



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 5, 2013

Ms. Ylise Janssen
Senior School Law Attorney
Austin Independent School District
1111 West Sixth Street
Austin, Texas 78703

OR2013-13459

Dear Ms. Janssen:

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# 495693.

The Austin Independent School District (the "district") received a request for incident report 12-004027 and a request from a different requestor for information pertaining to a named student and a specified incident, including but not limited to (1) the student's entire student file; (2) the student's educational records for a specified time period; (3) notes of school personnel that pertain to the provision of educational or counseling services to the student; (4) reports, evaluations, or assessments of the student for a specified time period; (5) written or recorded statements pertaining to the student for a specified time period; (6) charts, diagrams, photographs, videos, motion pictures, or recordings taken regarding the instruction or disciplining of the student for a specified time period; (7) correspondence pertaining to the student for a specified time period; (8) incident report 12-004027; (9) witness statements taken on the date of the incident at issue or immediately thereafter; (10) video surveillance concerning the incident at issue; and (11) any and all documents, tangible items, or information stored in an electric medium relating to the incident at issue. You claim the submitted information is excepted from disclosure under

sections 552.103 and 552.108 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the district has submitted only information responsive to items 8, 10, and 11 of the second request for information. Thus, to the extent any additional responsive information existed when the second request was received, we presume the district has released it. If such information has not been released, then it must be released at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we understand the district has redacted some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. 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.² *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 (the "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 department and is part of its concluded 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.

Next, we note the district did not fully comply with section 552.301 of the Government Code. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. Gov't Code § 552.301(b). You raised section 552.103 of the Government Code within the ten-business-day time period required by section 552.301(b) for the information you submitted as responsive to the second request. We note the incident report you have submitted as responsive to the second request is the exact same incident report you have submitted as responsive to the first request. However, you did not raise section 552.103 within the ten-business-day time period required by section 552.301(b) for

¹Although you raise section 552.101 of the Government Code, you make no arguments to support this exception. Therefore, we presume you no longer assert this exception. *See* Gov't Code §§ 552.301, .302.

²A 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>.

the first request. Accordingly, with respect to section 552.103 and the submitted incident report, we find the district violated section 552.301(b).

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 overcomes this presumption by demonstrating a compelling reason to withhold the information. *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 when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Although you raise section 552.103 of the Government Code for the submitted incident report, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, in failing to comply with section 552.301, the district has waived its argument under section 552.103 for the submitted incident report and may not withhold the information on that basis. However, we will consider your argument under section 552.103 for the remaining information that is responsive to only the second request. Additionally, we will address your argument under section 552.108 of the Government Code for all of the submitted information.

Section 552.108(a)(2) 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: . . . (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state, and provide a representation from the department stating, the submitted information pertains to a concluded criminal case conducted by the department that did not result in a conviction or deferred adjudication. Based on your representation, we agree section 552.108(a)(2) is applicable to the submitted information.

We note, however, section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531

S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See also* Open Records Decision No. 127 (1976) (summarizing the types of information considered to be basic information). Thus, with the exception of the basic front page offense information, which must be released, the district may withhold the submitted information under section 552.108(a)(2).³

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/tch

Ref: ID# 495693

Enc. Submitted documents

c: Two Requestors
(w/o enclosures)

³As our ruling is dispositive, we need not address the district's remaining argument against disclosure.