



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 24, 2011

Mr. John A. Kazen
Counsel for the Laredo Independent School District
Kazen, Meurer & Perez, LLP
P.O. Box 6237
Laredo, Texas 78042-6237

OR2011-09071

Dear Mr. Kazen:

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# 421702.

The Laredo Independent School District (the "district"), which you represent, received a request for the requestor's personnel file, records from the district's human resources and police department involving the requestor, and video recordings pertaining to a specified incident. You state the district has released some responsive information to the requestor. You claim the remaining responsive information is excepted from disclosure under sections 552.101, 552.108, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.108(a)(1) of the Government Code 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 the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note section 552.108 is generally not applicable to records of an internal affairs investigation that is purely administrative in nature and does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to

section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution). In this case, you state release of the submitted administrative investigation report and witness statements "would interfere with the detection, investigation, or prosecution of crime." However, you do not explain the information at issue pertains to a pending criminal case or otherwise provide an explanation for *how* release of this information at this time would interfere with law enforcement efforts. Accordingly, we conclude you have failed to demonstrate the applicability of section 552.108(a)(1) to the submitted information. Therefore, the district may not withhold the submitted information under section 552.108(a)(1) of the Government Code.

You claim the submitted witness statements should be withheld under sections 552.101 and 552.135 of the Government Code. Section 552.101 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 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); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App., 1928). The common-law informer's privilege protects from disclosure 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. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978).

You claim the submitted statements identify individuals who report a possible violation of law to the district's police department, which is charged with the duty to enforce "the particular law." The submitted information reflects the conduct at issue was the failure of a security guard to render aid during the specified incident. However, you have not explained how this reported conduct was a violation of any civil or criminal statute. You also have not explained whether any such statutory violations carry civil or criminal penalties. Accordingly, the district has failed to demonstrate that the informer's privilege is applicable to the submitted information. Thus, we conclude the district may not withhold any information under section 552.101 of the Government Code in conjunction with the informer's privilege.

Section 552.135 of the Government Code provides the following:

- (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 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].

Gov't Code § 552.135. As noted above, you have not provided any arguments explaining how the conduct described in the submitted information constitutes a violation of criminal, civil, or regulatory law. Accordingly, we find the district has failed to demonstrate how the information identifies an informer for purposes of section 552.135. Thus, the district may not withhold any of the remaining information under section 552.135 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. We note that information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and is, therefore, generally not protected from disclosure under common-law privacy. *See, e.g.*, Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest). Whether information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983). In this instance, you have not provided any arguments demonstrating that any portion of the submitted information is highly intimate or embarrassing and a matter of no legitimate public concern. We therefore conclude the district may not withhold any portion of the submitted information under section 552.101 in conjunction with common-law privacy.

We note portions of the submitted information are subject to section 552.102(a) of the Government Code.¹ Section 552.102(a) excepts from 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). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we have marked the birthdates the district must withhold under section 552.102(a) of the Government Code.

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions.

Portions of the submitted information may also be subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who timely requests this information be kept confidential under section 552.024. *See* Gov't Code § 552.117(a)(1). 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 the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, to the extent the employee whose information we marked timely requested confidentiality for the marked personal information under section 552.024, the district must withhold this information under section 552.117(a)(1). However, to the extent this employee did not so elect, the information we marked must be released.

In summary, the district must withhold the dates of birth we marked under section 552.102(a) of the Government Code. The district must also withhold the information we marked under section 552.117(a)(1) of the Government Code to the extent the employee whose information is at issue elected to withhold such information. The district must release the remaining information.²

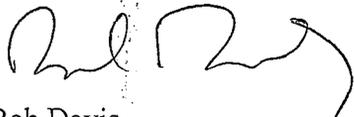
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

²We note that the United States Department of Education Family Policy Compliance Office has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, 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. Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). The submitted information may constitute unredacted education records. Because our office is prohibited from reviewing education records to determine the applicability of FERPA, we do not address FERPA with respect to any submitted education records. Such determinations under FERPA must be made by the educational authority in possession of the education records.

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,

A handwritten signature in black ink, appearing to read "Bob Davis", with a stylized flourish at the end.

Bob Davis
Assistant Attorney General
Open Records Division

RSD/eb

Ref: ID# 421702

Enc. Submitted documents

c: Requestor
(w/o enclosures)