



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 5, 2016

Ms. Nichole M. Plagens
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4849 Greenville Avenue, Suite 1300
Dallas, Texas 75206

OR2016-10292

Dear Ms. Plagens:

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# 608794 (File No. 27866).

The Cleburne Independent School District (the "district"), which you represent, received a request for a named individual's personnel file. You state you will redact information pursuant to sections 552.136 and 552.147 of the Government Code.¹ You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, 552.117, 552.1325, 552.135, 552.137, and 552.148 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the United States Department of Education Family Policy Compliance Office has informed this office 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 or an adult student's consent, unredacted, personally identifiable information contained in education records for

¹Section 552.136(c) of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *See id.* § 552.147(b).

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”). You have submitted redacted and 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. *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. However, we will consider your arguments against disclosure of the submitted information. Further, we note you have redacted the names of district employees. You do not assert, nor does our review of the records indicate, you have been authorized to withhold this information without seeking a ruling from this office. *See* Gov’t Code § 552.301(a); Open Records Decision No. 673 (2001). Therefore, information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of this information does not inhibit our ability to make a ruling. In the future, however, the district should refrain from redacting any information it is not authorized to withhold in seeking an open records ruling. Failure to do so may result in the presumption the redacted information is public. *See* Gov’t Code § 552.302.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses section 261.201 of the Family Code, which provides, in part, the following:

(a) [T]he following information is confidential, is not subject to public release under [the Act], 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; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

²A copy of this letter may be found on the Office of the Attorney General’s website at <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

Fam. Code § 261.201(a); *see id.* §§ 101.003(a) (defining “child” for purposes of chapter 261), 261.001(1), (4) (defining “abuse” and “neglect” for purposes of chapter 261 of the Family Code). The district is not an agency authorized to conduct an investigation under chapter 261 of the Family Code. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). However, some of the submitted information, which we marked, was turned over to the Cleburne Police Department (the “department”) as part of the department’s investigation under chapter 261 of the Family Code. Thus, this marked information was used or developed in an investigation of alleged or suspected child abuse under chapter 261 and must be withheld under section 552.101 of the Government Code in conjunction with subsection 261.201(a)(2) of the Family Code.³ We are unable to determine, however, whether some of the documents in the remaining information were shared with the department. Accordingly, we rule in the alternative. To the extent the remaining documents we have marked were used by the department, we find these documents consist of information used or developed in an investigation of alleged or suspected child abuse under chapter 261 and must be withheld under section 552.101 of the Government Code in conjunction with subsection 261.201(a)(2) of the Family Code.

In the event the documents were not used by the department, then these documents do not consist of information used or developed in an investigation of alleged or suspected child abuse under chapter 261 of the Family Code and may not be withheld on the basis of subsection 261.201(a)(2). In this instance, however, we find portions of the documents, which we have marked, consist of the identifying information of a person who reported alleged or suspected abuse or neglect to the department. This information is within the scope of subsection 261.201(a)(1) of the Family Code. Therefore, the district must withhold the information we have marked in the documents under section 552.101 of the Government Code in conjunction with subsection 261.201(a)(1) of the Family Code. Further, the district must withhold the additional identifying information which we have marked in the remaining information under section 552.101 of the Government Code in conjunction with subsection 261.201(a)(1) of the Family Code.

Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code. Section 21.355(a) provides “[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. *See* Open Records Decision No. 643 at 3 (1996). We also determined a “teacher” for purposes of section 21.355 means a person who (1) is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and (2) is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4.

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

You contend portions of the submitted information are confidential under section 21.355 of the Education Code. You assert some of the submitted information evaluates the performance of a teacher who holds the appropriate certificate for the purpose of section 21.355. Upon review, we conclude the information we have marked consists of evaluations of the teacher's performance and are subject to section 21.355 of the Education Code. Therefore, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.101 also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." Gov't Code § 411.082(2). Part 20 of title 28 of the Code of Federal Regulations governs the release of CHRI obtained from the National Crime Information Center network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990). Section 411.083 of the Government Code makes CHRI DPS maintains confidential, except DPS may disseminate this information as provided in chapter 411, subchapter F, or subchapter E-1 of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI. However, a criminal justice agency may only release CHRI to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Thus, CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with subchapter F of chapter 411 of the Government Code. Upon review, we find the information we marked constitutes confidential CHRI which the district must withhold under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.

Section 552.101 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, in Open Records Decision No. 393 (1983), this office concluded information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. ORD 393 at 2; *see* Open Records Decision No. 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d at 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). This office has also found common-law privacy generally protects the identifying

information of juvenile victims of abuse or neglect. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 261.201.

In this instance, the remaining information contains the identifying information of individuals who were juvenile victims or the victims of alleged sexual offenses. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.⁴

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). Accordingly, the district must withhold the dates of birth we have marked under section 552.102(a) of the Government Code.

