



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 23, 2007

Ms. Gita P. Bolt  
General Counsel  
Texas Southern University  
3100 Cleburne Avenue  
Houston, Texas 77004

OR2007-09289

Dear Ms. Bolt:

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# 284503.

Texas Southern University (the "university") received a request for information pertaining to a particular university professor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.114, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the university's obligations under the Act. Under section 552.301(e), a governmental body receiving a request for information that the governmental body wishes to withhold pursuant to an exception to disclosure under the Act is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You inform us that the university received this request on May 2, 2007. However, although you submitted some of the responsive records by the fifteen-business-day deadline, a portion of the responsive information was not submitted to this office until June 6, 2007. Consequently, with respect to the information submitted in your June 6 letter, we find that the university failed to comply with the procedural requirements of section 552.301.

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 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; *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. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). You have raised section 552.101 of the Government Code in conjunction with the informers privilege. The informer's privilege has been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). Because the purpose of the informer's privilege is to protect the flow of information to a governmental body, rather than to protect a third person, the informer's privilege, unlike other claims under section 552.101 of the Government Code, can be waived. *See* Open Records Decision No. 549 at 6 (1990). Similarly, sections 552.103 and 552.108 are discretionary exceptions, and may also 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 Nos. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). *But see* Open Records Decision No. 586 at 2-3 (1991) (claim of another governmental body under statutory predecessor to section 552.108 can provide compelling reason for non-disclosure). Therefore, the university may not withhold any of the information submitted in the June 6 letter under the informer's privilege or section 552.103 or section 552.108 of the Government Code. Because sections 552.101 and 552.137 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will address your remaining arguments under these exceptions. We will also address your arguments under sections 552.103 and 552.108 for the information that was timely submitted to this office.

First we will address your assertion that the timely submitted incident report is excepted from disclosure under section 552.108. Section 552.108(a) 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 the 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). You state that the university police department conducted an investigation pertaining to an alleged terroristic threat against the professor at issue. You explain that although charges were not accepted pertaining to the initial investigation of the incident, the professor at issue has indicated that she may pursue criminal charges against the suspect. Further, you assert that release of the information at issue would interfere with further investigation by another law enforcement entity. *See* Open Records Decision No. 372 (1983) (where incident involving

allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information relating to incident). Based upon this representation, we conclude that the release of report number 07-00420 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), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

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*. *See* Open Records Decision No. 127 (1976) (listing basic information that must be released from offense report in accordance with *Houston Chronicle*). Thus, with the exception of the basic front page offense and arrest information, you may withhold report number 07-00420 from disclosure based on section 552.108(a)(1).<sup>1</sup>

Next you assert that the basic information and the information submitted in your June 6 letter is confidential under section 552.101. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. This section encompasses information made confidential by other statutes. You assert that the remaining information is confidential under the Texas Homeland Security Act, specifically, section 418.177 of the Government Code. Section 418.177 provides:

Information is confidential if the information:

- (1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and
- (2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Gov't Code §§ 418.177. The fact that information may relate to a governmental body's security concerns does not make the information per se confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the

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<sup>1</sup>As our ruling is dispositive, we do not address your argument under section 552.103. Further, we note that generally, basic information held to be public in *Houston Chronicle* is not excepted from public disclosure under section 552.103 of the Government Code. Open Records Decision No. 597 (1991).

applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A).

In this instance, the remaining information consists of basic information from report number 07-00420 and e-mail communications pertaining to complaints against the professor. Upon review, we conclude that you have failed to demonstrate that this information relates to an assessment of a risk or vulnerability of persons or property to an act of terrorism or related criminal activity. *See id.* § 418.177(a). Thus, none of the remaining information is confidential under section 418.177 of the Government Code, and it may not be withheld under section 552.101 of the Government Code on this basis.

Next you assert that a portion of the remaining information is excepted from disclosure under section 552.101 in conjunction with common-law privacy and the ruling in *Morales v. Ellen*. 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). For information to be protected from public disclosure by the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). In *Morales v. Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment in an employment context. However, in this instance the information at issue concerns alleged physical threats made against a professor and communications pertaining to complaints against the professor. Because the allegations do not concern sexual harassment in the employment arena, we find that *Ellen* is not applicable in this instance. Consequently, the university may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy on the basis of *Morales v. Ellen*.

You also assert that the remaining information contains e-mail addresses that are excepted from public disclosure under section 552.137 of the Government Code. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses that you have marked are not of a type specifically excluded by section 552.137(c). Therefore, the university must withhold the e-mail addresses you have marked in accordance with section 552.137 unless the university receives consent for their release.

Finally, you state that the records submitted in your June 6 letter consist of student e-mail communications that were taken from a university faculty member's department file. The United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office that the Family Education Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purposes of our

review in the open records ruling process under the Act.<sup>2</sup> Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). The submitted e-mail communications appear to consist of unredacted education records. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to the information at issue.<sup>3</sup> Such determinations under FERPA must be made by the educational authority in possession of the education record. Accordingly, we also do not address your arguments under section 552.114 of the Government Code. *See* Gov’t Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure “student records”); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA).

In summary, with the exception of basic information, the university may withhold the submitted incident report under section 552.108(a)(1). Unless the university receives consent for their release, the university must withhold the e-mail addresses you have marked under section 552.137 of the Government Code. This ruling does not address the applicability of FERPA to the submitted information. Should the university determine that all or portions of the submitted e-mail communications consist of “education records” that must be withheld under FERPA, then the university must dispose of that information in accordance with FERPA, rather than the Act. The remaining information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

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<sup>2</sup>A copy of this letter may be found on the attorney general’s website, available at [http://www.oag.state.tx.us/opinopen/og\\_resources.shtml](http://www.oag.state.tx.us/opinopen/og_resources.shtml).

<sup>3</sup>In the future, if the district does obtain parental consent to submit unredacted education records, and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

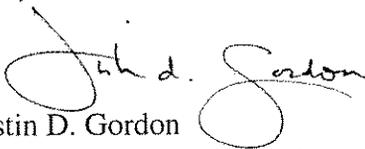
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

  
Justin D. Gordon  
Assistant Attorney General  
Open Records Division

JDG/jb

Ref: ID# 284503

Enc. Submitted documents

c: Mr. Damon Lovell  
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(w/o enclosures)