



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 24, 2010

Mr. Robert N. Jones, Jr.  
Assistant General Counsel  
Texas Workforce Commission  
101 East 15th Street  
Austin, Texas 78778-0001

OR2010-04135

Dear Mr. Jones:

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# 373656 (TWC Tracking No. 091230-029).

The Texas Workforce Commission (the "commission") received a request for complaints filed against a specified career school for a specified period of time. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note that you have submitted unredacted education records for our review, which you seek to withhold under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(g). 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>1</sup> See 34 C.F.R. § 99.3 (defining "personally identifiable information"). Although the commission is not an education authority, you inform us that the commission obtained the education records at

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<sup>1</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>.

issue during the course of its investigation. *See* 34 C.F.R. 99.33(a)(2). Because our office is prohibited from reviewing the education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to the submitted records. Such determinations under FERPA must be made by the educational authority from which the education records were obtained. Thus, the commission must contact the educational institution from which the education records at issue were obtained, as well as the DOE, regarding the applicability of FERPA to the education records.

Section 552.108(a)(1) of the Government Code generally exempts from disclosure information held by a law enforcement agency 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. *See* Gov't Code § 552.108(a)(1). Section 552.108 applies only to records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce criminal laws. *See* Open Records Decision Nos. 493 (1988), 287 (1981). Section 552.108 generally does not apply to records created by an agency whose chief function is essentially regulatory in nature. Open Records Decision No. 199 (1978). In this instance, you have not adequately demonstrated to this office that the commission is a "law enforcement agency" for purposes of section 552.108. *See* Attorney General Opinion MW-575 (1982) (regulatory agency not "law enforcement agency," even though it is charged with duty of enforcing its own statute); ORD 199.

However, an agency that does not qualify as a law enforcement agency may, under certain limited circumstances, claim that section 552.108 protects records in its possession. *See, e.g.,* Attorney General Opinion MW-575; Open Records Decision Nos. 493, 272 (1981). If an administrative agency's investigation reveals possible criminal conduct that the administrative agency intends to report or has already reported to the appropriate law enforcement agency, section 552.108 will apply to information gathered by the administrative agency if its release would interfere with law enforcement. *See* Gov't Code 552.108(a)(1); Attorney General Opinion MW-575; Open Records Decision Nos. 493 at 2, 474 (1987), 372 at 4 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to incident). You do not inform us that the commission intends to forward any of the information at issue to a law enforcement agency. You also do not inform us that the submitted information consists of law enforcement records of another law enforcement agency or prosecutor. Accordingly, the commission may not withhold the submitted information under section 552.108.

Next, you raise section 552.101 of the Government Code in conjunction with the informer's privilege for portions of the submitted information. Section 552.101 encompasses information protected by the 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). 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 that the subject of the information does not already know the informer's identity. See Open Records Decision Nos. 515 at 3 (1998), 208 at 1-2 (1978). The informer's 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." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (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 excepts the informer's statement only to the extent necessary to protect the informer's identity. See *Roviaro v. United States*, 353 U.S. 53, 60 (1957); Open Records Decision No. 549 at 5 (1990).

Although you raise the informer's privilege for some of the submitted information, you have not sufficiently demonstrated that a violation of law was reported to an official having a duty of inspection or of law enforcement. We also note witnesses who provide information in the course of an investigation but do not make the initial report of the violation are not informants for the purposes of claiming the informer's privilege. Accordingly, we find you have failed to demonstrate the informer's privilege is applicable to the information at issue. Thus, the commission may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the informer's privilege.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov't Code § 552.137(a)-(c). The e-mail addresses in the remaining information are not specifically excluded by section 552.137(c). As such, these e-mail addresses, which we have marked, must be withheld under section 552.137, unless the owners of the addresses have affirmatively consented to their release. See *id.* § 552.137(b).<sup>2</sup>

You seek to withhold portions of the remaining information under section 552.147 of the Government Code. This section provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act.<sup>3</sup> *Id.* § 552.147(a). Accordingly,

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<sup>2</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>3</sup>Section 552.147(b) 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. Gov't Code § 552.147(b).

the commission may withhold the social security numbers you have marked under section 552.147 of the Government Code.

In summary, unless the commission receives consent from the owners of the marked e-mail addresses to release this information, they must be withheld under section 552.137 of the Government Code. The commission may withhold the social security numbers you have marked under section 552.147 of the Government Code. The remaining 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.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,



Paige Lay  
Assistant Attorney General  
Open Records Division

PL/eeg

Ref: ID# 373656

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)