



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 17, 2003

Ms. Ann Manning
McWhorter, Cobb and Johnson, L.L.P.
P.O. Box 2547
Lubbock, Texas 79408

OR2003-8256

Dear Ms. Manning:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191167.

The Lubbock Independent School District (the "district"), which you represent, received a request for the personnel file of a former employee, including information relating to his length of employment, disciplinary actions taken against him, times during which he was placed on administrative leaves and the reasons for the leaves, and any allegations of misconduct with students or investigations of such allegations. You indicate that the district will release some of the requested information. The district claims no exception to the disclosure of the remaining requested information. The district believes, however, that the remaining information implicates the privacy interests of the former employee. You have submitted the information in question. You also provided notice of the request for this information to an attorney for the former employee. We received comments from the former employee's attorney.¹ We have considered his arguments and have reviewed the submitted information.

We first note that chapter 552 of the Government Code does not require the district to release information that did not exist when it received this request or to create responsive information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). We have marked information that did not exist on the date

¹See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

of the district's receipt of this request. This decision is not applicable to that information, which the district need not release.

We next note that the district has not complied with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See id.* § 552.301(e)(1)(A)-(D). If a governmental body does not request an attorney general decision as prescribed by section 552.301, the information requested in writing is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302.

You inform us that the district received the present request for information on September 2, 2003. The district raised no exceptions to the disclosure of the requested information within the ten-business-day period provided by section 552.301(b). Furthermore, the district failed to submit the information at issue to this office within the fifteen-business-day period prescribed by section 552.301(e). Therefore, the submitted information that is responsive to this request is presumed to be public and must be released under section 552.302, unless there is a compelling reason to withhold any of the information from the public. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

The presumption that information is public under section 552.302 can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). In this instance, the former employee's attorney has submitted arguments under sections 552.101 and 552.102 of the Government Code. As claims under these exceptions can provide a compelling reason for non-disclosure under section 552.302, we will consider whether any of the responsive information must be withheld from disclosure under sections 552.101 or 552.102.²

²In this instance, the requestor's attorney also has submitted information that he claims is excepted from disclosure. We note, however, that chapter 552 of the Government Code requires the governmental body to submit the requested information that it believes may be excepted from disclosure. *See* Gov't Code §§ 552.301(e)(1)(D), .303(a); Open Records Decision No. 542 (1990). Accordingly, this decision addresses only the information that was submitted to this office on behalf of the district. We do not address the

Section 552.101 of the Government Code excepts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception encompasses information that other statutes make confidential. Chapter 261 of the Family Code governs information that relates to reports and investigations of alleged or suspected child abuse or neglect. Section 261.201 of the Family Code provides in part:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a); *see also* Open Records Decision No. 440 at 2 (1986) (construing statutory predecessor). In this instance, one of the submitted documents relates to an investigation conducted under chapter 261 of the Family Code by the Texas Department of Protective and Regulatory Services (“DPRS”). *See* Fam. Code § 261.406(a). We assume that this information was provided to the district by DPRS. The information that relates to the DPRS investigation is confidential under section 261.201 of the Family Code. Therefore, the district must withhold that information, which we have marked, under section 552.101 of the Government Code as information made confidential by law.

The former employee’s attorney claims that the remaining information is private under sections 552.101 and 552.102 of the Government Code. Section 552.101 encompasses constitutional privacy, which protects two kinds of interests. *See* Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987); *see also Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The first is the interest in independence in making certain important decisions related to the “zones of privacy,” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See* Open Records Decision No. 455 at 3-7 (1987); *see also Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981). The second constitutionally

information that was submitted by the former employee’s attorney.

protected privacy interest is in freedom from public disclosure of certain personal matters. *See* Open Records Decision No. 455 at 6-7 (1987); *see also* *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985), *reh'g denied*, 770 F.2d 1081 (1985), *cert. denied*, 474 U.S. 1062 (1986). This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See* Open Records Decision No. 455 at 7 (1987). Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie v. City of Hedwig Village*, 765 F.2d at 492). We conclude that none of the remaining information is protected from disclosure by constitutional privacy under section 552.101 of the Government Code.

