



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 9, 2009

Ms. Christine Badillo
Walsh, Anderson, Brown, Aldridge & Gallegos, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2009-14277

Dear Ms. Badillo:

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# 357976.

The Leander Independent School District (the "district"), which you represent, received a request for information pertaining to a specified computer breach investigation. You state the district is redacting some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.¹ You have also redacted a social security number pursuant to section 552.147 of the Government Code. *See Gov't Code § 552.147(b)* (governmental body may redact social security number without necessity of requesting decision from this office under the Act). You claim the submitted information is excepted from disclosure under sections 552.108 and 552.111 of the Government Code. We have

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA 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 purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

considered the exceptions you claim and reviewed the submitted information, some of which appears to be a representative sample of information.²

You assert Exhibit 2 is excepted under section 552.108 of the Government Code. Section 552.108(a) generally excepts information held by a law enforcement agency 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. *See* Gov't Code § 552.108(a)(1). A governmental body that claims information is excepted from disclosure under section 552.108 must reasonably explain how and why section 552.108 is applicable to the information. *See* Gov't Code §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

The district is not a law enforcement agency. *See* Open Records Decision No. 199 (1978) (agency whose function is essentially regulatory in nature is not "law enforcement agency" for purposes of statutory predecessor to section 552.108). By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. This office has determined, however, where an incident involving alleged criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. *See* Open Records Decision Nos. 474 (1987), 372 (1983). Where a non-law enforcement agency has custody of information relating to a pending case of a law enforcement agency, the agency having custody of the information may withhold the information under section 552.108 if the agency demonstrates the information relates to the pending case and provides this office with a representation from the law enforcement entity the law enforcement entity wishes to withhold the information. The district has not provided any representation to indicate a law enforcement agency wishes to withhold the information at issue. Therefore, the district may not withhold the information under section 552.108.

You assert Exhibit 3 is excepted under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This section encompasses the attorney work product privilege found in Rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including

²We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. Tex. R. Civ. P. 192.5; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied that

a) 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 b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. 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; ORD 677 at 7.

You inform us Exhibit 3 "is a piece of correspondence produced by the District's legal counsel and transmitted to the Federal Bureau of Investigations 'FBI' in the context of their investigation into this matter." We find, however, you have not established this document constitutes material prepared or mental impressions developed in anticipation of litigation or for trial by or for the district or the district's representatives. Likewise, you have not shown this document is a communication made in anticipation of litigation or for trial between the district and the district's representatives or among the district's representatives. We therefore conclude that the district may not withhold Exhibit 3 as attorney work product under section 552.111 of the Government Code.

Some of the submitted information is excepted under section 552.130 of the Government Code, which provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). The district must withhold the Texas motor vehicle record information we have marked under section 552.130.

Some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are

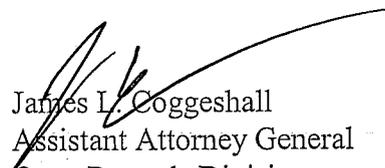
copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

To conclude, the district must withhold the information marked under section 552.130 of the Government Code. The district must release the remaining information, but any copyrighted information may only be released in accordance with copyright law.

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, 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/cc

Ref: ID# 357976

Enc. Submitted documents

cc: Requestor
(w/o enclosures)