



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 30, 1994

Mr. Jeffrey A. Davis
McGinnis, Lockridge & Kilgore
3200 One Houston Center
1221 McKinney Street
Houston, Texas 77010-2009

OR94-638

Dear Mr. Davis:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 27947.

The Spring Branch Independent School District (the "school district"), which you represent, has received a request for information relating to a school district student who was allegedly sexually assaulted by a school bus driver. Specifically, the requestor, who represents the child and her parents, seeks "any information, reports, memos, etc. relating to this matter that was prepared by Spring Branch Independent School District," including "the name of the driver of the bus my client was riding." You have submitted the requested information to us for review and claim that sections 552.101, 552.103, and 552.108 of the Government Code exempt it from required public disclosure.

Information may be withheld from required public disclosure under common-law privacy if it meets the criteria articulated for section 552.101 of the act by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under the *Industrial Foundation* case, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing *and* is of no legitimate concern to the public. In Open Records Decision No. 393 (1983), this office concluded that common-law privacy protects information that identifies or would tend to identify a victim of a serious sexual offense. *See also* Open Records Decision No. 339 (1982).

We have examined the information submitted to us for review. We agree that some of it would identify or tend to identify the alleged victim of a serious sexual offense. We note, however, that section 552.023 of the Government Code provides an

individual with a limited special right of access to information about himself or herself. It states in pertinent part:

(a) A person or a person's authorized representative has a special right of access, beyond the right of the general public, to records and copies of records held by a governmental body that contain information relating to the person that is protected from public disclosure by laws intended to protect that person's privacy interests.

(b) A governmental body may not deny access to information to the person, or the person's representative, to whom the information relates on the grounds that the information is considered confidential by privacy principles under this chapter but may assert as grounds for denial of access other provisions of this chapter or other law that are not intended to protect the person's privacy interests.

Gov't Code § 552.023; *see also* Open Records Decision No. 481 (1987) (determining that common-law privacy does not provide a basis for withholding information from its subject). We conclude, therefore, that the school district may not withhold the requested information from the requestor on privacy grounds.¹

Next we address whether the school district may withhold the requested information under section 552.103 of the Government Code. *See* Open Records Decision No. 556 (1990) at 2 (concluding that right of access to private information about one's self that section 552.023 gives individual does not override exceptions to disclosure in Open Records Act or confidentiality laws protecting interest other than that individual's privacy). Section 552.103(a) excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

¹The school district appears to contend that the bus driver's identity is protected by common-law privacy. Although intimate and embarrassing, we believe there is a legitimate public interest in the requested information. *See* Open Records Decision Nos. 470; 455 (1987) (concluding that public has a legitimate public interest in a public employee's job performance). The school district also appears to rely on a "false light" theory of privacy in claiming that section 552.101 excepts information concerning the bus drive. False light privacy, however, is not an actionable tort in Texas, *see Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994), and is no longer a basis for withholding information from required public disclosure under section 552.101 of the Government Code, *see* Open Records Decision No. 579 (1990).

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 (1990) at 5. A surmise that litigation will occur is not enough; there must be some concrete evidence pointing to litigation. Attorney General Opinion JM-266 (1984) at 4; Open Records Decision Nos. 518 (1989) at 5; 328 (1982). This office has concluded that a reasonable likelihood of litigation exists when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, *see* Open Records Decision No. 551, and when a requestor hires an attorney who then asserts an intent to sue, *see* Open Records Decision No. 555 (1990).

You believe that the requestor's letter indicates an intent to sue the school district. In addition, you believe that the fact that the school district police department investigated the matter makes litigation reasonably anticipated. Having examined the requestor's letter, however, it appears that he seeks the information only so that he may determine whether a claim is feasible. He states no claim nor makes any demands in his letter. The single fact that a request for information is made by an attorney on a client's behalf is not sufficient to invoke section 552.103(a). *See* Open Records Decision No. 361 (1983). We conclude, therefore, that litigation may not be reasonably anticipated in this instance. Accordingly, the school district may not withhold the requested information under section 552.103(a) of the Government Code.

We note that some of the records submitted for our review contain the school bus driver's address and telephone number. Section 552.117 of the Government Code requires the school district to withhold any home address or telephone number of any current or former official or employee who requested that this information be kept confidential under section 552.024. The school district may not, however, withhold the home address or telephone number of an official or employee who made the request for confidentiality under section 552.024 after this request for the documents was made. Whether a particular piece of information is public must be determined at the time the request is made. Open Records Decision No. 530 (1989) at 5. We are unable to determine from the records submitted for our review whether the school bus driver has requested that his address and telephone be kept confidential under section 552.024 of the Government Code. If he has not done so within the parameters of section 552.024, the information may not be withheld under section 552.117.

Finally, we address whether section 552.108 of the Government Code excepts the requested information from required public disclosure. Section 552.108 excepts:

(a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution.

When applying section 552.108, this office distinguishes between information relating to cases that are still under active investigation and other information. Open Records Decision No. 611 (1992) at 2. In cases that are still under active investigation, section 552.108 excepts from disclosure all information except that is generally found on the first page of the offense report. *See generally Houston Chronicle Publishing 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); Open Records Decision No. 127 (1976). Otherwise, when the "law enforcement" exception is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how release would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) at 3 (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). Whether information falls within the section 552.108 exception must be determined on a case-by-case basis. *Id.* at 2.

You do not claim that the submitted information relates to an ongoing law enforcement investigation. In fact, the investigation appears to have been concluded almost two years ago. In addition, you have not explained, nor does the submitted information supply an explanation on its face, how release of the submitted information would unduly interfere with law enforcement. We conclude, therefore, that the school district may not withhold the requested information under section 552.108 of the Government Code. The school district must release the requested information in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

Ref.: ID# 27947

Enclosures: Submitted documents

cc: Mr. Chester L. Thornton
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(w/o enclosures)