



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 16, 2010

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

OR2010-02297

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# 370287.

The Humble Independent School District (the "district") received a request for all district records pertaining to the requestor's son. You state the district has released or will release most of the responsive information to the requestor. You claim the submitted witness statements are not responsive to the request for information. In the alternative, you claim the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code. We have considered your arguments and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that an interested third party may submit comments stating why information should or should not be released).

You first assert the submitted witness statements are not responsive to the request for information. The request for information seeks "all student records" pertaining to the requestor's son. The Family Educational Rights and Privacy Act ("FERPA") excludes from its definition of "education records" those records that are "maintained by a law enforcement unit of [an] educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement[.]" 20 U.S.C. § 1232g(a)(4)(B)(ii); *see id.* § 1232g(a)(4) (defining "education record"). You argue that because the witness statements were created for and are maintained by the district's police department, they are law enforcement records not subject to FERPA. Based on your representations, we agree the witness statements at

issue are not education records for purposes of FERPA. However, we understand the requestor to seek all district records pertaining to his son, including those records that do not meet the definition of "education records" under FERPA. Thus, because the submitted witness statements are held by the district and pertain to the requestor's son, we determine the witness statements are responsive to this request for information and we will consider your raised exceptions to their disclosure.

First, however, we must address the district's procedural obligations under the Act. Section 552.301(e) of the Government Code provides that a governmental body must submit to this office, no later than the fifteenth business day after the date of its receipt of the request for information, the specific information the governmental body seeks to withhold or representative samples if the information is voluminous. *See* Gov't Code § 552.301(e)(1)(D). You state there is a responsive e-mail between a district principal and a district teacher that has not been released. Although you state in your brief to this office this e-mail was submitted as Attachment A, the e-mail has not been submitted to this office. Thus, we conclude the district failed to comply with the requirements mandated by section 552.301 with respect to that document.

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 id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Although you raise section 552.107 of the Government Code for the e-mail, section 552.107 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived; as such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. *See* Open Records Decision Nos. 676 at 12 (2002) (claim of attorney-client privilege under section 552.107 or rule 503 does not provide compelling reason to withhold information under section 552.302 if it does not implicate third-party rights), 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 630 at 4 (governmental body may waive attorney-client privilege, section 552.107(1)). In failing to comply with section 552.301, the district has waived its claim under section 552.107 and may not withhold the responsive e-mail on that basis. As you raise no other exceptions to disclosure of the e-mail, it must be released in its entirety. However, because the witness statements in Attachment B were timely submitted to this office, we will consider the public availability of those documents.

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 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You provide a letter from a sergeant with the district’s police department stating the witness statements at issue are part of that department’s ongoing criminal investigation of the incident to which the statements refer. The letter also states release of the witness statements at this time will negatively impact any future prosecution related to the incident. Based on these representations and our review, we determine release of Attachment B 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), *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). Accordingly, the district may withhold the witness statements in Attachment B pursuant to section 552.108(a)(1) of the Government Code. As our ruling is dispositive, we need not address your remaining argument against disclosure.

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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 370287

Enc. Submitted documents

cc: Requestor
(w/o enclosures)