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November 21, 2008

The Honorable Greg Abbott
Attorney General of Texas
Office of the Attorney General
Attn: Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

VIA CERTIFIED MAIL

Re: **Public Information Request from [REDACTED] to the Texas Education Agency ("TEA") dated October 22, 2008.**
3rd Party Objection on behalf of Lovejoy ISD
ORD ID #332450; TEA PIR #10326.

Dear General Abbott:

We represent Lovejoy Independent School District ("Lovejoy ISD" or "District") and [REDACTED] with regard to the above-referenced matter. We have been notified that on October 22, 2008, the Texas Education Agency ("TEA") received a public information request from [REDACTED] requesting a "report and any other documentation" concerning an investigation of a named educator. We object to the release of the requested information under Gov't. Code § 552.305; Open Records Decision No. 542 (1990), wherein it states that when a third party's privacy interest is implicated, the governmental body may rely on the third party to establish that the information should be withheld under applicable exceptions intended to protect those interests. The District objects to the disclosure of the requested information as follows:

Texas Government Code Sections 552.101 and 552.102 - Private Information

Section 552.102 of the Texas Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Tex. Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under Section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by Section 552.101 of the

Act. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977).

For information to be protected from public disclosure by the common law right of privacy under Section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685

It is our understanding that the identities of [REDACTED] is information excepted from required public disclosure under common-law privacy, see Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). While we contend that these responsive documents are defamatory, the identities of the [REDACTED] are disclosed. We believe that the information herein involves highly intimate information that is the potential subject of the anticipated litigation and we strongly object to disclosure of any of this information. The release of any part of this information will not protect the [REDACTED] or defamed party and will only serve to further the defamatory conduct which is the subject of the anticipated litigation in this matter. Further, we contend that these documents should be protected because private [REDACTED] matters, which are the subject of these documents, are not of legitimate concern to the public.

§ 552.101 and § 21.355 TEC: Teacher/Administrator Evaluation Documents

The Lovejoy ISD also asserts the information responsive to the request should be withheld under Section 552.101. Specifically, the District is seeking to withhold the information in the investigation that may be subject to Section 21.355 of the Texas Education Code. Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses the doctrine of common law privacy. This Section encompasses information protected by other statutes. Section 21.355 of the Texas Education Code provides, "A document evaluating the performance of a teacher or administrator is confidential." The Attorney General has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, the Attorney General concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under Chapter 21 of the Texas Education Code and is teaching at the time of his or her evaluation. *Id.* The word "teacher" in Section 21.355 means a person who is required to and does in fact hold an teacher's certificate under subchapter B of Chapter 21 of the Education Code and is performing the functions of an teacher, as that term is commonly defined, at the time of the evaluation. *Id.* The named educator does hold a Chapter 21 certificate and was required by the District to do so in his capacity with the District. Based upon statements and evidence gathered during the investigation, information responsive to the request may contain evaluative and assessment information regarding the individual's performance and should, therefore be withheld from disclosure under Section 552.101 in conjunction with Section 21.355 of the Texas Education Code.

In an opinion entered on May 12, 2006, the Austin Court of Appeals expanded what the Attorney General considered "performance evaluation documentation." In *Abbott v. North East Indep. Sch. Dist.*, --- S.W.3d ---, 2006 WL 1293545 (Tex. App.-- Austin May 12, 2006), the Court of Appeals held that the Attorney General's view was too narrow. The evaluation exception should also apply to memoranda to teachers that includes "the principal's judgment" regarding the employee's actions, "corrective direction, and provides for further review." *Id.* at pg. 3 of 4 (emphasis added).

The information sought to be withheld contains evaluative documentation and information regarding the investigation and disciplinary actions of the conduct of a Chapter 21 employee conducted by Lovejoy ISD Human Resources, the Department, and/or the employee's supervisors. Therefore, the information responsive to the requestor includes evaluative and assessment information regarding the individual's performance and should, therefore, be withheld in its entirety or, in the alternative, all evaluative information should be redacted from the documents. The District does not believe the evaluative information can be appropriately protected without withholding the documents in their entirety.

