



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.  
The ruling and judgment can be viewed in PDF  
format below.



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 3, 2017

**The ruling you have requested has been amended as a result of litigation and has been attached to this document.**

Mr. Harry F. Wright, Jr.  
School Attorney  
Bryan Independent School District  
101 North Texas Avenue  
Bryan, Texas 77803

OR2017-00064

Dear Mr. Wright:

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# 640183.

The Bryan Independent School District (the "district") received two requests for records pertaining to a named individual. The first requestor seeks all e-mails during a specified time period in which the named individual is the subject of a complaint.<sup>1</sup> The second requestor seeks all documents pertaining to allegations of misconduct by the named individual. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code.<sup>2</sup> The district also informs us it has notified

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<sup>1</sup>We note the district sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup>Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence and Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Accordingly, we do not address your arguments under section 552.101 of the Government Code in conjunction with these provisions. Additionally, although you raise rule 192.5 of the Texas Rules of Civil Procedure, we note the proper exception to raise when asserting the attorney work product privilege for information not subject to section 552.022 of the Government Code is section 552.111 of the Government Code. *See* Open Records Decision Nos. 677 (2002), 676 at 6.

the named individual party of his right to submit comments to this office as to why his information should not be released. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information). We have received comments from the named individual. We have considered the submitted arguments and reviewed the submitted information.

We note some of the submitted information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2016-27954 (2016) and 2016-28427 (2016). We have no indication there has been any change in the law, facts, or circumstances on which the previous rulings were based. Accordingly, we conclude the district must rely on Open Records Letter Nos. 2016-27954 and 2016-28427 as previous determinations and withhold or release the information we have indicated in accordance with those rulings.<sup>3</sup> *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will address your arguments against disclosure of the remaining submitted information, which is not subject to the previous determinations.

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). 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.). 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* ORD 643 at 4. Upon review, we find you have failed to demonstrate any of the remaining information at issue constitutes evaluations for purposes of section 21.355. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

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<sup>3</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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).

The district states some of the remaining information consists of communications involving attorneys for the district, district representatives, and other district employees and officials. The district states the communications were made for the purpose of facilitating the rendition of professional legal services to the district and these communications have remained confidential. Upon review, we find the district has demonstrated the applicability of the attorney-client privilege to the information we marked. Thus, the district may withhold the information we marked under section 552.107(1) of the Government Code.

We note some of the remaining information may be subject to section 552.117(a)(1) of the Government Code, which 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.<sup>4</sup> *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 (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 official whose information is at issue timely requested confidentiality under 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. Conversely, to the extent the official whose information is at issue did not timely request confidentiality under section 552.024, the district may not withhold the information under section 552.117(a)(1).

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). Upon review, we find 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 public disclosure.

In summary, the district must rely on Open Records Letter Nos. 2016-27954 and 2016-28427 as previous determinations and withhold or release the information we indicated in accordance with those rulings. The district may withhold the information we marked under section 552.107(1) of the Government Code. To the extent the official whose information is at issue timely requested confidentiality under 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. 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 public disclosure. 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.

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<sup>4</sup>The 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).

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,



Kelly McWethy  
Assistant Attorney General  
Open Records Division

KSM/eb

Ref: ID# 640183

Enc. Submitted documents

c: 3 Requestors  
(w/o enclosures)

DR. THOMAS A. WALLIS,  
*Plaintiff,*

v.

KEN PAXTON, ATTORNEY GENERAL  
OF THE STATE OF TEXAS, AND  
BRYAN INDEPENDENT SCHOOL  
DISTRICT  
*Defendants.*

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

345th JUDICIAL DISTRICT

Filed in The District Court  
of Travis County, Texas

DEC 20 2017  
10:40 A.M.  
At Velva L. Price, District Clerk

**FINAL JUDGMENT**

On November 15, 2017, a hearing was held on the Parties' motions for summary judgment. Plaintiff Dr. Thomas A. Wallis and Defendants Ken Paxton, Attorney General of the State of Texas, and Bryan Independent School District (the District), appeared through counsel. This is a lawsuit under the Public Information Act, by which Plaintiff sought declaratory relief from Attorney General Letter Rulings OR2016-24811, OR2016-28427, and OR2017-00064 (the "Letter Rulings"). The Court, having considered the motions, responses, summary judgment evidence, and arguments of counsel, and having reviewed the information at issue submitted for in camera inspection, consisting of In Camera Exhibits A-C, enters the following declaration and orders.

IT IS THEREFORE ORDERED AND DECLARED that Plaintiff's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART and Defendants' motions for summary judgment are GRANTED IN PART and DENIED IN PART. The Court FINDS AND CONCLUDES the following:

1. The following portions of In Camera Exhibit A are confidential under section 21.355 of the Texas Education Code and must be withheld by the District:
  - a. Part of In Camera Exhibit A-1, consisting of pages:
    - 1-10
    - 165-171
    - 225-227
    - 257-258
    - 301-304; and

b. In Camera Exhibit A-5.

2. The remaining portions of In Camera Exhibit A not designated as confidential in Section 1a and 1b, as well as the entirety of In Camera Exhibits B and C, are not excepted from public disclosure and shall be released by the District to the requestors consistent with the Letter Rulings, once this Judgment is final and no longer subject to appeal, whether by exhaustion of any possible appeal, lapse of time, petition for review, or otherwise, but in no event shall such release occur any later than 30 business days after this Judgment is final and no longer appealable.
3. Once this Judgment is final and no longer subject to appeal, whether by exhaustion of any possible appeal, lapse of time, petition for review, or otherwise, the Third Amended Temporary Injunction Order entered in this cause is hereby converted to a Permanent Injunction with respect to the documents designated as confidential in Sections 1a and 1b above, permanently enjoining the District from releasing the documents designated as confidential in Sections 1a and 1b above.
4. Once this Judgment is final and no longer subject to appeal, whether by exhaustion of any possible appeal, lapse of time, petition for review, or otherwise, the District will treat any and all future requests for information received by the District consistent with this Judgment, and shall not submit such requests to the Attorney General for a determination.
5. The Clerk of the Court is hereby directed to forthwith release Plaintiff Dr. Thomas A. Wallis' bond in the amount of \$100.00 to Dr. Thomas A. Wallis by and through his attorney of record.

All court costs and attorneys' fees are taxed against the parties incurring the same;

All relief not expressly granted is denied; and

This Order disposes of all claims between Plaintiff and Defendants in this cause and is final and appealable.

Signed this 20<sup>th</sup> day of December, 2017.


  
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JUDGE PRESIDING

**TIM SULAK**

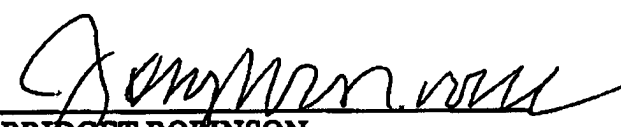
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