ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 8, 2010

Ms. Heather R. Rutland
Henslee Schwartz LLP
816 Congress Avenue, Suite 800
Austin, Texas 78701-2443

OR2010-04982

Dear Ms. Rutland:

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# 375209.

The Carrollton-Farmers Branch Independent School District (the "district"), which you represent, received a request for five categories of information pertaining to allegations against a former district employee. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code and privileged under Texas Rule of Evidence 503.[1] We have considered the exceptions you claim and reviewed the submitted information. We have also received comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that you state the district does not maintain information responsive to Categories 2, 3, 4, or 5 of the instant request. You state neither the district nor its law firm, Henslee Schwartz, LLP has "prepared any formal interview questions" responsive to Category 2 of the request. Further, you state that while individuals were interviewed as part of the investigation, there is no specific document listing the individuals interviewed during the course of the investigation responsive to Category 3 of the request. The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.–San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983). We note, however, a governmental body has a duty to make a good

[1]We note that you also claim the informer's privilege under Texas Rule of Evidence 508. The Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); Gov't Code § 552.022(a). In this instance, however, section 552.022 is not applicable to the information that you seek to withhold under the informer's privilege, and therefore, we do not address your arguments under rule 508.

faith effort to relate a request for information to information the governmental body holds. *See* Open Records Decision No. 561 (1990). Thus, to the extent the district maintains records from which the requested information in Categories 2 and 3 may be obtained, the district must provide such information to the requestor unless it has been demonstrated to come within an exception to public disclosure. *See* Gov't Code §§ 552.006, .221, .301, .302; Open Records Decision No. 664 (2000).

Next, we note that you have not submitted information responsive to Category 4 of the request, which pertains to answers to interview questions. Although you assert the district itself does not maintain information responsive to this portion of the request, you state "[a]ny answers or other information gleaned from interviews and other aspects of [the district's] investigation are held by Henslee Schwartz, LLP, and consequently protected from disclosure as attorney-client privileged." Thus, it appears that the district's law firm maintains information responsive to this portion of the request. Section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *See* Gov't Code § 552.002(a). Therefore, information that is maintained by a private entity is subject to the Act to the extent a governmental body owns or has a right of access to the information at issue. Accordingly, to the extent the district's law firm maintains information responsive to Category 4 of the request and the district has a right of access to that information, those records are subject to the Act. To the extent that this information is not collected, assembled, or maintained for the district or the district does not own or have a right of access to such information, we conclude that such information is not subject to disclosure under the Act and need not be released to the requestor.

To the extent the district maintains or has access to information responsive to Categories 3 and 4 of the request, we will address your claim for this information under the attorney-client privilege. Section 552.301(e) of the Government Code requires submission to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the written request was received, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). As of the date of this letter, you have not submitted to this office a copy or representative sample of the information responsive to Categories 3 and 4 of the request. Consequently, we find district failed to comply with the requirements of section 552.301 with respect to this information.

Pursuant to section 552.302 of the Government Code, failure to submit to this office the information required in section 552.301(e) results in the legal presumption the requested information is public and must be released. Information that is presumed public must be released, unless a compelling reason to withhold the information is demonstrated to overcome this presumption. *See Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex.

App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302 of the Government Code); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information may be demonstrated by showing the information is made confidential by another source of law or third party interests are affected. *See* ORD 630. You state that any information responsive to Categories 3 and 4 of the request is excepted from disclosure under the attorney-client privilege. However, section 552.107 of the Government Code and Texas Rule of Evidence 503 are discretionary in nature. They serve only to protect a governmental body's interests and may be waived; as such, they do not constitute compelling reasons to withhold information for purposes of section 552.302. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) and Texas Rule of Evidence 503 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Because you have not submitted information responsive to these portions of the request, you have waived your claims under section 552.107 and Texas Rule of Evidence 503. Thus, to the extent that this information is within the district's possession or the district has a right of access to this information, we have no choice but to order it released per section 552.302 of the Government Code. *See* Gov't Code §§ 552.301, 552.302.

Next, we will address your arguments for the submitted information. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses information protected by the informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects 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. *See* Open Records Decision Nos. 515 at 3 (1998), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The privilege excepts the informer's statement only to the extent necessary to protect the informer's identity. *See Roviaro v. United States*, 353 U.S. 53, 60 (1957); Open Records Decision No. 549 at 5 (1990).

You state that Exhibit B consists of informant furnished information relating to the district's investigation of a possible violation of law. You state "the civil, criminal and/or regulatory provisions allegedly violated are contained in Chapter 25 and 28 of the Texas Education Code, and Chapter 19, sections 74 and 101 of the Texas Administrative Code." Although you raise the informer's privilege for information you have marked in Exhibit B, you have failed to provide any arguments explaining how the district has criminal or quasi-criminal

law-enforcement authority over the subject of the allegations. Also, you have not sufficiently demonstrated that a violation of law was reported to an official having a duty of inspection or of law enforcement. Further, you have not explained whether the alleged violations carry any civil or criminal penalties. Accordingly, we find you have failed to demonstrate the informer's privilege is applicable to the information at issue. Thus, the district may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the informer's privilege.

Next, you assert that the information in Exhibits B, C and D is excepted from disclosure because release of these documents "would be publication of potentially libelous and otherwise defamatory materials." You acknowledge that it is not the purview of this office to determine fact issues, but state this office has ruled that under the law of "false light" privacy, releasing certain information would be reckless. However, in Open Records Decision No. 579, this office determined that the statutory predecessor to section 552.101 of the Government Code did not incorporate the common-law tort of false-light privacy, overruling prior decisions to the contrary. *See* Open Records Decision No. 579 at 3-8 (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. In addition, the Texas Supreme Court has held that false-light privacy is not an actionable tort in Texas. *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994). Thus, an argument based on false-light privacy is not grounds for excepting information from public disclosure under the Act. However, because you state release of this information would "cast aspersions and vitriol upon a former employee of the [d]istrict such that their publication would likely cause the former employee personal embarrassment, financial harm, public humiliation and irreparable injury to the former employee's professional reputation," the test we will apply to the information at issue is the doctrine of common-law privacy.

Section 552.101 also encompasses the doctrine of common-law privacy. For information to be protected from public disclosure by the common-law right of privacy, the information must meet the criteria set out by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). In *Industrial Foundation*, the Texas Supreme Court stated information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. This office has stated that there is a legitimate public interest in the work conduct and job performance of public employees. *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). You state the information at issue contains allegations against a former employee of the district. Upon review, we find this information pertains to the work conduct and job performance of a district employee. Thus, you have failed to establish that any portion of the submitted information is highly intimate or embarrassing and not of legitimate public interest. Therefore, no portion of the submitted information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. Accordingly, as you raise no further exceptions to disclosure, the submitted information must be released in its entirety.

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,

Nneka Kanu
Assistant Attorney General
Open Records Division

NK/jb

Ref: ID# 375209

Enc. Submitted documents

cc: Requestor
(w/o enclosures)