



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 15, 2016

Mr. Orlando Juarez, Jr.  
Counsel for United Independent School District  
J. Cruz & Associates, L.L.C.  
216 West Village Boulevard, Suite 202  
Laredo, Texas 78041

OR2016-13555

Dear Mr. Juarez:

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# 614326.

The United Independent School District (the "district"), which you represent, received a request for information pertaining to the retirement of a specified former employee. You state the district has released some information. We understand the district will withhold the information you have marked and redacted pursuant to section 552.024(c)(2) of the Government Code.<sup>1</sup> You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.116 of the Government Code.<sup>2</sup>

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<sup>1</sup>Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 of the Government Code without requesting a decision from this office if the current or former employee or official chooses not to allow public access to the information. *See* Gov't Code §§ 552.024(c), .117.

<sup>2</sup>Although you raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Additionally, although you also raise rule 503 of the Texas Rules of Evidence, we note section 552.107 of the Government Code is the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code. *See* ORD 676 at 1-2.

We have considered your arguments and reviewed the submitted information, a portion of which is a representative sample.<sup>3</sup>

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 section encompasses information protected by other statutes. Section 21.355 of the Education Code provides, in relevant part, “[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 or administrator. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined for purposes of section 21.355, the word “teacher” means a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code and who is in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. The Third Court of Appeals has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 because “it reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You contend the information in Exhibit A consists of confidential evaluations of a teacher by the district. You state the named former teacher held teaching certificates under chapter 21 of the Education Code and was acting as a teacher at the time the submitted evaluations were prepared. Based on your representations and our review, we find Exhibit A consists of evaluations for purposes of section 21.355. Accordingly, the district must withhold Exhibit A under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.101 of the Government Code also encompasses information protected by other statutes. Section 21.048 of the Education Code provides, in relevant part, the following:

The results of an examination administered under this section are confidential and are not subject to disclosure under [the Act], unless the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057

Educ. Code § 21.048(c-1). Upon review, we find the information you have marked in Exhibit B reflects the results of an examination administered under section 21.048 of the Education Code. We have no indication section 21.057 of the Education Code is applicable

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<sup>3</sup>We assume 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.

in this instance. Accordingly, the district must withhold the information you have marked in Exhibit B under section 552.101 in conjunction with section 21.048(c-1) of the Education 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). This exception further provides, however, that “the degree obtained or the curriculum on a transcript in the personnel file of the employee” are 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 degree obtained, which must be released, the district must withhold the submitted college transcript in Exhibit C pursuant to section 552.102(b) 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. ORD 676 at 6-7. First, a governmental body must demonstrate that 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. 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). 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 among clients, client representatives, lawyers, and lawyer representatives. 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. Lastly, 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. *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 that 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 the information in Exhibit D consists of a communication between district attorneys and employees and representatives of the district. Additionally, you state this communication was made for the purpose of facilitating the rendition of professional legal services, the confidentiality of the communication has been maintained, and the communication was not intended to be shared with any third parties. Based on these representations and our review, we find the district has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the district may withhold Exhibit D under section 552.107(1) of the Government Code.

Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. The district asserts the information in Exhibit E consists of audit working papers prepared or maintained in conducting an audit of a certain school's extracurricular activities. You state the district's internal auditor conducted the audit at issue as authorized by section 11.170 of the Education Code and the district's board of trustees. *See* Educ. Code § 11.170 (district's board of trustees may select internal auditor who reports directly to board). Upon review, we agree the information in Exhibit E constitutes audit working papers that the district may withhold under section 552.116(a) of the Government Code.

In summary, the district must withhold Exhibit A under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold the information you have marked in Exhibit B under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code. With the exception of the employee's name, courses taken, and degree obtained, which must be released, the district must withhold the submitted college transcript in Exhibit C pursuant to section 552.102(b) of the Government Code. The district may withhold Exhibit D under section 552.107(1) of the Government Code. The district may withhold Exhibit E under section 552.116(a) of the Government Code. The district must release the remaining 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](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,



Britni Ramirez  
Assistant Attorney General  
Open Records Division

BR/dls

Ref: ID# 614326

Enc. Submitted documents

c: Requestor  
(w/o enclosures)