



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 23, 2017

Mr. Lu Pham  
Counsel for the Tarrant County Community College District  
Dowell Pham Harrison LLP  
505 Pecan Street Building 2, Suite 101  
Fort Worth, Texas 76102

OR2017-19267

Dear Mr. Pham:

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# 672539.

The Tarrant County Community College District (the "district"), which you represent, received a request for all documents pertaining to the performance of the requestor's client as an employee of the district.<sup>1</sup> You claim some of the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception 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

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<sup>1</sup>As you have not submitted the request for information, we take our description from your brief.

the purpose of our review in the open records ruling process under the Act.<sup>2</sup> 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 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 must address the district’s procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(b), the governmental body must ask for the attorney general’s decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov’t Code § 552.301(b). Further, pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). The district states it received the request for information on March 7, 2017. This office does not count the date the request was received or the date the governmental body was closed as business days for the purpose of calculating a governmental body’s deadlines under the Act. Accordingly, the district was required to provide the information required by sections 552.301(b) and 552.301(e) within ten and fifteen business days of the initial request, respectively. Consequently, the district was required to provide the information required by section 552.301(b) by March 21, 2017, and the information required by section 552.301(e) by March 28, 2017. However, the envelope in which the district sent its request for a ruling was postmarked June 19, 2017. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Additionally, as of the date of this letter, we have not received a copy of the written request for information. Consequently, we find the district failed to comply with section 552.301(b) and section 552.301(e) of the Government Code.

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<sup>2</sup>A 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>.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). The district claims section 552.107 of the Government Code for the information you indicated. Section 552.107 of the Government Code can provide a compelling reason to overcome the presumption of openness. Therefore, we will address the applicability of section 552.107 of the Government Code to the information you indicated. Additionally, we will consider sections 552.101 and 552.137 of the Government Code for the submitted information.<sup>3</sup>

Next, you note that you inadvertently released the information you indicated to the requestor's legal counsel. You state attempts were made to recover this information. We note the Act does not permit selective disclosure of information to the public. *See Gov't Code* §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2(1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See Gov't Code* § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *but see* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor to Gov't Code § 552.007), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory predecessor to Gov't Code § 552.108). In this instance, you inform us that the release was inadvertent. We note a governmental body is not precluded from invoking an exception to further public disclosure of information that has been released on a limited basis through no official action and against the wishes and policy of the governmental body. *See* Open Records Decision No. 376 at 2 (1983); *see also* Open Records Decision No. 387 at 3 (1983) (information that is not voluntarily released by a governmental body, but nevertheless comes into another party's possession, is not henceforth automatically available to everyone). Based on your representations, we find there was no voluntary release of information in this instance. Accordingly, we will consider your arguments against disclosure of the information at issue.

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. *See* Open Records Decision No. 676 at 6-7

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<sup>3</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(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. 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 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. *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).

You generally raise section 552.107 for the information you indicated. However, you have failed to demonstrate the information at issue consists of privileged attorney-client communications. Accordingly, the district may not withhold the information at issue under section 552.107(1) of the Government Code.

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). Accordingly, the district must withhold the personal e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. *See id.* § 552.137(b).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.*

§ 552.101. This section encompasses information protected by other statutes, such as section 1324a of title 8 of the United States Code. Section 1324a provides that an Employment Eligibility Verification Form I-9 and “any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Accordingly, we conclude the I-9 form and its attachments are confidential pursuant to section 1324a of title 8 of the United States Code and may only be released in compliance with federal laws and regulations governing the employment verification system. Therefore, the district must withhold the I-9 form and its attachments under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

Section 552.101 of the Government Code also encompasses the Americans with Disabilities Act of 1990 (the “ADA”). *See* 42 U.S.C. § 12101 et seq. Title I of the ADA provides information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a “fitness for duty examination” conducted to determine whether an employee is still able to perform the essential functions of his or her job is to be treated as a confidential medical record as well. *See* 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the “EEOC”) has determined medical information for the purposes of the ADA includes “specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual.” *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Federal regulations define “disability” for the purposes of the ADA as “(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.” 29 C.F.R. § 1630.2(g). The regulations further provide physical or mental impairment means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. *See id.* § 1630.2(h). We note the provisions of the ADA preempt any right of access the requestor might have to his client's information under state law. *See English v. General Elec. Co.*, 496 U.S. 72, 79(1990) (noting state law is preempted to extent it actually conflicts with federal law); *see also La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) (noting that federal agency acting within scope of its congressionally delegated authority may preempt state regulation). We understand the information we marked was taken from the requestor's ADA file. Based on our review, we find the information we marked is confidential under the

ADA. Accordingly, the district must withhold the information we marked under section 552.101 of the Government Code in conjunction with the ADA.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. The court of appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at \*3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). However, we note the requestor has a right of access to his client's birth date. *See* Gov't Code § 552.023(a) (person or person's authorized representative has special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Thus, the district must withhold all public citizens' dates of birth in the remaining information, other than the date of birth of the requestor's client, under section 552.101 of the Government Code.

In summary, the district must withhold the personal e-mail addresses in the submitted information under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. The district must withhold the I-9 form and its attachments under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code. The district must withhold the information we marked under section 552.101 of the Government Code in conjunction with the ADA. The district must withhold all public citizens' dates of birth in the remaining information, other than the date of birth of the requestor's client, under section 552.101 of the Government Code in conjunction with common-law privacy. The district must release the remaining information.<sup>4</sup>

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/>

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<sup>4</sup>We note the remaining information contains social security numbers. 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* Gov't Code § 552.147(b). We also note the requestor has a right of access to some of the information being released pursuant to section 552.023 of the Government Code. *See* Gov't Code § 552.023(a); ORD 481 at 4.

[ori\\_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,

A handwritten signature in black ink that reads "Ashley Crutchfield". The signature is written in a cursive style with a large initial 'A' and a long, sweeping underline.

Ashley Crutchfield  
Assistant Attorney General  
Open Records Division

AC/bw

Ref: ID# 672539

Enc. Submitted documents

c: Requestor  
(w/o enclosures)