



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 17, 2010

Ms. Elisabeth A. Donley
Law Offices of Robert E. Luna, P.C.
For Lewisville Independent School District
4411 North Central Expressway
Dallas, Texas 75205

OR2010-07062

Dear Ms. Donley:

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# 379518.

The Lewisville Independent School District (the "district"), which you represent, received a request for the disciplinary records of a deceased student for the 2009-2010 school year, as well as all records related to the internal investigation of the death of the deceased student. You state the district has no records related to an internal investigation.¹ You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.137 of the Government Code. You also state that the submitted information may be subject to third party privacy interests. Thus, pursuant to section 552.304 of the Government Code, you state you have notified the deceased student's family of the request and of their right to submit arguments to this office as to why the information should not be released. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed 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." Gov't Code § 552.101. Section 552.101 encompasses the constitutional right to privacy. Constitutional privacy protects two kinds of interests. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

(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 *Fadjo 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). We note that the right to privacy is a personal right that lapses at death and therefore may not be asserted solely on behalf of a deceased individual. See *Moore*, 589 S.W.2d at 491; Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death).

The United States Supreme Court has determined, however, that surviving family members can have a privacy interest in information relating to their deceased relatives. See *Nat'l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570 (2004). As noted above, you notified the decedent's family of their right to assert a privacy interest in the information at issue. However, as of the date of this decision, we have received no correspondence from the surviving family members of the decedent. Thus, we have no basis for determining that the family has a privacy interest in any of the submitted information. Therefore, the submitted information may not be withheld under section 552.101 of the Government Code on the basis of constitutional privacy.

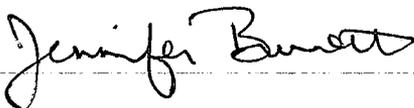
Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to 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 demonstrated. *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. *Id.* at 683. As previously discussed, privacy is a personal right that lapses at death. Thus, common-law privacy is not applicable to information that relates only to a deceased individual. See *Moore*, 589 S.W.2d at 491; see also *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); ORD 272 at 1. Accordingly, the district may not withhold any of the submitted information on the basis of the deceased student's interests under section 552.101 in conjunction with common-law privacy. Further, we find that none of the submitted information consists of highly intimate or embarrassing information that pertains to living individuals. Accordingly, no portion of the submitted information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

You seek to withhold the e-mail addresses you have marked in Exhibit 8 as confidential pursuant to section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov't Code § 552.137(a)-(c). The e-mail addresses at issue do not appear to be of types specifically excluded by section 552.137(c) of the Government Code. You do not state that the owner of the e-mail addresses at issue has consented to the release of her e-mail addresses. Accordingly, the district must withhold the e-mail addresses you have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to their disclosure. As you raise no further exceptions to disclosure, the remaining information 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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 379518

Enc. Submitted documents

c: Requestor
(w/o enclosures)