



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 7, 2011

Ms. Jessica L. Saldivar
Assistant General Counsel
Houston Community College
P.O. Box 667517
Houston, Texas 77266-7517

OR2011-14556

Dear Ms. Saldivar:

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# 432218.

Houston Community College (the "college") received requests from two requestors for a specified memorandum prepared by a named individual. The first requestor also seeks specified names and a specified date regarding actions by the college pertaining to the specified memorandum. You claim the submitted memorandum is excepted from disclosure under sections 552.107 and 552.108 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the first requestor. *See Gov't Code* § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we must determine whether the college complied with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures a governmental body must follow in asking this office to determine whether information is excepted from public disclosure under the Act. *See Gov't Code* § 552.301(a). Section 552.301(e)(1)(A) requires the governmental body to submit to this office "written comments stating the reasons why the stated exceptions apply that would allow the

¹Although you also raise section 552.101 of the Government Code in conjunction with section 552.108 of the Government Code, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See Open Records Decision Nos.* 676 at 1-2 (2002), 575 at 2 (1990).

information to be withheld[.]” *Id.* § 552.301(e)(1)(A). Section 552.301(e-1) provides as follows:

A governmental body that submits written comments to the attorney general under Subsection (e)(1)(A) shall send a copy of those comments to the person who requested the information from the governmental body not later than the 15th business day after the date of receiving the written request. If the written comments disclose or contain the substance of the information requested, the copy of the comments provided to the person must be a redacted copy.

Id. § 552.301(e-1). The first requestor has provided our office with a copy of the written comments the college provided to the first requestor regarding the submitted memorandum pursuant to section 552.301(e-1). We note the college redacted substantial portions of its arguments under sections 552.107 and 552.108 of the Government Code from the first requestor’s copy of the college’s comments. We further note the redacted portions of the college’s comments neither disclose nor contain the substance of the submitted memorandum. We, therefore, conclude the college failed to comply with section 552.301(e-1) of the Government Code in requesting a decision under sections 552.107 and 552.108.

Generally, a governmental body’s failure to comply with section 552.301 results in the waiver of its claims under the exceptions at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *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). In general, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Section 552.107(1) is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). In failing to comply with section 552.301(e-1) with regard to its claim under section 552.107(1), the college has waived this exception because it is not a compelling reason to withhold the submitted memorandum. *See* Gov’t Code § 552.302. Therefore, the college may not withhold the submitted memorandum under section 552.107(1) of the Government Code.

Section 552.108 is also a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Nevertheless, 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 state the United States Department of Education Office of Inspector General (“DOE-OIG”) asserts a law enforcement interest in the submitted memorandum. Therefore, we will consider whether the college may withhold the submitted memorandum on behalf of the DOE-OIG under section 552.108.

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). Generally, a governmental body claiming section 552.108(a)(1) must reasonably explain how and why release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by any proper custodian of information relating to a pending investigation or prosecution of 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 representation from the law enforcement agency that it wishes to have the information withheld and a demonstration the information relates to the pending case.

You state, and provide documentation showing, the DOE-OIG objects to the release of the submitted memorandum because its release would interfere with an open criminal investigation being conducted by the DOE-OIG. We understand the DOE-OIG is a law enforcement agency with the power to investigate and prosecute crimes. *See* 5 U.S.C. app. 3 §§ 4, 6 (1978). Based on these representations and our review, we conclude release of the submitted memorandum 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, the college may withhold the submitted memorandum under section 552.108(a)(1) of the Government Code on behalf of the DOE-OIG.

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,

A handwritten signature in cursive script that reads "Leah B. Wingerson".

Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 432218

Enc. Submitted documents

c: Requestor
(w/o enclosures)