



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 22, 2011

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

OR2011-17259

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# 437016.

Houston Community College (the "college") received a request for (1) all audits, reports, reviews, internal and external investigations, findings and Inspector General reports pertaining to or mentioning two named individuals and/or the firms RHJ or RHJ JOC, from January 1, 2008 until the date of the request, and (2) all findings, reports, summaries, executive summaries, synopses, interview transcripts, audio and/or video recordings, notes, memoranda, or other records gathered, obtained, made, prepared or collected as part of the creation, drafting, or writing of item number one. You state the college does not have information responsive to portions of the request.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

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<sup>1</sup>We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

<sup>2</sup>Although you initially raised section 552.102 of the Government Code, you have not submitted any arguments explaining how this exception applies to the submitted information. Therefore, we assume you have withdrawn this exception. See Gov't Code §§ 552.301, .302.

<sup>3</sup>This letter ruling assumes 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 must address the college's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e-1) provides the following:

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.

Gov't Code § 552.301(e-1). Pursuant to section 552.303 of the Government Code, we requested a copy of the letter the college provided to the requestor pursuant to section 552.301(e-1).<sup>4</sup> Upon review, we find the submitted letter to the requestor demonstrates the college redacted its discussion of the claimed exceptions, including information that does not disclose or contain the substance of the information requested. Consequently, we find the college failed to comply with the requirements of section 552.301(e-1).

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 information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *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, 381-82 (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. 630 (1994). A compelling reason generally 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). Although you claim section 552.107, this 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), the college has waived this exception. *See* Gov't Code § 552.302. Therefore, the college may not withhold the submitted information under section 552.107 of the Government Code.

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<sup>4</sup>*See* Gov't Code § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice).

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 No. 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 information. Therefore, we will consider whether the college may withhold the submitted information on behalf of the DOE-OIG under section 552.108. Further, because section 552.101 of the Government Code can also provide a compelling reason to withhold information, we will consider whether any of the submitted information is excepted from disclosure under this section.

We note portions of the information at issue are subject to section 552.022 of the Government Code. Section 552.022(a) provides in relevant part the following:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

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

Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 2 (to be codified as an amendment to Gov't Code § 552.022(a)). The submitted information consists of invoices relating to the expenditure of public funds by the college and is, thus, subject to subsection 552.022(a)(3). Although you raise section 552.108 of the Government Code for this information, this is a discretionary exception and does not make information confidential under the Act. *See id.* § 3-26, 28-37 (providing for "confidentiality" of information under specified exceptions); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 (1977) (governmental body may waive statutory predecessor to section 552.108). As such, section 552.108 is not "other law" that makes information confidential for the purposes of section 552.022(a)(3). Therefore, the college may not withhold any of the information subject to section 552.022(a)(3) under section 552.108. You also raise section 552.101 of the Government Code for the information at issue. Because section 552.101 applies to confidential information, we will address the applicability of this exception to the information subject to section 552.022(a)(3), as well as the remaining information. We will also consider your argument under section 552.108 for the information not subject to section 552.022(a)(3).

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 information 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 remaining information 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 remaining information under section 552.108(a)(1) of the Government Code on behalf of the DOE-OIG.<sup>5</sup>

You raise section 552.101 of the Government Code for the information subject to section 552.022(a)(3). Section 552.101 excepts from disclosure “information that is considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. However, you have not pointed to any statutory confidentiality provision, nor are we aware of any, that would make any of the information subject to section 552.022(a)(3) confidential under section 552.101. *See, e.g., Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality)*. Therefore, the college may not withhold any of the information subject to section 552.022(a)(3) under section 552.101 of the Government Code.<sup>6</sup>

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<sup>5</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure.

<sup>6</sup>We note section 552.101 of the Government Code does not encompass other exceptions in the Act. *See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990)*.

In summary, the college must release the invoices, which we have marked, pursuant to subsection 552.022(a)(3) of the Government Code. The college may withhold the remaining information 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](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,



Kirsten Brew  
Assistant Attorney General  
Open Records Division

KB/ag

Ref: ID# 437016

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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