



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

November 6, 2009

Mr. Christopher B. Gilbert
Thompson & Horton LLP
711 Louisiana Street, Suite 2100
Houston, Texas 77002

OR2009-15875

Dear Mr. Gilbert:

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# 360732.

The Katy Independent School District (the "district"), which you represent, received a request for information pertaining to a specified allegation against a former district teacher, including documents regarding the teacher's dismissal or resignation, and documents and communications pertaining to the allegation. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address your argument under section 552.108(a)(1) of the Government Code, which excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why release of the requested information would interfere with law enforcement. *See id.* § .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The documents submitted in Exhibit B relate to an administrative investigation of the former employee and the circumstances surrounding her resignation. This administrative investigation is unrelated to the allegations under investigation in the documents in Exhibit A. Because you do not explain, and the submitted information does

not indicate, how release of the documents submitted in Exhibit B will interfere with this law enforcement investigation, the information in Exhibit B may not be withheld under section 552.108. However, you inform this office the offense report submitted in Exhibit A pertains to a pending investigation by the district's police department (the "department"). Based on your representations and our review, we determine release of most of the information in Exhibit A would interfere with the detection, investigation, or prosecution of crime. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. See Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Although you seek to withhold the identities of the suspect and witnesses, as well as the details of the allegations, on the basis of privacy, this information is not basic information and may, therefore, be withheld under section 552.108. See *id.* Thus, with the exception of basic information, the district may withhold the information in Exhibit A under section 552.108(a)(1).¹

You claim the information in Exhibit B is excepted under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of common-law privacy. Section 552.102(a) excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" *Id.* § 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(a) is the same as the common-law privacy test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. 540

¹As our ruling is dispositive for the information you seek to withhold in Exhibit A, we need not address your remaining arguments against disclosure of this information, except to note you redacted student-identifying information in Exhibit A pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. However, FERPA is not applicable to law enforcement records maintained by the department that were created by the department for a law enforcement purpose. See 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8.

S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *See id.* at 681-82.

Section 552.101 also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)).

The information in Exhibit B pertains directly to the job performance of a former district teacher, and the circumstances surrounding that teacher's resignation. This office has stated in numerous opinions that the public has a legitimate interest in knowing the reasons for the dismissal of public employees and the circumstances surrounding their resignation. Open Records Decision No. 444 at 6 (1986); *see* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). We have also held the public's need to know information related to the work behavior and resignation of a public employee generally outweighs the employee's privacy interests for purposes of constitutional privacy. *See* Open Records Decision Nos. 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom not protected under statutory predecessor to section 552.101 or predecessor to section 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of complaint not protected under either constitutional or common-law right of privacy). You explain that in this instance, however, release of any information from Exhibit B would necessarily identify the former teacher as a suspect in the department's ongoing investigation discussed above. You state such a revelation would cause irreparable harm to the former employee irrespective of the truth or falsity of the criminal allegations. However, section 552.101 does not encompass the doctrine of false-light privacy, which is concerned with whether information would place a person in a false light in the public eye. *See* Open Records Decision No. 579 at 7-8 (1990) (attorney general could not conclude that legislature intended for statutory predecessor to section 552.101 to encompass doctrine of false-light privacy); *see also* Open Records Decision No. 408 at 11 (1984) (fact that the allegations were found untrue could easily be released with the allegations themselves, mitigating harm). Thus, the truth or falsity of information is not relevant under the Act. As

you have failed to demonstrate the teacher has a privacy interest in this information, Exhibit B must be released in its entirety.²

In summary, with the exception of basic information, the district may withhold the information in Exhibit A under section 552.108(a)(1) of the Government Code. Exhibit B must be released.

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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 360732

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

²You state the district has redacted some information from Exhibit B pursuant to FERPA. We note that the United States Department of Education Family Policy Compliance Office (the "DOE") informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental 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 that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.