



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 9, 2011

Ms. Susan G. Morrison
The Fowler Law Firm, P.C.
919 Congress Avenue, Suite 900
Austin, Texas 78701

OR2011-01956

Dear Ms. Morrison:

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# 408611.

The Leggett Independent School District (the "district"), which you represent, received a request for nine categories of information relating to a named educator. You state you will provide some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note you have redacted portions of the submitted information. 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, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. *See Gov't Code*

¹Although you do not explicitly raise section 552.101 of the Government Code in your brief, based on your arguments we understand you to raise section 552.101.

²We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decisions Nos. 499 (1988), 497 (1988)*. This open records letter does not reach, and, therefore, does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

§ 552.301(a), (e)(1)(D). You do not assert, nor does our review of our records indicate, the district has been authorized to withhold the redacted information without seeking a ruling from this office. *Id.* § 552.301(a); Open Records Decision No. 673 (2000). As such, this 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 information; thus, being deprived of that information does not inhibit our ability to make a ruling. In the future, however, the district should refrain from redacting any information that it submits to this office in seeking an open records ruling. Failure to do so may result in the presumption the redacted information is public. *See Gov't Code § 552.302.*

Next, we note a portion of the submitted information consists of a completed investigation report and is subject to section 552.022 of the Government Code, which states in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Id. § 552.022(a)(1). Pursuant to section 552.022(a)(1) of the Government Code, a completed report is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Although you claim this information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code, we note that these sections are discretionary exceptions under the Act that do not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the district may not withhold the information at issue under section 552.103 or section 552.107 of the Government Code. However, the Texas Supreme Court has held that the Texas Rules of Evidence are "other law" that makes information expressly confidential for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also* ORD 676. Accordingly, we will consider your attorney-client privilege argument under Texas Rule of Evidence 503.

Texas Rule of Evidence 503 encompasses the attorney-client privilege and provides in part:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if 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). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You explain that the district's superintendent requested that the district's general counsel conduct an investigation of the named educator in order to provide legal advice to the district. You state the resulting investigation report was transmitted amongst the district's general counsel, the district superintendent, and the district's board in furtherance of the rendition of professional legal services to the district. You also state that this information has remained confidential. Based on your representations and our review of the information at issue, we conclude that the submitted investigation report is privileged under rule 503 of the Texas Rules of Evidence. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328

(Tex. App.—Austin 2000, pet. denied) (attorney’s entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, the district may withhold the submitted investigation report under rule 503.

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. Section 21.355 of the Education Code provides “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also concluded a teacher is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* In addition, the Third Court of Appeals has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 because “it reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You assert that the remaining information is confidential under section 21.355. We understand the named educator was a certified teacher at the time of the evaluation. Based on your representation and our review, we conclude a portion of the information, which we have marked, consists of a teacher evaluation for the purposes of section 21.355. Therefore, the district must withhold this information under section 552.101 of the Government Code. However, we find you have failed to demonstrate, nor do the documents reflect, how any of the remaining information consists of evaluations or written reprimands as contemplated by section 21.355 of the Education Code. Therefore, the district may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

You assert the remaining information is confidential under section 552.102 of the Government Code. Section 552.102(a) of the Government Code 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). Upon review, we find none of the remaining information is excepted from disclosure under section 552.102(a) of the Government Code. Accordingly, none of the remaining information may be withheld on that basis.

In summary, the district may withhold the submitted investigation report under rule 503 of the Texas Rules of Evidence. The district must withhold the teacher evaluation we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education 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, 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 'Sarah Casterline', with a long horizontal flourish extending to the right.

Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/vb

Ref: ID# 408611

Enc. Submitted documents

c: Requestor
(w/o enclosures)