Section 552.101 also encompasses the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The common-law right to privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. *See* Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private).

Section 552.102 excepts from required public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). Section 552.102(a) is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The test of whether information is private under section 552.102(a) is the same as the standard for common-law privacy under section 552.101 of the Government Code. *See* *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

In this instance, the remaining information relates to a public employee's official conduct in the workplace. As this office has often noted, the public has a legitimate interest in the workplace conduct of public employees. *See* Open Records Decision Nos. 405 at 2 (1983) (manner in which public employee performed his or her job cannot be said to be of minimal public interest), 470 at 4 (1987) (public employee's job performance does not generally constitute his or her private affairs). Thus, we conclude that the public has a legitimate interest in the rest of the submitted information. Consequently, none of that information is excepted from disclosure under sections 552.101 or 552.102 in conjunction with common-law privacy. *See also* Open Records Decision Nos. 562 at 10 (1990) (personnel file

information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 at 5 (1990) (information in public employee's resume not protected by constitutional or common-law privacy under statutory predecessors to Gov't Code §§ 552.101 and 552.102), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 423 at 2 (1984) (statutory predecessor to Gov't Code § 552.102 applicable when information would reveal intimate details of highly personal nature), 400 at 5 (1983) (statutory predecessor to Gov't Code § 552.102 protected information only if release would lead to clearly unwarranted invasion of privacy).

The former employee's attorney also appears to contend that some of the submitted information is confidential because it consists of communications between attorneys. We note that section 552.101 of the Government Code does not encompass the attorney-client privilege. *See* Open Records Decision No. 676 at 2-3 (2002). Rather, the attorney-privilege is found at section 552.107(1). *Id.* The interest of a governmental body in withholding information under section 552.107(1) on the basis of the attorney-client privilege is not a compelling reason for non-disclosure under section 552.302 of the Government Code. *Id.* at 11-12. This office has stated, however, that a compelling reason may be presented under section 552.302 to withhold privileged attorney-client communications if it is demonstrated that the release of the information would harm a third party. *Id.* at 12. This issue is resolved on a case-by-case basis. *Id.* It must also be demonstrated, however, that the attorney-client privilege is applicable to the information in question. *Id.* at 6-11. In this instance, the information at issue is contained in correspondence between attorneys for the district and for the former employee. The former employee's attorney has not demonstrated that any of this information is protected by the attorney-client privilege. *See also* TEX. R. EVID. 511 (waiver of privilege by voluntary disclosure); Open Records Decision No. 676 at 10-11 (where document has been voluntarily disclosed to opposing party, attorney-client privilege has generally been waived.). We therefore conclude that there has been no demonstration of any compelling reason to withhold any of the remaining information on the basis of the attorney-client privilege under section 552.107(1).

We note, however, that the district may be required to withhold some of the remaining responsive information under section 552.117 of the Government Code. The home address and telephone number, social security number, and family member information of a current or former employee of the district are excepted from disclosure under section 552.117(a)(1) if the current or former employee timely requested confidentiality for that information under section 552.024 of the Government Code. 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 information. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the district's receipt of this request for information. The district may not withhold information under section 552.117(a)(1) on behalf of a current or

former employee who did not make a timely request for confidentiality under section 552.024. We have marked the information that the district may be required to withhold under section 552.117(a)(1).

In summary, the district must withhold the information that is confidential under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The district may be required to withhold the information that we have marked under section 552.117 of the Government Code. The rest of the responsive information must be released.

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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a horizontal line extending to the right from the end of the signature.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 191167

Enc: Submitted documents

c: Mr. Mel Tittle
Lubbock Avalanche-Journal
710 Avenue J
Lubbock, Texas 79401
(w/o enclosures)

Mr. Travis S. Ware
1915 Broadway
Lubbock, Texas 79401
(w/o enclosures)