



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 9, 2013

Ms. Betsy Hall Bender
Counsel for the Schertz-Cibolo-Universal City Independent School District
P.O. Box 26715
Austin, Texas 78755-0715

OR2013-00544

Dear Ms. Bender:

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# 475822 (ISD PIA No. 12-058).

The Schertz-Cibolo-Universal City Independent School District (the "district"), which you represent, received a request for all documents pertaining to "any administrative, complaint or administrative action" pertaining to a named individual for a specified time period. You state the district is releasing some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, 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

¹Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

review in the open records ruling process under the Act.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”). In this instance, you have submitted redacted and unredacted education records for our review. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to any of the submitted documents, except to note that parents have a right of access to their own child’s education records. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the educational authority in possession of the education records.³ We will, however, address the applicability of the district’s claimed exceptions to 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 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(a). 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). We have determined that, 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 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. Additionally, the courts have concluded that a written reprimand constitutes an evaluation for purposes of section 21.355 as 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 seek to withhold Exhibit 2-A under section 21.355. Upon review, we agree the information we have marked in Exhibit 2-A consists of an evaluation of a teacher. You submit supporting documentation reflecting the teacher at issue held the appropriate certificate and was acting as a teacher at the time of the evaluation for the purposes of section 21.355. Based on your representations, we find the district must withhold the evaluation we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, the remaining information in Exhibit 2-A pertains to the employee at issue in his capacity as a coach. As such, we find

²A copy of this letter may be found on the Office of the Attorney General’s website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

³In the future, if the district does obtain parental or an adult student’s 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.

you have not demonstrated how any of the remaining information in Exhibit 2-A constitutes an evaluation of the performance of a teacher or an administrator for purposes of section 21.355(a). *See* Educ. Code § 21.353 (teachers shall be appraised only on basis of classroom teaching performance and not in connection with extracurricular activities). Accordingly, the district may not withhold any of the remaining information in Exhibit 2-A under section 552.101 of the Government Code on this basis.

Section 552.101 of the Government Code also encompasses section 261.201 of the Family Code. Section 261.201 provides as follows, in pertinent part:

(a) [T]he following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report[.]

Fam. Code § 261.201(a)(1). You assert Exhibit 2-B is subject to section 261.201(a)(1) of the Family Code because it identifies an individual who made a report of alleged child abuse or neglect to the Child Protective Services Division of the Department of Family and Protective Services (“DFPS”). *See id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of chapter 261 of the Family Code). Upon review, we agree portions of Exhibit 2-B, which we have marked, reveal the identity of the individual who made the report of the alleged or suspected abuse to DFPS. We note a child for purposes of section 261.201 is defined as a person younger than eighteen years of age. *Id.* § 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). Because the submitted information does not reveal the age of the alleged victim, it is not clear whether section 261.201(a)(1) is applicable to Exhibit 2-B. As such, we rule conditionally. If the victim at issue was eighteen years of age or older at the time of the alleged abuse or neglect, the district may not withhold any portion of Exhibit 2-B under section 552.101 of the Government Code in conjunction with section 261.201(a)(1) of the Family Code. Conversely, if the victim at issue was younger than eighteen years of age at the time of the alleged abuse or neglect, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201(a)(1) of the Family Code. However, we find you have failed to demonstrate how the remaining information in Exhibit 2-B consists of a report of alleged or suspected abuse or neglect under chapter 261 or reveals the identity of the person who made such a report. Thus, none of the remaining information in Exhibit 2-B may be withheld under section 552.101 of the Government Code on this basis.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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 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). 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 to only 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 to only 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, orig. proceeding). 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 information in Exhibit 2-C constitutes e-mails between an attorney for the district and a district employee that were made for the purpose of providing legal services to the district. The e-mails at issue reflect they were intended to be confidential and we understand they have remained so. Based on your representations and our review, we find the information in Exhibit 2-C consists of privileged attorney-client communications that the district may generally withhold under section 552.107(1) of the Government Code. We note, however, one of the e-mail strings at issue includes e-mails received from or sent to a non-privileged party. Furthermore, if the e-mails received from or sent to the non-privileged party are removed from the e-mail string in which they appear and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the district separate and apart from the otherwise privileged e-mail string in which they appear, then the district may not withhold these non-privileged e-mails under section 552.107(1).

We note some of the remaining information in Exhibit 2-A is subject to section 552.117 of the Government Code.⁴ Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former 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). Therefore, a governmental body must withhold information under section 552.117 on behalf of a current or former employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024, the information we have marked in Exhibit 2-A must be withheld under section 552.117(a)(1) of the Government Code. The district may not withhold the marked information under section 552.117 if the individual did not make a timely election to keep the information confidential.

To the extent the e-mails we have marked are maintained by the district separate and apart from the otherwise privileged e-mail string in which they appear, portions of the non-privileged e-mails are 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). Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail address we have marked is not a type specifically excluded by section 552.137(c). Accordingly, the district must withhold the e-mail address we have marked in Exhibit 2-C under section 552.137 of the Government Code unless the owner of the address affirmatively consents to its release.⁵

In summary, the district must withhold the evaluation we have marked in Exhibit 2-A under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. If the victim at issue was younger than eighteen years of age at the time of

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁵We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

the alleged abuse or neglect, the district must withhold the information we have marked in Exhibit 2-B under section 552.101 of the Government Code in conjunction with section 261.201(a)(1) of the Family Code. The district may withhold the information in Exhibit 2-C under section 552.107(1) of the Government Code, to the extent the non-privileged e-mails we have marked are not maintained separate and apart from the otherwise privileged e-mail string in which they appear. To the extent the non-privileged e-mails we have marked in Exhibit 2-C are maintained separate and apart from the otherwise privileged e-mail string in which they appear, then the district may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. If the individual whose information is at issue timely requested confidentiality pursuant to section 552.024, the information we have marked in Exhibit 2-A must be withheld under section 552.117(a)(1) of the Government Code. The district must withhold the e-mail address we have marked in Exhibit 2-C under section 552.137 of the Government Code unless the owner of the address affirmatively consents to its release. The district must release the remaining information.

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/tch

Ref: ID# 475822

Enc. Submitted documents

c: Requestor
(w/o enclosures)