



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 31, 2013

Ms. Sarah Orman
Counsel for Dripping Springs Independent School District
Walsh, Anderson, Gallegos, Green, and Treviño, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2013-01815

Dear Ms. Orman:

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# 478441.

The Dripping Springs Independent School District (the "district"), which you represent, received two requests from the same requestor for (1) several categories of information pertaining to the FFA organization, Agricultural Sciences, funds handled by district teachers, and information pertaining to a named district employee; and (2) several categories of information pertaining to the Agricultural Advisory Committee and information pertaining to determinations made with regards to the requestor's public information requests. You inform us the district has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).¹ You also state the district will withhold certain information pursuant to section 552.024 of the Government

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office 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 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>.

Code.² You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.135 of the Government Code and privileged under Texas Rule of Evidence 503.³ We have considered your arguments and reviewed the submitted information.

Initially, we understand you have only submitted information pertaining to the district's investigation of the named district employee. Thus, to the extent any additional responsive information existed when the present request was received, we assume it has been released. If such information has not been released, then it must be released at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note the submitted information is subject to section 552.022(a)(1) of the Government Code as it consists of information pertaining to a completed investigation. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is confidential under the Act or other law. Gov't Code § 552.022(a)(1). Although you raise section 552.107 of the Government Code for some of this information, section 552.107 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.107 does not make information confidential under the Act. Therefore, the district may not withhold any of Exhibit 2 under section 552.107. We note the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022(a). *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information at issue. You also claim portions of this information are excepted under sections 552.101 and 552.135 of the Government Code, which make information confidential under the Act. Thus, we will also consider your claims under these exceptions for the submitted information.

Texas Rule of Evidence 503 provides as follows:

²Section 552.024 of the Government Code authorizes a governmental body to redact from public release a current or former official's or employee's home address, home telephone number, social security number, and information that reveals whether the person has family members without the necessity of requesting a decision from this office under the Act, if the employee or official timely elected to withhold such information. Gov't Code § 552.024(a)-(c).

³Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 1 (1990).

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). 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. *See* ORD 676 at 6-7.

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 state Exhibit 2 constitutes communications created by a district representative at the request of an attorney for the district that were provided to that attorney for the purpose of facilitating the rendition of professional legal services to the district. You further state the confidentiality of the information at issue has been maintained. Therefore, based on your

representations and our review, we conclude the district may withhold Exhibit 2 under Texas Rule of Evidence 503.⁴

Next, we address your argument under section 552.135 of the Government Code, which provides the following:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov't Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under the exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* § 552.301(e)(1)(A). Additionally, individuals who provide information in the course of an investigation, but do not make the initial report, are not informants for purposes of section 552.135 of the Government Code. Upon review, we find Exhibit 3 identifies witnesses who were subsequently interviewed during a district investigation. You have failed to demonstrate how this remaining information reveals the identity of an informer for the purposes of section 552.135. Thus, the district may not withhold any portion of Exhibit 3 under section 552.135 of the Government Code.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."⁵ *Id.* § 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.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find the district must withhold the dates of birth you have marked in Exhibit 3 under section 552.102(a) of the Government Code.⁶

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of portions of this information.

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

⁶As our ruling for this information is dispositive, we need not address your argument against its release.

In summary, the district may withhold Exhibit 2 under Texas Rule of Evidence 503. The district must withhold the dates of birth you have marked in Exhibit 3 under section 552.102(a) of the Government Code. The remaining information at issue in Exhibit 3 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/ag

Ref: ID# 478441

Enc. Submitted documents

c: Requestor
(w/o enclosures)