



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

September 11, 2019

Mr. Jay Youngblood  
Counsel for the Commerce Independent School District  
Powell Youngblood & Taylor, LLP  
1001 East Southeast Loop 323, Suite 450  
Tyler, Texas 75701

OR2019-25420

Dear Mr. Youngblood:

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# 784797.

The Commerce Independent School District (the "district"), which you represent, received a request for information pertaining to an investigation involving a former employee. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.116 of the Government Code. Additionally, the district states release of some of the submitted information may implicate the interests of the Texas Education Agency ("TEA"). Accordingly, the district states, and provides documentation showing, it notified TEA of the request for information pursuant to section 552.304 of the Government Code. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have received comments from TEA. We have considered the submitted arguments and reviewed the submitted information.

The district and TEA assert some of the submitted information is excepted from disclosure under section 552.116 of the Government Code, which provides:

- (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 [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] 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. TEA states the information at issue consists of audit working papers prepared or maintained by TEA’s Student Assessment Division Security Task Force in conducting investigations of testing irregularities in the administration of statewide assessment instruments. TEA states the investigations are authorized by section 39.057(a)(8) of the Education Code, which permits special accreditation investigations to be conducted in response to an allegation regarding or an analysis using a statistical method result indicating a possible violation of an assessment instrument security procedure. *See* Educ. Code § 39.057 (listing circumstances in which the commissioner shall authorize investigations). Based on these representations and our review, we agree Exhibit B consists of audit working papers for purposes of section 552.116. Accordingly, the district may withhold Exhibit B under section 552.116 of the Government Code on behalf of TEA.<sup>1</sup> However, we find the remaining information is maintained independently of the audit working papers. Section 552.116 does not apply to records that exist independently of the audit working papers. *See id.* § 552.116(a) (if information in audit working paper is also maintained in another record, that other record is not excepted from public disclosure by

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<sup>1</sup> As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

section 552.116). Thus, the district may not withhold any of the remaining information under section 552.116 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. *See* Open Records Decision No. 676 at 6-7 (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). 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 state Exhibits D-1 through D-8 consist of communications between attorneys for the district and district personnel made for the purpose of providing legal services to the district. You indicate the communications were intended to be and have remained confidential. Based on your representations and our review, we find the information at issue consists of privileged attorney-client communications the district may generally withhold under section 552.107(1) of the Government Code. We note, however, some of these otherwise privileged e-mail strings include e-mails received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the otherwise privileged e-mail strings in which they appear and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which

we marked, are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold these non-privileged e-mails under section 552.107(1).

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 section 21.355 of the Education Code, which provides, in relevant part, “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355(a). Additionally, the Third Court of Appeals has concluded a written reprimand constitutes an evaluation for purposes of section 21.355, as 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). We also determined for purposes of section 21.355, an “administrator” 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.* We further determined “teacher interns, teacher trainees, librarians, educational aids and counselors cannot be teachers or administrators for purposes of section 21.355.” *See* Open Records Decision No. 684 at 5 (2009).

You assert Exhibit C consists of confidential evaluations of an administrator by the district. You inform us the administrator at issue held the appropriate certifications and was acting as an administrator at the time the evaluations were prepared. Upon review, we find you have failed to demonstrate the information at issue consists of documents evaluating the performance of an administrator for purposes of section 21.355. 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.

In summary, the district may withhold Exhibit B under section 552.116 of the Government Code on behalf of TEA. The district may generally withhold Exhibits D-1 through D-8 under section 552.107(1) of the Government Code; however the district may not withhold the marked non-privileged e-mails if they are maintained separate and apart from the otherwise privileged e-mail strings in which they appear. 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 <https://www.texasattorneygeneral.gov/open->

government/members-public/what-expect-after-ruling-issued or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Michelle Case", followed by a horizontal flourish line.

D. Michelle Case  
Assistant Attorney General  
Open Records Division

DMC/be

Ref: ID# 784797

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

1 Third Party  
(w/o enclosures)