In addition, documents submitted are related to an investigation conducted pursuant to section 21.041 of the Education Code and section 249.14 of title 19 of the Texas Administration Code. See Educ. Code § 21.041 (authorizing adoption of rules to provide, among other things, for regulation of educators and disciplinary proceedings); 19 T.A.C. § 249.14 (authorizing board to obtain and investigate information concerning alleged improper misconduct by educators and other persons). The Attorney General concluded that the agency may withhold the submitted information under section 552.116 based on the premise that documents provided included investigation information. See Tex. Atty. Gen. Op. OR2006-10826, 2006 WL 2737102 (Tex. A.G.).

Informer's Privilege

The District also raises Section 552.101 in conjunction with the common law informer's privilege, which Texas courts have long recognized. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. See Open Records Decision Nos. 515 at 3 (1998), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." See Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The privilege excepts the informer's statement only to the extent necessary to protect the informer's identity. See Open Records Decision No. 549 at 5 (1990). The investigation involved alleged defamation and alleged violation of the Educator Code of Ethics 19 TAC § 247.30. Once again, the District asserts the documents responsive to the request should be

withheld in its entirety or, in the alternative, the individual witnesses/informer's names and identifying information should be withheld.

School District Informers

The District asserts that the names and identifying information of all informer's should be withheld under Section 552.101 of the Government Code in conjunction with the informer's privilege.

In this regard, the District also raises Section 552.135 of the Government Code, which provides in part:

- (a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.
- (b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].
- (c) Subsection (b) does not apply:
 - (1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or
 - (2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or
 - (3) if the informer planned, initiated, or participated in the possible violation.

Tex. Gov't Code § 552.135(a)-(c). Because the legislature limited the protection of Section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under this exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* §§ 552.301(e)(1)(A), 135(a). Tex. Atty. Gen. Op. OR2006-05983. Therefore, the District asserts the documents should be withheld in its entirety or, in the alternative, the individual witnesses/informer's names and identifying information should be withheld.

Attorney-Client Privilege

The Lovejoy ISD also asserts that portions of the submitted information are excepted from disclosure under section 552.107 of the Government Code, which 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. 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 "for the purpose of facilitating 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 Texas 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 to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of 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, no writ). 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).

The communications at issue include correspondence between the District and counsel for the District. Counsel for the District includes Richard Abernathy, Mari McGowan, Meridith Hayes, Susan Brendemihl, Candace Lewis and Yana Andrus of Abernathy, Roeder, Boyd & Joplin P.C. Counsel for [REDACTED] includes Neil Adams and Richard Hill. Representatives of the District include Mr. Ted Moore, Mr. Dennis Muizers, Mr. Mark Slavin, and Ms. Cindy Booker. These communications were made in confidence and have not been shared or distributed to others. Therefore, the District believes the portions of the documents that are related to communications between the District and its attorneys are protected pursuant to the attorney-client privilege.

Pending or Anticipated Litigation

The LISD asserts that all of the information requested is excepted from disclosure pursuant to Section 552.103 of the Texas Government Code. Specifically, Section 552.103 of the Government Code provides as follows:

- (a) Information is excepted from required public disclosure if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

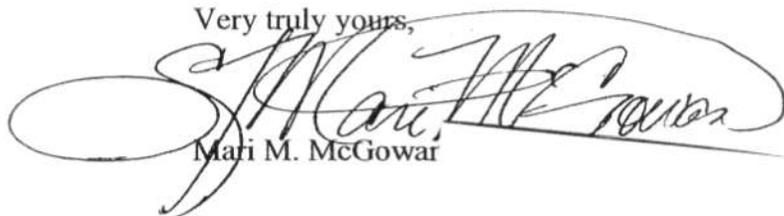
- (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Tex. Gov't Code § 552.103(a), (c).

A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. V. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W. 2d 210, 212 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). To establish that litigation is reasonably anticipated, a governmental body must provide the Attorney General "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). Enclosed as **Exhibit "A"** is a letter evidencing that the [REDACTED] is contemplating litigation due to the defamatory nature of the e-mails that are the subject of this request. Therefore, the Lovejoy ISD asserts that the requested information should be withheld in its entirety.

Your consideration is appreciated.

Very truly yours,



Mari M. McGowar

MMM/MLH/slb

cc: [REDACTED]
[REDACTED]

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