



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 28, 2022

Ms. Rebecca Bradley
Counsel for the Frisco Independent School District
Abernathy, Roeder, Roeder, Boyd & Hullett, P.C.
1700 Redbud Boulevard, Suite 300
McKinney, Texas 75069

OR2022-02525

Dear Ms. Bradley:

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# 926002 (Reference No. 1486).

The Frisco Independent School District (the "district"), which you represent, received a request for all e-mails sent to or received by a named individual during a stated time period.¹ You state the district has released some information to the requestor. You also state the district has redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.² You claim the submitted information is excepted from disclosure under sections 552.101, 552.107,

¹ You state the district sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

² The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or student consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. A copy of this letter may be found on the Office of the Attorney General's website: <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/20060725-USDOE-FERPA.pdf>.

552.117, and 552.137 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, we note the submitted information includes a completed report that is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body” unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under the Act or “other law.” Gov’t Code § 552.022(a)(1). Although you assert the information subject to section 552.022(a)(1), which we marked, is excepted from disclosure under section 552.107 of the Government Code, this section is discretionary and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, none of the information subject to section 552.022(a)(1), which we marked, may be withheld under section 552.107. However, the Texas Supreme Court has held the Texas Rules Evidence and the Texas Rules of Civil Procedure are “other law” for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your claims under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5 for the information subject to section 552.022 of the Government Code. We will also address your arguments for the information not subject to section 552.022(a)(1) of the Government Code.

Next, we address Texas Rule of Evidence 503, which encompasses the attorney-client privilege, for the information subject to section 552.022(a)(1) of the Government Code. Rule 503(b)(1) provides the following:

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

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

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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and 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).

You claim the information subject to section 552.022 of the Government Code is protected by the attorney-client privilege. You assert the information at issue consists of a communication between attorneys for the district and district employees and officials. You state the communication was made for the purpose of facilitating the rendition of professional legal services to the district. You also state this communication was not intended to be disclosed to third persons and has remained confidential. Based upon your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the district may withhold the information we marked under rule 503 of the Texas Rules of Evidence.⁴ *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding attorney's entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purposes of providing legal services and advice).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for Texas Rule of Evidence 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. *See* 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*, 922 S.W.2d at 923.

⁴ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

You claim section 552.107 of the Government Code for the remaining information you marked that is not subject to section 552.022 of the Government Code. You assert the information at issue consists of communications between the attorneys for the district and district employees and officials that were made for the purpose of facilitating the rendition of professional legal services to the district. You also state these communications were not intended to be disclosed to third persons and have remained confidential. Based upon your representations and our review, we find the information at issue consists of privileged attorney-client communications. Accordingly, the district may withhold the remaining information you marked under section 552.107 of the Government Code.⁵

Section 552.101 of the Government Code excepts from public 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 and not subject to disclosure under [the Act].” 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). 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 id.* at 4.

You claim the information you marked consist of an evaluation of a teacher that is confidential under section 21.355 of the Education Code. However, upon review, we find the district has failed to demonstrate the information at issue consists of a document evaluating the performance of a teacher for purposes of section 21.355 of the Education Code. Therefore, the district may not withhold the information you marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education 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. We note, for purposes of section 552.117, “family member” means a spouse, minor child, or adult child who resides in the person’s home. *See id.* § 552.117(c) (providing “family member” has meaning assigned by Fin. Code § 31.006(d)). Upon review, we find no portion of the remaining information is subject to section 552.117. Therefore, the district may not withhold any portion of the remaining information under section 552.117 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

⁵ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). Upon review, we find you failed to demonstrate section 552.137 is applicable to any of the remaining information. Therefore, the district may not withhold any of the remaining information under section 552.137 of the Government Code.

In summary, the district may withhold the information we marked under rule 503 of the Texas Rules of Evidence. The district may withhold the remaining information you marked under section 552.107 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 <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,

James M. Graham
Assistant Attorney General
Open Records Division

JMG/jm

Ref: ID# 926002

Enc. Submitted documents

c: Requestor
(w/o enclosures)