



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 9, 2011

Mr. Christopher B. Gilbert  
Thompson & Horton, L.L.P.  
Phoenix Tower, Suite 2000  
3200 Southwest Freeway  
Houston, Texas 77027

OR2011-18169

Dear Mr. Gilbert:

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# 438651.

The Katy Independent School District (the "district"), which you represent, received three requests for information pertaining to a specified incident.<sup>1</sup> The third requestor seeks the offense report made by a named individual pertaining to the specified incident, while the first and second requestors seek the offense report as well as any additional information pertaining to the specified incident. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.108 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the first and third requestors. *See Gov't Code* § 552.304 (interested party may submit comments to this office stating why the information at issue should or should not be released).

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<sup>1</sup>We note the first request was received by the district on September 20, 2011, the second request was received on September 22, 2011, and the third request was received on October 13, 2011. For purposes of this ruling, the requestor whose request was received on September 20 will be referred to as the "first requestor," the requestor whose request was received on September 22 will be referred to as the "second requestor," and the requestor whose request was received on October 13 will be referred to as the "third requestor."

<sup>2</sup>Although you initially raised sections 552.103, 552.111, and 552.137 of the Government Code, you have not submitted any arguments explaining how these exceptions apply to the submitted information. Therefore, we assume you have withdrawn these exceptions. *See Gov't Code* §§ 552.301, .302.

Initially, we note the district appears to have redacted some information pursuant to the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g. The United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student’s consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.<sup>3</sup> 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”). However, FERPA is not applicable to law enforcement records maintained by the district’s police department (the “department”) for law enforcement purposes. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8. Upon review, we find the information containing FERPA redactions constitutes law enforcement records created and maintained by the department for law enforcement purposes. Thus, these records are not subject to FERPA, and no portion of the records at issue may be withheld on that basis. Because we are able to discern the nature of the redacted information, we are not prevented from determining whether that information falls within the scope of the district’s exceptions to disclosure. Accordingly, we will address the district’s remaining arguments with respect to all of the submitted information, including the redacted information. Nevertheless, we caution the district that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering the redacted information to be released. *See* Gov’t Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of specific information requested or representative sample if information is voluminous), 552.302.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”<sup>4</sup> Section 552.101 encompasses information made confidential by other statutes, including section 261.201 of the Family Code, which provides in relevant part:

(a) [T]he following information is confidential, is not subject to public release under [the Act] and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

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<sup>3</sup>A copy of this letter may be found on the Office of the Attorney General’s website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

<sup>4</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

...

(k) Notwithstanding Subsection (a), an investigating agency, other than the [Texas Department of Family and Protective Services] or the Texas Youth Commission, on request, shall provide to the parent, managing conservator, or other legal representative of a child who is the subject of reported abuse or neglect, or to the child if the child is at least 18 years of age, information concerning the reported abuse or neglect that would otherwise be confidential under this section. The investigating agency shall withhold information under this subsection if the parent, managing conservator, or other legal representative of the child requesting the information is alleged to have committed the abuse or neglect.

(l) Before a child or a parent, managing conservator, or other legal representative of a child may inspect or copy a record or file concerning the child under Subsection (k), the custodian of the record or file must redact:

(1) any personally identifiable information about a victim or witness under 18 years of age unless that victim or witness is:

(A) the child who is the subject of the report; or

(B) another child of the parent, managing conservator, or other legal representative requesting the information;

(2) any information that is excepted from required disclosure under [the Act], or other law; and

(3) the identity of the person who made the report.

Fam. Code § 261.201(a), (k), (l). We note the district is not an agency authorized to conduct a Chapter 261 investigation. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). We note, however, that the requested information was used or developed in an investigation by the department of alleged or suspected child abuse or neglect under chapter 261 of the Family Code. *See id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of section 261.201 of Family Code). You further inform us that as of the dates

of the requests, the matter was pending with the Fort Bend County District Attorney's Office (the "district attorney"). Upon review, we find the requested information is within the scope of section 261.201(a). You have not indicated that the department has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, the requested information is generally confidential pursuant to section 261.201(a) of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). We note, however, all three requestors are parents of the alleged child victims and are not alleged to have committed the suspected abuse or neglect. Thus, the district may not withhold the responsive information from the requestors on the basis of section 261.201(a). *See* Fam. Code § 261.201(k). However, section 261.201(l)(2) of the Government Code states that any information that is excepted from required disclosure under the Act or other law may still be withheld from disclosure. *See id.* § 261.201(l)(2). Thus, we will address your additional arguments under sections 552.101, 552.102, and 552.108.

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(a)(1) 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). You state the requested information relates to an ongoing criminal investigation and the district attorney object to its release. You further state release of the requested information would interfere with the investigation and prosecution of the crime. Based on these representations and our review, we conclude the release of the requested information to the requestors would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Accordingly, section 552.108(a)(1) is applicable to the requested information.

However, section 552.108 does not except from required public disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle* and includes a detailed description of the offense. *See* 531 S.W.2d at 186-87; Open Records Decision No. 127 (summarizing types of information considered basic information). Thus, with the exception of basic information, the district may withhold the requested information from the requestors under section 552.108(a)(1) of the Government Code. We will next address your remaining arguments against release of the basic information.

You also argue the information is excepted from disclosure under section 552.101 of the Government Code in conjunction with constitutional and common-law privacy. Common-law privacy 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). 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. In addition, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

We note the submitted information is related to public employees and public employment. The behavior of a public employee in the workplace and the conditions for his or her continued employment are generally matters of legitimate public interest that are not protected by common-law privacy. *See* Open Records Decision No. 438 (1986). Likewise, information about a public employee's qualifications, disciplinary action, and background is generally not protected by common-law privacy. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of his resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former sections 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy).

Federal constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *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 type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village*, Tex., 765 F.2d 490 (5th Cir. 1985)).

Upon review, we find none of the basic information is highly intimate or embarrassing and not of legitimate public interest. Further, none of the basic information falls within the zones of privacy or implicates privacy interests for purposes of constitutional privacy. Therefore, the district may not withhold any of the basic information under section 552.101 on that basis.

You also claim the requested information is excepted from disclosure under section 552.102(a) of the Government Code, which 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). Upon review, we find none of the basic information is excepted under section 552.102(a) of the Government Code. Accordingly, none of the basic information may be withheld on this basis.

In summary, with the exception of basic information, the district may withhold the requested information from the requestors under section 552.108(a)(1) of the Government Code.<sup>5</sup>

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](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,



Sean Opperman  
Assistant Attorney General  
Open Records Division

SO/ag

Ref: ID# 438651

Enc. Submitted documents

c: 3 Requestors  
(w/o enclosures)

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<sup>5</sup>Because the requestors have a special right of access to the information being released, the district must again seek a decision from this office if it receives another request for the same information from another requestor.