



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 12, 2017

Ms. Kristi Godden
Counsel for La Joya Independent School District
O'Hanlon, McCollom & Demerath
808 West Avenue
Austin, Texas 78701

OR2017-12842

Dear Ms. Godden:

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# 661428 (LJISD- 004).

The La Joya Independent School District (the "district"), which you represent, received a request for the personnel files of eight named individuals. We understand the district will redact information under section 552.130(c) of the Government Code.¹ You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.117 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

¹Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

²Although you do not raise section 552.102 in your brief, we understand you to do so based on your markings.

³We 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 those records contain substantially different types of information than that submitted to this office.

Initially, 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 the purpose of our review in the open records ruling process under the Act.⁴ 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 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.

Next, we note the district has redacted portions of the remaining information. We understand the district has redacted information subject to section 552.117(a)(1) of the Government Code as permitted by section 552.024(c) of the Government Code and pursuant to section 552.147(b) of the Government Code.⁵ However, you have also redacted other information. 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). 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 are able to discern the nature of some of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling, and we will address whether this information is subject to disclosure under the Act. Nevertheless, be advised that a failure to provide this office with the requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering the redacted information be released. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body must provide this office with copy of “specific information requested”). Thus, in the

⁴A copy of this letter may be found on the Office of the Attorney General’s website at <http://www.texasattorneygeneral.gov/open/20060725usdoe.pdf>.

⁵Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov’t Code § 552.024(c)(2). If a governmental body redacts such information, it must notify the requestor in accordance with subsections 552.024(c-1) and (c-2). *See id.* § 552.024(c-1)-(c-2). 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. *See id.* § 552.147(b).

future, the district should refrain from redacting, without authorization, any information it submits to this office in seeking an open records ruling. However, we are unable to discern the nature of the remaining redacted information. Therefore, the district has failed to comply with section 552.301 of the Government Code as to this information, and this information is presumed public under section 552.302. Accordingly, the district must release the remaining redacted information.

Section 552.107(1) protects information that comes within the attorney-client privilege. *See id.* § 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. Open Records Decision No. 676 at 6-7 (2002). 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 you have marked consists of a communication involving a district employee and counsel for the district. You state the communication was made for the purpose of facilitating the rendition of professional legal services to the district and the communication has remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the district

may withhold the information you have marked under section 552.107(1) of the Government Code.

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 has 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 date of birth you have marked under section 552.102(a) of the Government Code.

As noted above, you have redacted certain information subject to section 552.117(a)(1) of the Government Code as permitted by section 552.024(c) of the Government Code. Section 552.117(a)(1) of the Government Code 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, except as provided by section 552.024(a-1). *See* 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, a school 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. 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. 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) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We note the remaining information contains additional information subject to section 552.117(a)(1). Accordingly, if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024, the district must withhold the additional information we have marked under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone number may only be withheld if the cellular telephone service is not paid for by a governmental body. However, if the individual whose information is at issue did not make a timely election under section 552.024, the district may not withhold the information we have marked under section 552.117(a)(1) of the Government Code.

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. Section 552.101 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). We note, however, the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decision Nos. 542 (1990); 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees); 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees); 432 at 2 (1984) (scope of public employee privacy is narrow). We note the fact that a public employee is sick is public information, but specific information about illnesses is excepted from disclosure. *See* ORD 470 at 4.

Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. However, we find you have not demonstrated some of information you marked is highly intimate or embarrassing and not of legitimate public concern. This information, which we have marked for release, may not be withheld under section 552.101 in conjunction with common-law privacy. Therefore, with the exception of the information we have marked for release, the district must generally withhold the information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we note some of the information at issue pertains to individuals whose identities may be protected under section 552.117(a)(1) of the Government Code. In that instance, the information at issue relates to individuals who have been de-identified and whose privacy interests are thus protected, and the district may not withhold that information under section 552.101 in conjunction with common-law privacy. Further, we find you have not demonstrated any of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, the district may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

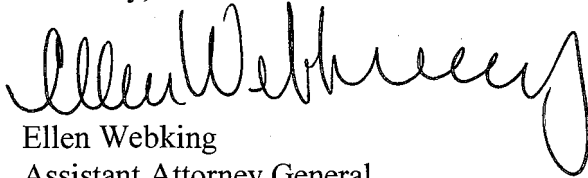
In summary, the district may withhold the information you have marked under section 552.107(1) of the Government Code. The district must withhold the date of birth you have marked under section 552.102(a) of the Government Code. If the individual whose information is at issue timely requested confidentiality pursuant to section 552.024, the district must withhold the additional information we have marked under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone number may only be withheld if the cellular telephone service is not paid for by a governmental body. With the exception of the information we have marked for release, the

district must generally withhold the information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, if the information at issue pertains to individuals whose identities may be protected under section 552.117(a)(1) of the Government Code, the district may not withhold that information under section 552.101 in conjunction with common-law privacy. 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, 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,



Ellen Webking
Assistant Attorney General
Open Records Division

EW/bw

Ref: ID# 661428

Enc. Submitted documents

c: Requestor
(w/o enclosures)