



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 1, 2011

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

OR2011-17731

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# 437538.

Houston Community College (the "college") received two requests from the same requestor for communications from any federal agency since January 1, 2011. You claim the submitted information is excepted from disclosure under sections 552.101, 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 from an attorney for the requestor. Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note, and you acknowledge, the college failed to meet the statutory deadline imposed by section 552.301 of the Government Code. *See* Gov't Code § 552.301(b). Further, the requestor's attorney argues the college failed to comply with section 552.301(e-1) of the Government Code, which requires a governmental body that

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, 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). We note the proper exception to raise for your attorney-client privilege claim is section 552.107 of the Government Code, as the submitted information is not subject to section 552.022 of the Government Code. *See* ORD 676.

submits written comments to the attorney general under subsection 552.301(e)(1)(A) requesting a ruling, to send a copy of those comments to the person who requested the information from the governmental body not later than the fifteenth business day after the date of receiving the written request. *Id.* § 552.301(e-1). Section 552.301(e-1) authorizes the governmental body to redact information from those written comments that discloses or contains the substance of the information requested. *Id.* The requestor's attorney and the college have provided our office with a copy of the written comments the college provided to the requestor pursuant to section 552.301(e-1). We note the college redacted substantial portions of its arguments under sections 552.101, 552.107, and 552.108 of the Government Code from the 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 information. We, therefore, conclude the college also failed to comply with section 552.301(e-1) in requesting a decision under sections 552.101, 552.107, and 552.108.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption 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; *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); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (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 (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, the college has waived this exception because it is not a compelling reason to withhold the submitted information. *See* Gov't Code § 552.302. Therefore, the college may not withhold any of the submitted information under section 552.107(1).

Section 552.108 of the Government Code 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 (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 information. Therefore,

we will consider whether the college may withhold the submitted information on behalf of the DOE-OIG under section 552.108. We also will consider your claim under section 552.101 of the Government Code, which can provide a compelling reason for non-disclosure under section 552.302.

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 submitted 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 submitted information under section 552.108(a)(1) of the Government Code on behalf of the DOE-OIG.²

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.

²As our ruling for the submitted information is dispositive, we need not address your remaining claims under section 552.101 of the Government Code against its release.

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/agn

Ref: ID# 437538

Enc. Submitted documents

c: Requestor
(w/o enclosures)