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ATTORNEY GENERAL OF TEXAS

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Mr. Benjamin Castillo
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220 South Jackson Road
Edinburg, Texas 78539

OR2016-00076

Dear Mr. Castillo:

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# 593185.

The Edinburg Independent School District (the "district"), which you represent, received six requests from the same requestor for salary information pertaining to two district employees for a specified time frame, the amount and date of all expenditures made to a specified law firm during a specified time frame, and the amount and date of all expenditures made to a named individual during a specified time frame. You state the district has no information responsive to a portion to the request.¹ You also state the district will redact information pursuant to the family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.² You further state the district has released some

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²The 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 or student 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. A 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>.

responsive information. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information.

Initially, you state some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2014-07496 (2014). In that ruling, we determined the district (1) may withhold the information we marked under Texas Rule of Evidence 503; (2) must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; and (3) must release the remaining information. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, the district must continue to rely on Open Records Letter No. 2014-07496 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). We will address your arguments against release of the submitted information that is not encompassed by Open Records Letter No. 2014-07496.

Next, you acknowledge, and we agree, some of the submitted information consists of attorney fee bills subject to section 552.022 of the Government Code. Section 552.022(a)(16) provides for the required public disclosure of “information that is in a bill for attorney’s fees and that is not privileged under the attorney-client privilege,” unless it is “made confidential under [the Act] or other law[.]” Gov’t Code § 552.022(a)(16). The Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022. Furthermore, as section 552.101 of the Government Code can make information confidential under the Act, we will also consider your argument under this exception for the information at issue, as well as for the remaining information.

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

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

- (A) between the client or the client’s representative and the client’s lawyer or the lawyer’s representative;
- (B) between the client’s lawyer and the lawyer’s representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; 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 to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, 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. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication 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 attaches to complete communication, including factual information).

You assert portions of the submitted fee bills should be withheld under rule 503. You state the attorney fee bills reflect communications between attorneys for the district and district officers and employees that were made for the purpose of facilitating the rendition of professional legal services. You do not indicate the district has waived the attorney-client privilege with regard to the communications. Upon review, we find the district may withhold the information we have marked under Texas Rule of Evidence 503.³ However, we find you have failed to demonstrate the remaining information consists of privileged attorney-client communications. We note an entry stating a memorandum or an e-mail was prepared or drafted does not demonstrate the document was communicated to the client. Thus, we find you have not demonstrated the remaining information at issue was

³As our ruling is dispositive, we do not address your other arguments to withhold this information.

communicated and it does not reveal a client confidence. Thus, the district may not withhold any of the remaining information at issue 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 exception encompasses information made confidential by other statutes, such as section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders federal tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term “return information” as “a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] with respect to a return or with respect to the determination of the existence, or possible existence, of liability, . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]” *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993). Thus, the submitted W-2 forms constitute tax return information that is confidential under section 6103(a) of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses section 2000e-5 of title 42 of the United States Code, which provides, in relevant part:

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice, the [EEOC] shall serve a notice of the charge . . . and shall make an investigation thereof Charges shall not be made public *by the* [EEOC]. . . .

42 U.S.C. § 2000e-5(b) (emphasis added). This office has held that section 2000e-5 only restricts disclosure by those who enforce the Equal Employment Opportunity Act and does not make information in the hands of the state reporting agency confidential. *See, e.g.*, Open Records Decision Nos. 245 at 2 (1980) (City of Rio Hondo may not withhold information under section 2000e-5 or 2000e-7 of title 42 of the United States Code), 155 at 2 (1977) (City of Austin may not withhold information under section 2000e-5), 59 at 2 (1974) (Dallas County may not withhold information under section 2000e-8); *see also Whitaker v. Carney*, 778 F. 2d 216 (5th Cir. 1985) (title VII proscribes release of information only when held by EEOC or EEOC employees, and not when held by employer). You claim some of the remaining information is confidential under section 2000e-5 of title 42 of the United States Code. However, the information at issue is maintained by the district and not by

employees of the EEOC; therefore, we conclude the district may not withhold any of the remaining information pursuant to section 552.101 of the Government Code in conjunction with section 2000e-5 of title 42 of the United States Code.

Section 552.101 of the Government Code also encompasses the Family and Medical Leave Act (the "FMLA"). *See* 29 U.S.C. §§ 2601 *et seq.* Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Section 825.500(g) reads as follows:

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files. If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA shall be maintained in accordance with the confidentiality requirements of Title II of GINA (*see* 29 C.F.R. 1635.9), which permit such information to be disclosed consistent with the requirements of FMLA. If the [Americans with Disabilities Act (the "ADA")], as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). You assert some of the remaining information is confidential under the FMLA. However, you have not established any of this information relates to medical certifications, recertifications, or medical histories of employees or employees' family members, created for purposes of the FMLA. Consequently, we find this information is not confidential under the FMLA, and the district may not withhold it under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code excepts also 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). However, information pertaining to an individual that has been de-identified is not excepted under common-law privacy, as his or her privacy interest is protected. Upon review, we find the information we have marked meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the remaining information either pertains to individuals who have been de-identified, or is not highly intimate or embarrassing and of no legitimate public interest. Therefore, the district may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

In summary, the district must continue to rely on Open Records Letter No. 2014-07496 as a previous determination and withhold or release the identical information in accordance with that ruling. The district may withhold the information we have marked under Texas Rule of Evidence 503. The district must withhold the W-2 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. 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.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,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 593185

Enc. Submitted documents

c: Requestor
(w/o enclosures)