

The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 13, 2008

Ms. Leslie McCollom
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OR2008-07450A

Dear Ms. McCollom:

This office issued Open Records Letter No. 2008-07450 (2008) on June 2, 2008. We have examined this ruling and determined that we made an error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that the Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of this chapter). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on June 2, 2008.

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# 311923.

The Austin Independent School District (the "district"), which you represent, received four requests for information obtained in the course of mandatory criminal background checks on district employees. Specifically, the *Austin American-Statesman* requested information regarding 1) the number of employees with criminal histories broken down by campus, 2) the specific felony and misdemeanor offenses found, and 3) the number of employees the district has confirmed that have convictions, separated into felony and misdemeanor convictions. The *Austin American-Statesman* submitted a separate request for information regarding 1) the number of employees fingerprinted and the number of arrests, broken down by felony and misdemeanor arrests, 2) of those arrested, the number who are teachers, 3) the offenses found, broken down by campus, and 4) the number of employees fired as a result of the background checks. KVUE News requested information regarding 1) the number of felony arrests, out of fifteen felony arrests previously reported by the district, that resulted in a conviction and 2) a list of all offenses committed by each convicted felon. Finally, KXAN News requested the results of the background checks conducted on certified educators,

including the specific felony and misdemeanor offenses found and the campuses where these educators teach.¹

You inform us that the district has previously released district-wide summary data showing the number of employees' records reviewed, as of February 20, 2008, and the number of those records indicating a criminal history, broken down by offense level.² You claim that the information originally submitted in Exhibits 8, 9, and 10 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 representative sample of information.³ We have also received and considered comments from the Texas Department of Public Safety ("DPS"), the Texas American Federation of Teachers, the Association of Texas Professional Educators, the Texas Association of School Administrators, the Texas Association of School Boards, the Texas Classroom Teachers Association, and the Texas State Teachers Association. *See id.* § 552.304 (interested party may submit written comments stating why information should or should not be released).

Initially, you assert that some of the requested information does not exist because the district is in the process of verifying the criminal history information obtained on each employee, but the process is not complete. You inform us that this process is to determine whether the arrests resulted in convictions, and if so, for what offenses and what offense levels. Specifically, you state that the district "cannot give answers about the number or level of convictions, whether misdemeanor or felony," because the information is either unverified, incomplete, or missing. Additionally, you state that, as of yet, the district has not fired any employees as a result of the background checks; therefore the district has no information responsive to this particular request. The Act does not require a governmental body to release information that did not exist at the time the request for information was received or create new information in response to a request. *See Econ. 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 note, however, that the district has a good faith duty to relate a request to information held by it. Open Records Decision No. 561 at 8 (1990). We will therefore consider whether the submitted information is subject to required public disclosure under the Act.

¹You inform this office that the *Austin American-Statesman* clarified its first request, and KVUE News clarified its request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²You submitted this information as Exhibit 11 in your original request for a decision.

³We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.101 of the Government Code 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 chapter 411 of the Government Code. Chapter 411 authorizes DPS to compile and maintain criminal history record information (“CHRI”) from law enforcement agencies throughout the state and to maintain access for authorized persons to federal criminal history records. *See* Gov’t Code §§ 411.042, .087. CHRI is defined as “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” *Id.* § 411.082(2).

In 2007, the Legislature enacted section 411.0845 of the Government Code, which provides in pertinent part as follows:

(a) [DPS] shall establish an electronic clearinghouse and subscription service to provide criminal history record information to a particular person entitled to receive criminal history record information and updates to a particular record to which the person has subscribed under this subchapter.

(b) On receiving a request for criminal history record information from a person entitled to such information under this subchapter, [DPS] shall provide through the electronic clearinghouse:

(1) the criminal history record information reported to [DPS] or the Federal Bureau of Investigation relating to the individual who is the subject of the request; or

(2) a statement that the individual who is the subject of the request does not have any criminal history record information reported to [DPS] or the Federal Bureau of Investigation.

...

(d) [DPS] shall ensure that the information described by Subsection (b) is provided only to a person otherwise entitled to obtain criminal history record information under this subchapter. Information collected under this section is confidential and is not subject to disclosure under [the Act].

(e) A person entitled to receive criminal history record information under this section must provide [DPS] with the following information regarding the person who is the subject of the criminal history record information requested:

(1) the person’s full name, date of birth, sex, Texas driver’s license number or personal identification certificate number, and social security number;

(2) a recent electronic digital image photograph of the person and a complete set of the person's fingerprints as required by [DPS]; and

(3) any other information required by [DPS].

Id. § 411.0845(a), (b), (d), (e). Pursuant to section 22.083(a-1) of the Education Code, a school district is authorized to obtain this CHRI from DPS. Educ. Code § 22.083(a-1)(1); *see also* Gov't Code § 411.097.

You state that the district obtained the information in the original Exhibit 8 from the DPS clearinghouse pursuant to section 411.0845 of the Government Code. You further state that the district created the original Exhibit 9 by combining information obtained from the clearinghouse reports with information the district already maintained. You also seek to withhold the original Exhibit 10 which was created by the district and consists of summary information separated by campus.⁴ Based on your representations and our review, we find that the information in Exhibit 8 and the information obtained from the clearinghouse reports in Exhibit 9 is confidential under section 411.0845(d) of the Government Code. Therefore, the district must withhold Exhibit 8 in its entirety and the columns we have marked in Exhibit 9 under section 552.101 of the Government Code in conjunction with section 411.0845(d).⁵ *Id.* § 411.0845(d)(providing that information collected under section 411.0845 is confidential and not subject to disclosure under the Act). However, the district has failed to demonstrate how the remaining information in Exhibit 9, as well as the information in Exhibit 10, constitutes confidential information obtained from the clearinghouse reports, and this information may not be withheld under section 552.101 on that basis.

