



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 22, 2014

Ms. Leticia D. McGowan
School Attorney
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204

OR2014-23278

Dear Ms. McGowan:

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# 547647.

The Dallas Independent School District (the "district") received two requests from separate requestors for specified investigation reports pertaining to Woodrow Wilson High School. You state the district will provide some of the requested information to the second requestor. You claim and indicate the submitted information is excepted from disclosure under sections 552.102, 552.107, and 552.137 of the Government Code, and privileged under Texas Rule of Evidence 503.¹ We have considered your arguments and reviewed the submitted information.

¹Although you do not raise sections 552.102 and 552.137 in your briefing to this office, we understand you to raise these exceptions based on your markings in the submitted information. Additionally, although you raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code, the attorney-client privilege under Texas Rule of Evidence 503, and the attorney work product privilege under Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass other exceptions found in the Act or discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Furthermore, although you raise Texas Rule of Civil Procedure 192.5, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we assume the district has withdrawn this claim. *See* Gov't Code §§ 552.301, .302.

Initially, we note 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”), 20 U.S.C. § 1232g, 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.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”); *see also* Open Records Decision No. 224 (1979) (student’s handwritten comments protected under FERPA because they would make identity of student easily traceable through handwriting, style of expression, or particular incidents related in the comments). You have submitted unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records, except to note the requestors have a right of access under FERPA to their child’s education records. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. Such determinations under FERPA must be made by the educational authority in possession of the education records. However, the DOE also has informed our office the right of access of a student or a student’s parent under FERPA to information about the student does not prevail over an educational institution’s right to assert the attorney-client privilege. Accordingly, we will consider your arguments for the attorney-client privilege under section 552.107 of the Government Code and Texas Rule of Evidence 503.

Next, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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[.]

Gov’t Code § 552.022(a)(1). The submitted information consists of a completed report that is subject to section 552.022(a)(1). The district must release the completed report pursuant to section 552.022(a)(1), unless it is excepted from disclosure under section 552.108 of the

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>.

Government Code or is made confidential under the Act or other law. *See id.* Although you seek to withhold the submitted information under section 552.107(1) of the Government Code, this section is a discretionary exception and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the submitted information may not be withheld under section 552.107(1) of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will, therefore, consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the submitted information. Further, we note portions of the submitted information are subject to sections 552.117 and 552.147(a-1) of the Government Code.³ As sections 552.102, 552.117, 552.137, and 552.147(a-1) make information confidential under the Act, we will consider the applicability of these exceptions to the submitted information.

Texas Rule of Evidence 503(b)(1) provides:

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 it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470.

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 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *Id.* Upon a demonstration of all three factors, the entire communication 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). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege extends to entire communication, including factual information).

The district states some of the submitted information consists of communications involving representatives and attorneys for the district. The district claims the communications were made for the purpose of facilitating the rendition of professional legal services to the district and these communications have remained confidential. We note, however, the submitted information shows it was shared with the University Interscholastic League (the “UIL”). You have not explained, or otherwise demonstrated, how the district shares a common interest with the UIL. *See In re XL Speciality Ins. Co.*, 373 S.W.3d 46, 51 (Tex. 2012) (discussing common interest rule under attorney-client privilege). Therefore, we find the district has not demonstrated any of the submitted information reveals privileged attorney-client communications for the purposes of Texas Rule of Evidence 503. Consequently, the district may not withhold any of the submitted information on that basis.

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 [.]” Gov’t Code § 552.102(a). The Texas Supreme Court 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). The district must withhold the information you have highlighted under section 552.102(a) of the Government Code.

Section 552.117(a)(1) of the Government Code applies to records a governmental body holds in an employment capacity and excepts from disclosure the home addresses and telephone numbers, emergency contact information, 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, except as provided by section 552.024(a-1). Gov't Code § 552.117(a)(1), .024. Section 552.024(a-1) of the Government Code provides, "A school district may not require an employee or former employee of the district to choose whether to allow public access to the employee's or former employee's social security number." *Id.* § 552.024(a-1). Thus, the district may only withhold under section 552.117 the home address and telephone number, emergency contact information, and family member information of a current or former employee or official of the district who requests this information be kept confidential under section 552.024. Section 552.117 also encompasses a personal cellular telephone number, provided 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). Whether 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(a)(1) on behalf of a current or former official or 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 individuals whose information is at issue timely requested confidentiality pursuant to section 552.024, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code, including the personal cellular telephone numbers we have marked and indicated if the cellular telephone service is not paid for by a governmental body. The district may not withhold this information under section 552.117(a)(1) if the individuals whose information is at issue did not make timely elections to keep the information confidential. Further, the district may not withhold the marked and indicated cellular telephone numbers if the cellular telephone service is paid for by a governmental body.

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 member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the district must generally withhold the personal e-mail addresses you have highlighted, as well as those we have marked and indicated, under section 552.137 of the Government Code, unless their owners affirmatively consent to public disclosure. We note, however, each requestor has a right to his or her own e-mail address under section 552.137(b) of the Government Code, and a requestor's own e-mail address may not be withheld from him or her under section 552.137 of the Government Code. *See id.* § 552.137(b).

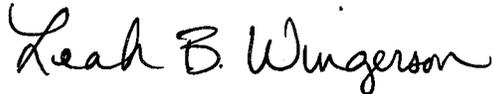
The remaining information contains the social security numbers of district employees. Section 552.147(a-1) of the Government Code provides, “The social security number of an employee of a school district in the custody of the district is confidential.” *Id.* § 552.147(a-1). The Eighty-third Texas Legislature amended section 552.147 to make the social security numbers of school district employees confidential, without such employees being required to first make a confidentiality election under section 552.024 of the Government Code. *See id.* § 552.024(a-1) (a school district may not require an employee or former employee of the district to choose whether to allow public access to the employee’s or former employee’s social security number). The legislative history of sections 552.024(a-1) and 552.147(a-1) reflects the protection afforded by section 552.147(a-1) was intended to extend to both current and former school district employees. *See* House Comm. on Gov’t Efficiency and Reform, Bill Analysis, Tex. H.B. 2961, 83rd Leg., R.S. (2013) (“H.B. 2961 seeks to protect the social security number of a school district employee or former employee from public disclosure.”). Thus, when reading sections 552.024(a-1) and 552.147(a-1) together, and upon review of the legislative history of these two amendments, we conclude section 552.147(a-1) makes confidential the social security numbers of both current and former school district employees. Accordingly, the district must withhold the social security numbers you have highlighted under section 552.147(a-1) of the Government Code.

In summary, the district must withhold the information you have highlighted under section 552.102(a) of the Government Code. The district must withhold the information we have marked under section 552.117(a)(1) of the Government Code, including the marked and indicated cellular telephone numbers if the cellular telephone service is not paid for by a governmental body, to the extent the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code. The district must withhold the personal e-mail addresses you have highlighted, as well as those we have marked and indicated, under section 552.137 of the Government Code, unless their owners affirmatively consent to public disclosure. However, the marked and indicated e-mail addresses may not be withheld from a requestor to whom it belongs. The district must withhold the social security numbers you have highlighted under section 552.147(a-1) of the Government Code. The district must release the remaining information. This ruling does not address the applicability of FERPA to the submitted information. Should the district determine any of the submitted information consists of “education records” that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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,

A handwritten signature in black ink that reads "Leah B. Wingerson". The signature is written in a cursive, flowing style.

Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/akg

Ref: ID# 547647

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)