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ATTORNEY GENERAL OF TEXAS

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Ms. Kristi Godden
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808 West Avenue
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OR2019-10699

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# 761776 (HISD-19-002).

The Hidalgo Independent School District (the "district"), which you represent, received a request for the personnel records of a named individual, all records relating to the named individual being placed on administrative leave, and all complaints relating to the named individual. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

...

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(1), (3), (18). The submitted information includes completed evaluations made for or by the district that are subject to section 552.022(a)(1). Thus, this information must be released unless it is either excepted under section 552.108 of the Government Code or is confidential under the Act or other law. *Id.* § 552.022(a)(1). The remaining information also includes information in an account, voucher, or contract relating to the receipt or expenditure of funds by a governmental body that is subject to section 552.022(a)(3) and a settlement agreement subject to section 552.022(a)(18). The information subject to sections 552.022(a)(3) and 552.022(a)(18) must be released unless it is confidential under the Act or other law. *Id.* § 552.022(a)(3), (a)(18). Although you seek to withhold the information at issue under section 552.107 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision No. 676 at 6 (2002) (attorney-client privilege under section 552.107 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the district may not withhold this information under section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider the district's assertion of attorney-client privilege district's under Texas Rule of Evidence 503 for the information subject to section 552.022. Additionally, as section 552.101 of the Government Code makes information confidential for purposes of section 552.022, we will address your arguments for the information at issue as well as for the information not subject to section 552.022.

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 and is not subject to disclosure under [the Act]." Educ. Code § 21.355(a). 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.). 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 an “administrator” for purposes of section 21.355 means a person who is required to, and does in fact, hold an administrator’s certificate under subchapter B of chapter 21 of the Education Code, and is performing the functions as an administrator, as that term is commonly defined, at the time of the evaluation. *Id.* at 4.

You assert, and we agree, some of the information at issue consists of written evaluations that are confidential under section 21.355. You inform us, and provide documentation showing, the administrator at issue held the appropriate certification at the time of the evaluations at issue. Therefore, the district must withhold the information we have indicated under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, upon review, we find you have failed to demonstrate any of the remaining information constitutes documents evaluating the performance of an administrator for the purposes of section 21.355 of the Education Code. Therefore, the district may not withhold any of the remaining information 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 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. Upon review, however, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate public concern, and the district may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

Next, we address your assertion of the attorney client privilege for the remaining information subject to section 552.022. Texas Rule of Evidence 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client’s representative and the client’s lawyer or the lawyer’s representative;

(B) between the client’s lawyer and the lawyer’s representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

Upon review of the remaining information subject to section 552.022, we find you have failed to demonstrate the information at issue consists of privileged communications for purposes of rule 503. Therefore, the district may not withhold the remaining information subject to section 552.022 of the Government Code under Texas Rule of Evidence 503.

Next, we address your argument under section 552.107 of the Government Code for the information not subject to section 552.022. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of privilege under section 552.107 are the same as those discussed for rule 503. 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. 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 the remaining information consists of communications involving an attorneys for the district and district employees and officials that were made in furtherance of the rendition of professional legal services to the district. The district states these communications were intended to be, and have remained, confidential. Based on the district's representations and our review, we find the district has demonstrated the applicability of the attorney-client privilege to the information we indicated. Thus, the district may generally withhold the e-mail string we indicated under section 552.107(1) of the Government Code. We note, however, the e-mail string includes an e-mail and attachment received from a non-privileged party. Furthermore, if the e-mail and attachment received from the non-privileged party are removed from the e-mail string and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mail and attachment, which we marked, are maintained by the district separate and apart from the otherwise privileged e-mail string in which they appear, then the district may not withhold the non-privileged e-mail and attachment under section 552.107(1) of the Government Code. Further, we find you have failed to demonstrate the remaining information constitutes communications between privileged parties made in furtherance of the rendition of professional legal services to the district for the purposes of section 552.107(1) of the Government Code. Thus, the district may not withhold any of the remaining information on that basis.

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).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, 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. 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 only be withheld under section 552.117(a)(1) on behalf of a current or

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

former employee 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. Therefore, to the extent the individual at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individual at issue did not timely request confidentiality under section 552.024, the district may not withhold the information we have marked under section 552.117(a)(1).

Next, we note, to the extent the non-privileged e-mail we marked is maintained separate and apart from the otherwise privileged e-mail string in which it appears, the e-mail includes an e-mail address subject to section 552.137 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). The e-mail address at issue is not excluded by subsection (c). Therefore, the district must withhold the personal e-mail address we marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

The remaining information also includes a social security number. Section 552.147(a-1) of the Government Code provides, "[t]he social security number of an employee of a school district in the custody of the district is confidential." *Id.* § 552.147(a-1). Thus, section 552.147(a-1) makes the social security numbers of school district employees confidential, without such employees being required to first make a confidentiality election under section 552.024 of the Government Code. *Id.* § 552.024(a-1) (school district may not require employee or former employee of district to choose whether to allow public access to employee's or former employee's social security number). Reading sections 552.024(a-1) and 552.147(a-1) together, we conclude section 552.147(a-1) makes confidential the social security numbers of both current and former school district employees. Accordingly, the district must withhold the social security number in the remaining information under section 552.147(a-1) of the Government Code.

In summary, the district must withhold the information we have indicated under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district may generally withhold the e-mail string we indicated under section 552.107(1) of the Government Code; however, the district may not withhold the non-privileged e-mail and attachment we marked if they are maintained by the district separate and apart from the otherwise privileged e-mail string in which they appear. To the extent the individual at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. In the event the non-privileged e-mail we marked is maintained separate and apart from the otherwise privileged e-mail string in which it appears, the district must withhold the personal e-mail address we marked under section 552.137 of the Government

Code, unless the owner affirmatively consents to its public disclosure. The district must withhold the social security number in the remaining information under section 552.147(a-1) 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, 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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/mo

Ref: ID# 761776

Enc. Submitted documents

c: Requestor
(w/o enclosures)