Section 552.102(b) of the Government Code excepts from public disclosure “a transcript from an institution of higher education maintained in the personnel file of a professional public school employee[.]” Gov’t Code § 552.102(b). However, section 552.102(b) further provides, “the degree obtained or the curriculum on a transcript in the personnel file of the employee” is not excepted from disclosure. *Id.*; *see also* Open Records Decision No. 526 (1989). Thus, with the exception of the employee’s name, courses taken, and degrees obtained, the district must withhold the college transcript we marked under section 552.102(b) of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* 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. *See* 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 “to facilitate the rendition of professional legal services” to the client governmental body. *See* 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. *See 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 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 only to communications between or

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

among clients, client representatives, lawyers, and lawyer representatives. See TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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. Finally, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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. See *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).

Upon review, you have failed to demonstrate that the attorney client privilege is applicable to any portion of the remaining information, and the district may not withhold any portion of the remaining information under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. Open Records Decision No. 677 at 4-8 (2002); see *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 377 (Tex. 2000). Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a)(1)-(2). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances . . . that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

Upon review, we find you have failed to establish the information at issue consists of material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial by or for the district or representatives of the district. Therefore, the district may not withhold any of the submitted information as attorney work product under section 552.111 of the Government Code.

Section 552.117(a)(1) of the Government Code 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). 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 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and 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, the district may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Such information may not be withheld for an individual who did not make a timely election. Therefore, to the extent the employees at issue timely elected confidentiality under section 552.024, the district must withhold the information we marked under section 552.117(a)(1); however, the district may only withhold the cellular telephone numbers we marked if the cellular telephone service is not paid for by a governmental body.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is

excepted from public release.⁵ See Gov't Code § 552.130(a). The district must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

You raise section 552.1325 of the Government Code, which provides as follows:

(a) In this section:

(1) "Crime victim" means a person who is a victim as defined by Article 56.32, Code of Criminal Procedure.

(2) "Victim impact statement" means a victim impact statement under Article 56.03, Code of Criminal Procedure.

(b) The following information that is held by a governmental body or filed with a court and that is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement is confidential:

(1) the name, social security number, address, and telephone number of a crime victim; and

(2) any other information the disclosure of which would identify or tend to identify the crime victim.

Id. § 552.1325. Article 56.32 of the Code of Criminal Procedure defines victim to include an individual who suffers physical or mental harm as a result of criminally injurious conduct. Crim. Proc. Code art. 56.32(a)(10), (11). Upon review, we find the remaining information does not include a victim impact statement for the purposes of section 552.1325. In addition, we find the district failed to establish the remaining information was submitted for the purpose of preparing a victim impact statement. Thus, we conclude the district has not established section 552.1325 is applicable to the remaining information and the district may not withhold such information based on that exception.

Section 552.135 of the Government Code provides in relevant part the following:

(a) "Informer" means a student or a 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.

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).

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

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

Gov't Code § 552.135(a)-(c). 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 that 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 report a possible violation of law are not informants for purposes of section 552.135. The district claims the remaining information contains personally identifiable information of informers who reported possible violations of criminal and civil law. However, upon review, we find the district has failed to demonstrate any of the remaining information reveals the identity of an informer for the purposes of section 552.135 of the Government Code. Therefore, the district may not withhold the remaining information on that ground.

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 id.* § 552.137(a)-(c). The e-mail addresses at issue are none of the types excluded by subsection (c). Therefore, the district must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.⁶

Section 552.148 of the Government Code provides the following:

(a) In this section, "minor" means a person younger than 18 years of age.

⁶We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

(b) The following information maintained by a municipality for purposes related to the participation by a minor in a recreational program or activity is excepted from the requirements of Section 552.021:

- (1) the name, age, home address, home telephone number, or social security number of the minor;
- (2) a photograph of the minor; and
- (3) the name of the minor's parent or legal guardian.

Id. § 552.148. You state the remaining information relates to the participation by minors in a district recreational program or activity. Based on your representations and our review, we find the district has failed to demonstrate the remaining information consists of personal information maintained by a municipality pertaining to a minor who is a participant in a recreational program or activity. Therefore, the district may not withhold any portion of the remaining information under section 552.148 of the Government Code.

In summary, the district must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 261.201(a)(2) of the Family Code. To the extent the remaining documents we marked were produced to the department, they must be withheld under section 552.101 of the Government Code in conjunction with subsection 261.201(a)(2) of the Family Code. To the extent these documents were not provided to the department, they may not be withheld on the basis of subsection 261.201(a)(2); however, in this instance, the district must withhold the information we have marked in the documents under section 552.101 of the Government Code in conjunction with subsection 261.201(a)(1) of the Family Code. The district must withhold the additional identifying information which we have marked in the remaining information under section 552.101 of the Government Code in conjunction with subsection 261.201(a)(1) of the Family Code. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold the CHRI we marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The district must withhold the remaining information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district must withhold the dates of birth we have marked under section 552.102(a) of the Government Code. With the exception of the employee's name, courses taken, and degrees obtained, the district must withhold the college transcript we marked under section 552.102(b) of the Government Code. If the individual whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code, the district must withhold the information we marked under section 552.117(a)(1) of the Government Code, including the personal cellular telephone number if the cellular telephone service is not paid for by a governmental body. The district must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The district must withhold the e-mail addresses we marked under section 552.137 of the

Government Code unless the owners affirmatively consent to their release. 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,



Kavid Singh
Assistant Attorney General
Open Records Division

KVS/som

Ref: ID# 608794

Enc. Submitted documents

c: Requestor
(w/o enclosures)