



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 9, 2009

Ms. Stephanie S. Rosenberg  
General Counsel  
Humble Independent School District  
P.O. Box 2000  
Humble, Texas 77347-2000

OR2009-00362

Dear Ms. Rosenberg:

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# 332043.

The Humble Independent School District (the "district") received a request for information in the requestor's personnel file, including information regarding a specified incident. You state you have made some of the information available for inspection. You also state the district will redact the social security numbers pursuant to section 552.147 of the Government Code.<sup>1</sup> Next, you state that you do not have possession or a right of access to the requested video recording.<sup>2</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.130, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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<sup>1</sup>Section 552.147 of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

<sup>2</sup>We note that the Act does not require the district to release information that did not exist when it received this request, create responsive information, or obtain information that is not held by or on behalf of the district. *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), 534 at 2-3 (1989), 518 at 3 (1989), 452 at 3 (1986), 362 at 2 (1983).

We must first address the district's procedural obligations under the Act. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Gov't Code § 552.301(b). Additionally, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records 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 governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). You state, and provide documentation showing, that the requestor made a request for information on October 13, 2008, for all information in his personnel file, including information related to a specified incident. Accordingly, the ten-business-day deadline with regard to this was October 27, 2008, and the fifteen-business-day deadline was November 3, 2008. The requestor sent additional correspondence to the district on October 27, 2008, stating that his request includes "documents, video surveillance, etc. located at any location under the care, custody, and control of the [district]." Although you claim that the requestor's October 27 communication should be treated as a "modified request," we disagree. The requestor's communication on October 27 is just a reiteration of his October 13<sup>th</sup> request. You did not request a ruling in regard to the October 13<sup>th</sup> request until October 31, 2008, and did not submit responsive documents until November 17, 2008. Consequently, we find that the district failed to comply with the procedural requirements of section 552.301 of the Government Code with regard to this request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). You claim an exception to disclosure under section 552.108 of the Government Code, which is a discretionary exception that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). However, the interests under section 552.108 of a governmental body other than the one that failed to comply with section 552.301 can provide a compelling reason for non-disclosure under section 552.302. *See* Open Records Decision No. 586 at 2-3 (1991). You inform us that the Harris County

District Attorney's Office (the "district attorney") asserts a law enforcement interest in the submitted information. Therefore, we will determine whether the district may withhold the information on behalf of the district attorney under section 552.108. We also will consider your claims under sections 552.101, 552.130, and 552.135 of the Government Code, which can provide compelling reasons for non-disclosure under section 552.302.

Next, we note that recently the United States Department of Education Family Policy Compliance Office (the "DOE") informed this office that the Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, 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 purposes 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"). A portion of the information that you have marked under FERPA includes police reports and records created and maintained by the district's police department. We note, however, that FERPA is not applicable to law enforcement records maintained by the district's police department that were created by the department for a law enforcement purpose. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8. Further, you have submitted, among other things, redacted education records for our review. You state you will withhold the identifying information of students from the requested documents pursuant to FERPA. Accordingly, we will address the applicability of the claimed exceptions to the remainder of the submitted information.

We also note that, in addition to the redaction of student identifying information, you have redacted some personal information pertaining to the requestor. You do not assert, nor does our review of our records indicate, that you have been authorized to withhold any such information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision 673 (2000). Because we can discern the nature of the information that has been redacted, being deprived of this information does not inhibit our ability to make a ruling in this instance. Nevertheless, be advised 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 that the redacted information 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), .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." *Id.*

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

§ 552.101. This section encompasses information protected by other statutes. Section 261.201(a) of the Family Code provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, 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:

(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.

Fam. Code § 261.201(a). The submitted information relates to an investigation of alleged or suspected abuse of a child conducted by the district's police department and is therefore subject to section 261.201. *See id.* § 261.001(1) (defining "abuse" for the purposes of chapter 261 of the Family Code); *see also id.* § 101.003(a) (defining "child" for purposes of section 261.201 as "person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes"). You do not indicate that the district's police department has adopted a rule that governs the release of this type of information. We therefore assume no such rule exists. Given that assumption, we conclude that the submitted information is generally confidential under section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

We note, however, that the submitted information contains the requestor's fingerprints. The public availability of a fingerprint is governed by sections 560.001, 560.002, and 560.003 of the Government Code. Section 560.001 provides in part that "[i]n this chapter . . . '[b]iometric identifier' means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry." Gov't Code § 560.001(1). Section 560.003 provides that "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." *Id.* § 560.003. Section 560.002 provides, however, that "[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]" *Id.* § 560.002(1)(A). Sections 560.001, 560.002, and 560.003 are intended to protect the privacy of a living individual to whom a fingerprint or other biometric identifier pertains. Therefore, the requestor has a right of access to his own fingerprint information under section 560.002(1)(A) of the Government Code.

Generally, information used or developed in an investigation of child abuse under chapter 261 of the Family Code must be withheld in its entirety under section 261.201 of the

Family Code. Thus, there is a conflict of laws between section 261.201 and section 560.002 of the Government Code. However, where information falls within both a general and a specific statutory provision, the specific provision prevails over the general. *See* Gov't Code § 311.025(a) (if statutes enacted at same or different sessions of legislature are irreconcilable, statute latest in date of enactment prevails); *Cuellar v. State*, 521 S.W.2d 277 (Tex. Crim. App.1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones); Open Records Decision Nos. 598 (1991), 583 (1990), 451 (1986). In this instance, the public availability provision of section 560.002 of the Government Code is more specific than the general confidentiality provision in section 261.201 of the Family Code. Thus, section 560.002 more specifically governs the public availability of the submitted fingerprints and prevails over the more general confidentiality provisions of section 261.201. *See Lufkin v. City of Galveston*, 63 Tex. 437 (1885) (when two sections of an act apply, and one is general and the other is specific, then the specific controls); *see also* Gov't Code § 311.026 (where a general statutory provision conflicts with a specific provision, the specific provision prevails as an exception to the general provision). Therefore, the requestor's fingerprint information must be released to him under section 560.002 of the Government Code. The district must withhold the rest of the submitted information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.<sup>4</sup>

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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 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

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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 challenge 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,



Amy L.S. Shipp  
Assistant Attorney General  
Open Records Division

ALS/jb

Ref: ID# 332043

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)