ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 17, 2014

Ms. Sarah W. Langlois
Counsel for the Harris County Department of Education
Rogers Morris & Grover
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2014-22923

Dear Ms. Langlois:

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# 547387.

The Harris County Department of Education (the "department"), which you represent, received a request for all complaints or grievances received by the department over a specified period of time and any e-mails or correspondence received by two named department employees over a specified period of time reporting or alleging improper practices or actions by department employees or individuals affiliated with the department. We note you have redacted portions of the information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.[1] You claim the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.117 of the Government Code. We

[1]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 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.

have considered the exceptions you claim and reviewed the submitted representative sample of information.[2]

You inform us the department searched its physical files and intranet system, along with the individual computers and hard drives of department employees and members of the department's Board of Trustees (the "board") for information responsive to the present request. You state, in addition to the information that was located, the department may have information responsive to the request that exists only as backup data on magnetic tapes. You explain that once information has been deleted from the department's intranet system/portal or an individual department computer's hard drive, such information exists only as backup data on magnetic tapes, unless the user personally archives the information. You state that in order to restore archived information that exists on backup tapes, the department would be required to load backup tapes and program and/or manipulate data through use of software to be able to search the content of the archived information. You contend such information is not considered to be "maintained" by the department for purposes of the Act.

We note computer software programs generally keep track of the location of files by storing the location of data in the "file allocation table" (FAT) of a computer's hard disk. The software then displays the file as being in a specific storage location. Usually, but not always, when a file is "deleted," it is not actually deleted, but the display of its location is merely shown to be moved to a "trash bin" or "recycle bin." Later, when files are "deleted" or "emptied" from these "trash bins," the data is usually not deleted, but the location of the data is deleted from the FAT. Some software programs immediately delete the location information from the FAT when a file is deleted. Once the location reference is deleted from the FAT, the data may be overwritten and permanently removed. Thus, based on your representations, we conclude the locations of any information stored on backup tapes have been deleted from the FAT system. Therefore, we agree any such information was no longer being "maintained" by the department at the time of the present request and does not constitute public information subject to disclosure under the Act. *See* Gov't Code §§ 552.002 (public information consists of information written, produced, collected, assembled, or maintained under law or ordinance or in connection with transaction of official business by or for governmental body or by individual officer or employer of governmental body in official capacity and pertaining to official business of governmental body), .021; *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd). Thus, the Act does not require the department to release any information that was stored on backup tapes when the department received the present request for information.

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[2]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision 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 that those records contain substantially different types of information than that submitted to this office.

Section 552.103 of the Government Code provides, in part,

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> . . .
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> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See* ORD 551 at 4.

This office has long held that for the purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (concerning hearing before Public Utilities Commission). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* ORD 588.

The submitted information consists of grievances filed with the department by a number of department employees. You explain grievances filed with the department are "litigation"

because the department follows administrative procedures in handling such disputes. You state the department's grievance process is a multi-level hearing process wherein various administrators initially hear a grievance, and the department's board ultimately hears the grievance. You explain during these hearings the grievant is allowed to be represented by counsel and present evidence to the department. You state the grievant must complete the department's grievance process in order to exhaust his administrative remedies before he can appeal to either the Texas Commissioner of Education or a court of competent jurisdiction. Based on your representations and our review, we find you have demonstrated the department's administrative procedure for disputes is conducted in a quasi-judicial forum and, thus, constitutes litigation for purposes of section 552.103.

You claim the information submitted as Exhibits A-1 through A-15 is protected by section 552.103 of the Government Code. You inform us, and the submitted documentation demonstrates, the grievances at issue were filed prior to the date the department received the request for information. Upon review, however, we find some of the grievances at issue were resolved pursuant to mediated agreements prior to the date the department received the request. Further, some of the grievances at issue were withdrawn by the grievants prior to the date the department received the request. Finally, the submitted documentation reveals the department resolved some of the grievances at issue by issuing a written decision, and you do not inform us, and the submitted documentation does not reveal, the grievants in these matters timely appealed the department's final decision prior to the date the department received the request. Thus, we find the department has not demonstrated how, on the date it received the instant request for information, it was involved in litigation that was pending or reasonably anticipated with respect to these grievances.

Additionally, we note the potential opposing party to the anticipated litigation has seen or had access to the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once an opposing party has seen or had access to information related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349(1982), 320 (1982). In this instance, regardless of whether litigation is still pending or anticipated, the information at issue has been seen by all parties to the anticipated litigation. Therefore, the department may not withhold any of the information submitted as Exhibits A-1 through A-15 under section 552.103 of the Government Code.

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 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 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 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 Exhibit B consists of communications among department employees and board members, reflecting legal advice given by counsel for the department. You state this legal advice was communicated between the department's attorney, department board members, and department employees for the purpose of the rendition of legal services. You state these communications were not intended to be disclosed to third parties and these communications are and have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to Exhibit B. Accordingly, the department may withhold Exhibit B under section 552.107 of the Government Code.[3]

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5

[3]As our ruling is dispositive, we need not address your remaining argument against disclosure of the information at issue.

(1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individuals at issue timely requested confidentiality under section 552.024 of the Government Code, the department must withhold the information you have marked, as well as the information we have marked, under section 552.117(a)(1) of the Government Code. Conversely, to the extent the employees at issue did not timely request confidentiality under section 552.024, the department may not withhold the information under section 552.117(a)(1).

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 that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation. Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find some of the submitted information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation.* Accordingly, in the event the employee at issue did not make a timely election to withhold his personal information under section 552.117, we have marked information that satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation* that must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have failed to demonstrate any of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Thus, the department may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.137 of the Government Code 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 owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c). Gov't Code § 552.137(a)-(c). Accordingly, the department must withhold the e-mail addresses we have marked, unless the owners affirmatively consent to their public disclosure, pursuant to section 552.137 of the Government Code.

In summary, the department may withhold Exhibit B under section 552.107 of the Government Code. To the extent the individuals whose information is at issue are current or former department employees who timely requested confidentiality under section 552.024 of the Government Code, the department must withhold the information you have marked, as well as the additional information we have marked, under section 552.117(a)(1) of the Government Code. In the event the employee at issue did not make a timely election to withhold his personal information under section 552.117, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. Unless the owners affirmatively consent to their public disclosure, the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The department must release the remaining submitted 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Abigail T. Adams

Abigail T. Adams
Assistant Attorney General
Open Records Division

ATA/ac

Ref: ID# 547387

Enc. Submitted documents

c: Requestor
(w/o enclosures)