



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 10, 2007

Mr. Roger D. Hepworth
Henslee Fowler Hepworth & Schwartz LLP
for Dilley Independent School District
816 Congress Avenue, Suite 800
Austin, Texas 78701

OR2007-00422

Dear Mr. Hepworth:

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# 268887.

The Dilley Independent School District (the "district"), which you represent, received a request for information relating to a named individual. You state that the district has released some of the requested information. You have submitted information that the district seeks to withhold under sections 552.103, 552.107, 552.108, 552.111, 552.116, and 552.135 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

We first note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). In this instance, some of the submitted information was created after the district's receipt of the instant request for information. That information, which we have marked, is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

We also note that the submitted information includes education records. The United States Department of Education Family Policy Compliance Office (the "DOE") recently informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, 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.¹ 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"). You have submitted, among other things, unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine the applicability of FERPA, we will not address FERPA with respect to these records. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. Such determinations under FERPA must be made by the educational authority in possession of the education records.² However, we will consider your claimed exceptions to the disclosure of the submitted information.

We next note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(3) provides for the required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body," unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(3). Although you seek to withhold the information that is subject to section 552.022 under sections 552.103 and 552.108, those sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App. – Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). As such, sections 552.103 and 552.108 are not other law that makes information confidential for the purposes of section 552.022(a)(3). Therefore, the information that is subject to section 552.022(a)(3) may not be withheld under section 552.103 or section 552.108. We note that you also raise section 552.116 of the Government Code, which excepts the audit working papers of certain types of entities from

¹A copy of this letter may be found on the attorney general's website, http://www.oag.state.tx.us/opinopen/og_resources.shtml.

²In the future, if the district does obtain parental consent to submit unredacted education records, and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

public disclosure.³ *See* Gov't Code § 552.116(a). That exception is not applicable to the district, however, and therefore the district may not withhold any of the information that is subject to section 552.022(a)(3) under section 552.116.

We note that section 552.136 of the Government Code is applicable to some of the information in question.⁴ Section 552.136 provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked an account number that the district must withhold under section 552.136. The district must release the rest of the information, which we also have marked, that is subject to section 552.022(a)(3).

You claim that the remaining information is excepted from disclosure under section 552.108. Section 552.108(a)(1) excepts from public 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 that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or

³Section 552.116 excepts from disclosure "[a]n audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, or a joint board operating under Section 22.074, Transportation Code[.]" Gov't Code § 552.116(a).

⁴Unlike other exceptions to disclosure, this office will raise section 552.136 on behalf of a governmental body, because this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

prosecution of alleged criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987). Where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

You state that the remaining information is part of a criminal investigation that is being conducted by the Dilley Police Department (the “department”). You inform us that the department has requested that the remaining information not be released. Based on your representations, we conclude that the district may withhold the remaining information under section 552.108(a)(1). *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.]1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

In summary: (1) the district must release the marked information that is subject to section 552.022 of the Government Code, except for the marked information that must be withheld under section 552.136 of the Government Code; and (2) the district may withhold the rest of the submitted information under section 552.108 of the Government Code.⁵

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 appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, 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

⁵As we are able to make these determinations, we need not address your claims under sections 552.103, 552.107, 552.111, and 552.135 of the Government Code.

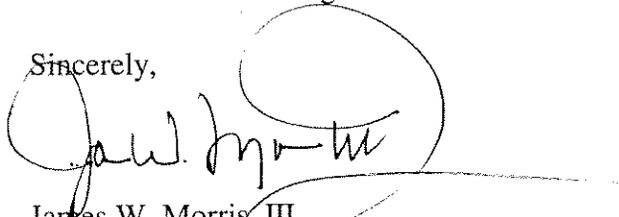
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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 appeal 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,

A handwritten signature in black ink, appearing to read "James W. Morris, III", is written over a circular stamp. The signature is fluid and cursive.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/krl

Ref: ID# 268887

Enc: Submitted documents

c: Mr. Wayne Wright
5707 Interstate 10 West
San Antonio, Texas 78201
(w/o enclosures)