



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 18, 2007

Ms. Deborah F. Harrison  
Assistant District Attorney  
Collin County Courthouse  
210 South McDonald, Suite 324  
McKinney, Texas 75069

OR2007-13682

Dear Ms. Harrison:

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# 293814.

The Collin County Sheriff's Office (the "sheriff"), which you represent, received a request for information regarding two named officers. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.111, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information includes college transcripts. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational 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 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.<sup>1</sup> Consequently, education records that are responsive to a request for information under the Act should not be submitted 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"). Because

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<sup>1</sup>A copy of this letter may be found on the Office of the Attorney General's website: [http://www.oag.state.tx.us/opinopen/og\\_resources.shtml](http://www.oag.state.tx.us/opinopen/og_resources.shtml).

our office is prohibited from reviewing education records to determine whether appropriate redactions have been made under FERPA, we will not address the applicability of FERPA to the transcript. Such determinations under FERPA must be made by the educational authority from which the sheriff obtained the transcripts. Thus, the sheriff should contact the educational authority from which the transcripts were obtained and the DOE regarding the applicability of FERPA to the transcripts.

We must next address the sheriff'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. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See Gov't Code* § 552.301(e)(1)(D). The sheriff received the request for information on August 17, 2007; however, the envelope in which the requested information was submitted to this office is postmarked September 11, 2007. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). The sheriff also failed to timely assert sections 552.102 and 552.136 of the Government Code. *See id.* § 552.301(b)(1), (4). Thus, the sheriff failed to comply with the procedural requirements mandated by 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 Gov't Code* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); 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). Sections 552.103, 552.108, and 552.111 of the Government Code are all discretionary in nature; they serve only to protect a governmental body's interests and may be waived. As such, they do not generally constitute compelling reasons to withhold information. *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. 677 at 10 (2002) (claim of attorney work-product privilege under section 552.111 or Texas Rule of Civil Procedure 192.5 does not provide compelling reason for purposes of section 552.302 if it does not implicate third party rights), 473 (1987) (statutory predecessor to section 552.111 may be waived), 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). By failing to comply with section 552.301, the sheriff has waived his claims under these sections. However, the need of a governmental body, other than the agency that is seeking an open records decision, to withhold information under sections 552.103 and 552.108 of the Government Code can provide a compelling reason to withhold information from disclosure.

Open Records Decision Nos. 586 (1991), 469 (1987) (university may withhold information under section § 552.103 predecessor to protect district attorney's interest in anticipated criminal litigation). Because you inform us that the Collin County District Attorney's Office (the "district attorney") objects to the release of the requested information, we will consider your claims regarding the exceptions that the district attorney asserts. Sections 552.101, 552.102, 552.130, and 552.136 can also provide compelling reasons to overcome the presumption of openness. Therefore, we will also consider your arguments under these sections.

We also note that the submitted documents contain information that is subject to section 552.022 of the Government Code. Under section 552.022(a)(3), information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body is expressly public unless it is expressly confidential under other law. Although the district attorney asserts this information is excepted under sections 552.103, 552.108, and 552.111 of the Government Code, these sections are discretionary under the Act and do not constitute "other law" for purposes of section 552.022. *See Dallas Morning News*, 4 S.W.3d at 475-76; Open Records Decision Nos. 663 (1999), 542 at 4 (1990), 177; *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the sheriff may not withhold this information on these bases. However, the Texas Supreme Court has held that the Texas Rules of Civil Procedure are 'other law' within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also* Open Records Decision Nos. 677 (2002), 676 (2002). Accordingly, we will address whether the information is excepted under these rules.

For the purpose of section 552.022, information is confidential under rule 192.5 of the Texas Rules of Civil Procedure only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 at 9-10 (2002). Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation and (2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract

possibility or unwarranted fear.” *Id.* at 204. The second prong of the work product test requires the governmental body to show that the documents at issue contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Having considered your representations and reviewed the information at issue, we find you have not established that the information subject to section 552.022 consists of privileged core attorney work product. Therefore, the sheriff may not withhold this information under rule 192.5.

The district attorney asserts the remaining information is excepted under section 552.108 of the Government Code. Section 552.108(a)(1) 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.” 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* Gov’t Code §§ 552.108(a)(1), 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the remaining information relates to a pending criminal prosecution and that the district attorney objects to its release. You also state that the submitted information is information about the witnesses to this case. Based upon this representation, we conclude that the release of this 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), *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). Accordingly, the sheriff may withhold the information requested pursuant to section 552.108(a)(1) of the Government Code.

To conclude, the sheriff should contact the educational authority from which the transcripts were obtained and the DOE regarding the applicability of FERPA to the transcript. The sheriff must release the information marked under section 552.022(a)(3) of the Government Code. The sheriff may withhold the remaining information under section 552.108 of the Government Code. As our ruling is dispositive, we do not address your remaining arguments to withhold the submitted information.

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).

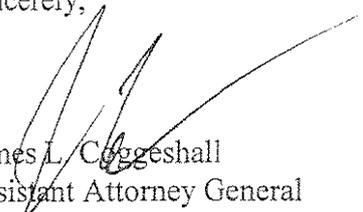
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/jh

Ref: ID# 293814

Enc. Submitted documents

c: Ms. Sharon Curtis  
1216 North Central Expressway, Suite 101  
McKinney, Texas 75070  
(w/o enclosures)