright law.⁷

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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/dls

Ref: ID# 407070

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁷Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147.