



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 6, 2011

Ms. LeAnne Lundy
Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2011-00360

Dear Ms. Lundy:

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# 405053 (Fort Bend TPIA/ORR # 2010-11-156).

The Fort Bend Independent School District (the "district") received a request for "any and all documents" concerning a specified investigation during a specified time frame. You state the district has redacted social security numbers of living persons pursuant to section 552.147 of the Government Code.¹ You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.117, 552.130, and 552.136 of the Government Code and privileged under Texas Rule of Evidence 503.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

¹Section 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. *See* Gov't Code § 552.147(b).

²Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

³This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Initially, we will address your contention that Exhibit C is not responsive to the request for information. You assert the information in Exhibit C is not responsive to the request for information because it consists of information created after the present request for information was received on October 15, 2010.⁴ You state the district sought and received a clarification regarding a specified time frame for the request of "October 18, 2009 through October 18, 2010." See Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used). Because the request for information indicates the district received the clarification on October 18, 2010, the information in Exhibit C is responsive to the request for information and we will address your arguments against disclosure of this information. See *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date the request is clarified or narrowed).

You state the district has redacted some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit a state educational agency or institution 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.⁵ See 34 C.F.R. § 99.3 (defining "personally identifiable information"); However, FERPA is not applicable to law enforcement records maintained by the district's police department for law enforcement purposes. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3 (defining "education record"), .8. You state the information at issue is maintained by the district's police department and is part of an ongoing criminal investigation. Accordingly, because the information is maintained by a law enforcement unit of an educational agency, the information does not constitute an education record subject to FERPA and no portion of it may be withheld on that basis.

We note some of the information at issue within Exhibit B is subject to section 552.022 of the Government Code, which provides in pertinent part:

(a) [T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

⁴The Act does not require a governmental body to release information that did not exist when it received a request or to 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).

⁵A 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>.

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(3), (17). The information at issue contains documents that consist of information that fall within the purview of section 552.022(a)(3) and a court-filed document subject to section 552.022(a)(17). This information, which we have marked, must be released unless it is expressly confidential under other law. *See id.* Although you raise section 552.108 of the Government Code for all the information at issue, this section is discretionary in nature and thus may be waived. *See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (governmental body may waive statutory predecessor to section 552.108).* As such, section 552.108 does not constitute other law that makes information expressly confidential for the purposes of section 552.022. Therefore, the district may not withhold the information relating to receipt or expenditure of public funds or the court-filed document, which we have marked, under section 552.108. However, you assert portions of the information are subject to sections 552.117 and 552.136 of the Government Code, which do constitute "other law" for purposes of section 552.022; thus, we will consider the applicability of sections 552.117 and 552.136 to this information. We will also consider your arguments under sections 552.101, 552.107, 552.108, 552.117, 552.130, and 552.136 for the information not subject to section 552.022.

You contend a portion of the information subject to section 552.022 is excepted from disclosure under section 552.117 of the Government Code. Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989).* Therefore, the district must withhold information under section 552.117 on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You state the information you have marked under section 552.117 pertains to an employee who made a timely election to withhold this information. Accordingly, we determine the district must withhold the employee home address we have marked under section 552.117 of the Government Code.

You also claim portions of the information subject to section 552.022 are excepted from disclosure under section 552.136 of the Government Code. Section 552.136 states, "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(b). We agree that some of the account numbers you have marked fall within the scope of section 552.136. The district must withhold the toll road authority billing account, bank account, and bank routing numbers we have marked under section 552.136. However, the district has not explained how any of the remaining information at issue, which consists of internal district account numbers, constitutes access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining "access device"). Accordingly, no portion of the remaining information subject to section 552.022 may be withheld on that basis. Because you do not submit additional arguments against disclosure of this information, it must be released to the requestor.

We will now address the information that is not subject to section 552.022. You raise section 552.107 of the Government Code for the information in Exhibit C. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies to only communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies to only a confidential communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client

privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the e-mails in Exhibit C constitute communications amongst district attorneys, police officers, and employees that were made for the purpose of providing legal services to the district. The e-mails in Exhibit C reflect the communications were intended to be confidential and we understand they have remained confidential. Based on your representations and our review, we find the district may withhold Exhibit C under section 552.107(1) of the Government Code.

Section 552.108(a) 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). Generally, a governmental body claiming section 552.108 must reasonably explain how and why release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), (b)(1), 301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state, and provide supporting documentation from the district’s police department representing, the information in Exhibit B is being used in the district’s police department’s ongoing investigation of criminal activity. Based upon your representation and our review, we conclude that release of the information in Exhibit B that is not subject to section 552.022 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) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the information in Exhibit B that is not subject to section 552.022.

We note, however, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*, and includes, among other items, an identification and description of the complainant, a detailed description of the offense, and any property involved. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic front page offense and arrest information, which you must release, the district may withhold the information in Exhibit B not subject to section 552.022 based on section 552.108(a)(1) of the Government Code.⁶

In summary: (1) the district must withhold the employee home address we have marked in the information subject to section 552.022 under section 552.117 of the Government Code;

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure of the information in Exhibit B, except to note that basic information described in *Houston Chronicle* does not include information subject to section 552.130, or the address or phone numbers of a suspect, reportee, or witness.

(2) the district must withhold the information we have marked pursuant to section 552.136 of the Government Code; (3) the district may withhold the information in Exhibit C under section 552.107(1) of the Government Code; and (4) with the exception of basic information, the district may withhold the information that is not subject to section 552.022 under section 552.108 of the Government Code. The district must release the remaining information at issue.

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/em

Ref: ID# 405053

Enc. Submitted documents

c: Requestor
(w/o enclosures)