



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

March 20, 2003

Ms. Lisa B. Silvia
Paralegal
Fort Worth Independent School District
100 North University Drive, Suite NW 130
Fort Worth, Texas 76107

OR2003-1927

Dear Ms. Silva:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178082.

The Fort Worth Independent School District (the "district") received two requests for "any and all results from the personnel investigation" of three named employees, any agreement that may pertain to severance and/or future benefits for these three employees, and the age and number of years that each of the three employees worked for the district. You state that the district will release some responsive information. However, you claim that the submitted information is excepted from disclosure under sections 552.101, 552.135 and 552.137 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, we address your argument that one of the submitted documents, Exhibit 6, was created after the district received the initial request for information. We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). Therefore, the district need not release Exhibit 6.

Next, we must address the district's obligations under section 552.301(b) of the Government Code. Subsections 552.301(a) and (b) provide:

- (a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney

general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

According to the documents submitted to this office, the district received the first request for information on December 16, 2002. You state that the district was closed for Winter Break. The district's board of education approved Winter Break to be from December 23, 2002, to January 3, 2003. You did not request a decision from this office until January 14, 2003. Consequently, you failed to request a decision within the ten business day period mandated by section 552.301(b) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See Gov't Code § 552.302; Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). As sections 552.101, 552.135, and 552.137 of the Government Code provide compelling reasons to overcome the presumption of openness, we will address your arguments under those exceptions. *See Open Records Decision No.150 (1977)* (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

You claim that the submitted photographic information must be withheld under section 552.101 which excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also encompasses the doctrines of constitutional and common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. We note that the submitted photographic information relates solely to the possible work behavior of district employees and a district computer. We further note that there is a legitimate public interest in the work behavior of public employees and the conditions for their continued

employment. *See* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in having access to information concerning job performance of governmental employees), 444 (1986) (public has legitimate interest in knowing reasons for public employee's demotion, dismissal, or resignation), 423 at 2 (1984) (scope of public employee privacy is narrow).

You also argue that the submitted photographic information contains potentially offensive materials the source of which may be erroneously attributed to a particular employee. We note that the Texas Supreme Court has held that false-light privacy is not an actionable tort in Texas. *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994). In addition, in Open Records Decision No. 579, the attorney general determined that the statutory predecessor to section 552.101 did not incorporate the common-law tort of false-light privacy, overruling prior decisions to the contrary. Open Records Decision No. 579 at 3-8 (1990). Thus, the truth or falsity of information is not relevant under the Public Information Act. After reviewing your arguments and the submitted information, we conclude that none of the submitted photographic information may be withheld under section 552.101 and a common-law right of privacy belonging to the employee at issue.

We next address whether any of the submitted photographic information must be withheld under a constitutional right to privacy belonging to the employee at issue. Under the federal constitution, "in the context of governmental disclosure of personal matters, an individual's right to privacy is violated if: (1) the person had a legitimate expectation of privacy; and (2) that privacy interest outweighs the public need for disclosure." *Cantu v. Rocha*, 77 F.3d 795, 806 (5th Cir 1996); *see also Abdeljalil v. City of Fort Worth*, 55 F. Supp.2d 614 (N.D. Tex. 1999). The constitutional test requires a balancing of these two elements. This balancing test considers a number of factors, including the potential for harm in any subsequent non-consensual disclosure of the information, and "whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access." *Doe v. Attorney Gen.*, 941 F.2d 780, 796 (9th Cir. 1991) (quoting *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3rd Cir. 1980)). We will apply the balancing test to the submitted photographic information to determine whether the district must withhold this information under the named employee's constitutional right to privacy.

Information concerning the most intimate aspects of human affairs is entitled to privacy protection. Open Records Decision No. 455 at 5 (1987). Under the constitutional privacy test, however, we must weigh that privacy interest with the public need for disclosure. As we discussed above, there is substantial public interest in the submitted photographic information. Furthermore, we conclude that the legitimate public interest outweighs any privacy interest of the employee at issue, and thus, the district may not withhold the submitted photographic information under a constitutional right of privacy of the named employee.

The district also argues that the employee's family, friends, and co-workers have a privacy interest in the information. An action for the invasion of privacy cannot be maintained by a relative of the person concerned, unless that relative is himself brought into unjustifiable publicity. *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.) The right of recovery is restricted to the person about whom facts have been wrongfully published. *Id*; see also *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1093 (5th Cir. 1984) (“Texas does not permit a plaintiff to recover for injury caused by the invasion of another’s privacy.”); *Cordell v. Detective Publications, Inc.*, 419 F.2d 989, 990 (6th Cir. 1969) (under Tennessee law, “one cannot recover for this kind of invasion of the privacy of a relative, no matter how close the relationship”); *Swickard v. Wayne County Med. Exam’r*, 475 N.W.2d 304, 311-12 (Mich. 1991) (“We follow the general rule that the right of privacy is personal, and the relatives of deceased persons who are objects of publicity may not maintain actions for invasion of privacy unless their own privacy is violated.”). Thus, the employee’s family, friends and co-workers may only seek to prevent disclosures that would result in invasion of *their own* privacy interests. Here, these individuals’ privacy interests are not implicated because the information in question does not refer to them.

We will next address whether any of the submitted information must be withheld under a common-law or constitutional right of privacy for the individuals whose photographs appear in the submitted information. Upon review of the submitted information, we conclude that the photographed individuals, whether clothed or unclothed, do not have a common-law or constitutional privacy interest in the submitted photographs of themselves, all of which were obtained from publicly available websites. We find that, as these photographs are in the public domain, the individuals pictured have no reasonable expectation of privacy. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (action for invasion of privacy cannot be maintained where information is in public domain); *Star Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (law cannot recall information once in public domain), *Roberts v. Houston Indep. Sch. Dist.*, 788 S.W.2d 107, 111 (Tex. App.—Houston [1st Dist.] 1990). Additionally, photographs of individuals whose faces are hidden or who are otherwise unidentifiable are not protected, as the privacy interests of these individuals are not implicated by release of these photographs. Therefore, none of the submitted photographic information may be withheld under section 552.101 and a common-law or constitutional right of privacy belonging to the photographed individuals.

You also claim exception for some of the submitted information under section 552.101 in conjunction with section 1703.306 of the Occupations Code which provides:

- (a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

Occ. Code § 1703.306. We conclude that certain information was obtained from a polygraph examination. Accordingly, the district must withhold the polygraph information we have marked pursuant to section 1703.306(a)(1) of the Occupations Code.

You also claim exception under section 552.135 of the Government Code. Section 552.135 provides as follows:

(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.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.135. Because the legislature specifically 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 section 552.135 must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See also* Gov't Code § 552.301(e)(1)(A). The submitted documents do not include a report made by an informer or the identity of an informer. Consequently, none of the submitted information may be withheld under section 552.135.

Next, we note the existence of information that must be withheld under section 552.130. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the Texas driver's licenses that we have marked under section 552.130.

Lastly, the submitted documents contain e-mail addresses obtained from the public that are protected by section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential.¹ Section 552.137 provides:

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

¹The identical language in section 552.137 is also found in section 552.136.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The district must, therefore, withhold the e-mail addresses we have marked under section 552.137.

In summary, the district must withhold the information that we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code, the driver's license information that we have marked under section 552.130, and the e-mail addresses we have marked under section 552.137. The remaining information, excluding Exhibit 6, must be released to the requestors.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/sdk

Ref: ID# 178082

Enc: Submitted documents

c: Ms. Jennifer Autrey
Star Telegram
400 West 7th Street
Fort Worth, Texas 76102
(w/o enclosures)