



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 24, 2017

Ms. Vanessa A. Gonzalez
Counsel for Abilene Christian University
Bickerstaff Heath Delgado Acosta, LLP
3711 South MoPac Expressway, Building One, Suite 300
Austin, Texas 78746

OR2017-01552

Dear Ms. Gonzalez:

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# 642549.

The Abilene Christian University Police Department (the "department") received two requests from different requestors for all information related to specified incidents within a specified period of time and information related to all Title IX cases. You state the department has withheld some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, you inform us some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

²We assume 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 those records contain substantially different types of information than that submitted to this office.

No. 2016-07452 (2016). In Open Records Letter No. 2016-07452, we determined the department (1) must withhold some of the information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code, (2) with the exception of basic information, may withhold some of the information under sections 552.108(a)(1) and 552.108(a)(2) of the Government Code, and, (3) in releasing basic information, may withhold the information we marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. We note the requestor in the previous file excluded some information. Thus, we note the circumstances have changed and the department may not rely on Open Records Letter No. 2016-07452 as a previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). Accordingly, we will consider your arguments against disclosure of the submitted information.

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: (1) 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 explain how and why the release of the information at issue 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, 710 (Tex. 1977). The department states the information in Exhibits B1 and B2 relates to pending prosecutions. Additionally, the department has submitted an affidavit from the Abilene Police Department in which the Abilene Police Department objects to the release of Exhibit B2 because it pertains to a pending criminal investigation and prosecution. Based on these representations, we conclude the release of the information at issue 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, 186-87 (Tex. Civ. App.—Houston [14th Dist.] 1975) (delineating law enforcement interests present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Therefore, section 552.108(a)(1) is applicable to Exhibits B1 and B2.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov’t Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the information at issue relates to a criminal investigation that has concluded in a final result other than conviction or deferred adjudication. *See id.* §§ 552.108(a)(2), .301(e)(1)(A). The department states the information in Exhibit B3 pertains to a case that concluded in a result other than conviction or deferred adjudication. Therefore, we agree section 552.108(a)(2) is applicable to this information.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the

information held to be public in *Houston Chronicle*. See 531 S.W.2d at 186-88; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). We note basic information includes the identity of the complainant but does not include the identity of a victim who is not the complainant and the location of the offense. See ORD 127 at 3-4. Thus, with the exception of basic information, the department may withhold Exhibits B1 and B2 under section 552.108(a)(1) of the Government Code and Exhibit B3 under section 552.108(a)(2) of the Government Code.³

You seek to withhold a portion of the basic information for Exhibit B2 under section 552.101 of the Government Code in conjunction with the informer's privilege. 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 common-law 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); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). 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 the subject of the information does not already know the informer's identity. See Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The 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." See Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. 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. The privilege protects the informer's statement only to the extent necessary to protect the informer's identity. See Open Records Decision No. 549 at 5 (1990).

You state some of the basic information in Exhibit B2 reveals the identity of a complainant who reported a possible violation of law that carries criminal penalties to the department. There is no indication the subject of the complaint knows the identity of the complainant. Based on your representations and our review, we conclude the information we have marked identifies the complainant; thus, in releasing basic information from Exhibit B2, the department may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.⁴

³As our ruling is dispositive, we need not address the department's remaining argument against disclosure, except to note basic information is generally not excepted from public disclosure under section 552.103. Open Records Decision No. 597 (1991).

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

You also claim some of the remaining information is subject to the doctrine of common-law privacy. Section 552.101 also encompasses the doctrine of common-law privacy, which 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). Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683.

In Open Records Decision No. 393 (1983), this office concluded information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. ORD 393 at 2; *see* Open Records Decision No. 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d at 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Further, where the requestor knows the identity of the victim, the entire report must be withheld to protect the victim's privacy. In this instance, you seek to withhold the entirety of the basic information for Exhibits B1 and B2 under section 552.101 in conjunction with common-law privacy. However, the department has not demonstrated, nor does it otherwise appear, this is a situation in which the entirety of the information at issue must be withheld on the basis of common-law privacy. Accordingly, the department may not withhold the entirety of the basic information for Exhibits B1 and B2 under section 552.101 of the Government Code on that basis. However, upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Thus, in releasing basic information, the information we have marked must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. However, the department has failed to demonstrate the remaining basic information is highly intimate or embarrassing and of no legitimate public interest. Thus, the remaining basic information may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, with the exception of basic information, the department may withhold Exhibits B1 and B2 under section 552.108(a)(1) of the Government Code and Exhibit B3 under section 552.108(a)(2) of the Government Code. In releasing basic information, the department may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege and must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining basic 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.texasattorneygeneral.gov/open/>

[orl_ruling_info.shtml](#), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Kavid Singh". The signature is written in a cursive style with some loops and flourishes.

Kavid Singh
Assistant Attorney General
Open Records Division

KVS/som

Ref: ID# 642549

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)