Section 552.102 of the Government Code excepts from 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, Inc.*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information protected under section 552.102 is the same 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. Accordingly, we will consider the privacy claims under both section 552.101 and 552.102.

⁴We note that we previously ruled on Exhibit 10 in Open Records Letter No. 2008-06168 (2008). To the extent the analysis in this ruling conflicts with the analysis in the previous ruling, Open Records Letter No. 2008-06168 is overruled.

⁵As our ruling is dispositive, we need not address the district's remaining arguments for Exhibit 8.

Common-law privacy protects information if it (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. *See Indus. Found.*, 540 S.W.2d at 685. This office has held that the compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information, and notes that individual has significant privacy interest in compilation of one's criminal history). Moreover, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public.

The district argues that the remaining information could be used to determine which individuals have a criminal history. Even if this assertion is true, the information the district seeks to withhold pertains to district employees, not private citizens. This office has found that the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications. *See Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990)* (information about the qualifications of a public employee is of legitimate concern to the public); *see also Open Records Decision No. 423 at 2 (1984)* (scope of public employee privacy is narrow). The information at issue was gathered in the course of conducting mandatory background checks on employees, and presumably will play a role in the district's employment decisions. Accordingly, there is a legitimate public interest in this information. Therefore, the doctrine of common-law privacy is not applicable in this instance, and the remaining information may not be withheld on this basis.

Constitutional privacy under section 552.101 protects two kinds of interests: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of a personal matter. *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 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 Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See ORD 455 at 7*. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). In this instance, the information at issue pertains solely to the job qualifications and conduct of public employees. As such, this information does not fall within the zones of privacy, nor does it implicate the employees' privacy interests for the purposes of constitutional privacy. Accordingly, the district may not withhold any of the

remaining information on the basis of privacy under section 552.101 or 552.102 of the Government Code.

Next, section 552.108(a)(2) 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 . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(a)(2). By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. A school district is not a law enforcement agency. Accordingly, the district may not withhold the remaining submitted information under section 552.108(a)(2) of the Government Code.

In summary, the district need not create new information responsive to the requests or release information that did not exist when the district received the requests for information. The district must withhold the information in Exhibit 8 and the information we have marked in Exhibit 9 that was obtained from the DPS clearinghouse under section 552.101 of the Government Code in conjunction with section 411.0845 of the Government Code. The remaining information in Exhibit 9 and the information in Exhibit 10 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 challenge 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 Office of the Attorney General 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. 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,



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Assistant Attorney General
Open Records Division

TLH/eeg

Ref: ID# 311923A

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assembled or maintained on, before, on or after the date of this provision. The parties are in agreement that section 22.08391 applies to the information at issue in this cause. The parties are in agreement that section 22.08391 should be applied to the information at issue even though the court has ordered previously, under the law existing at the time of the ruling, that the information at issue is subject to disclosure. The parties have moved the Court to enter a Final Judgment applying Tex. Educ. Code § 22.08391. The Court also is of the opinion that section 22.08391 of the Education Code applies to the information at issue.

1. IT IS THEREFORE DECLARED that the information in columns G, H, and I, in Exhibit 9 (to Austin I.S.D.'s request for a ruling to the Attorney General) is confidential under Tex. Gov't Code § 552.101, in conjunction with Tex. Educ. Code § 22.08391, and

2. IT IS FURTHER DECLARED that Cross-Plaintiff Austin I.S.D. is relieved of compliance with that portion of Attorney General Letter Ruling OR2008-07450 that held the information at issue subject to disclosure.

3. This JUDGMENT supercedes the Court's Order on Motions for Summary Judgment, signed on March 6, 2009, subject to Paragraph 4 of this JUDGMENT.

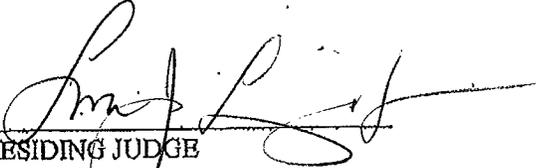
4. This JUDGMENT is contingent on H.B. 2730, SECTION 9A.05, 81st Leg., R.S. (2009) becoming law, either by signature of the Governor or by operation of law. If H.B. 2730, SECTION 9A.05 does not become law, this JUDGMENT is void and of no effect, and the Court's Order on Motions for Summary Judgment, signed on March 6, 2009, is the final judgment in this cause.

5. All costs of court are taxed against the party incurring the same;

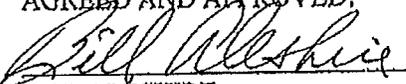
6. All relief not expressly granted is denied; and

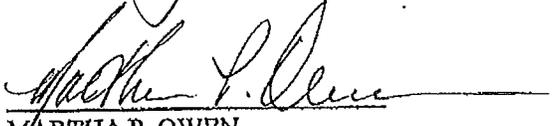
7. This JUDGMENT disposes of all claims between Plaintiffs, Cross-Plaintiff/Defendant and Defendant and is a final judgment.

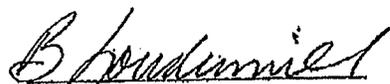
SIGNED this 12th day of JUNE, 2009.

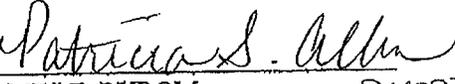

PRESIDING JUDGE

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