



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 16, 2010

Ms. Marianna M. McGowan
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OR2010-02308

Dear Ms. McGowan:

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# 370311.

The Mansfield Independent School District Police Department (the "department"), which you represent, received a request for information relating to a specified incident and involving a named individual. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.¹

We first note that the department has redacted portions of the submitted records. The department appears to have done so on the basis of 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 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

¹You also inform us, and have provided documentation reflecting, that third parties were notified of this request for information and of their right to submit comments to this office as to why the requested information should or should not be released. See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released). As of the date of this decision, this office has received no correspondence from any of the third parties who were notified.

process under the Act.² FERPA is not applicable, however, to law enforcement records that were created and are maintained by the law enforcement unit of a school district for a law enforcement purpose. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, 99.8. But records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of an educational agency or institution other than the law enforcement unit or that are used exclusively for a non-law enforcement purpose such as a disciplinary proceeding are not records of the law enforcement unit and are education records subject to FERPA. *See id.* § 99.8(b)(2).

In this instance, the requestor addressed his request for information directly to the department. Thus, we understand that the submitted records are maintained by the department. The department informs us that the records in question are related to a criminal investigation conducted by the department. There is no indication that these records are maintained by a component of the Mansfield Independent School District (the “district”) other than the department or that the records in question have been used exclusively for any purpose other than law enforcement. Therefore, we find that the information that has been redacted from the submitted records is not subject to FERPA and may not be withheld on that basis. Because we are able to discern the nature of the redacted information, we are not prevented from determining whether that information falls within the scope of the department’s exceptions to disclosure. Accordingly, we will address the department’s arguments with respect to all of the submitted information, including the redacted information. Nevertheless, we caution the department that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering the redacted information to be released. *See Gov’t Code* §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of specific information requested or representative sample if information is voluminous), 552.302.

We begin with section 552.108 of the Government Code, which is the most inclusive exception the department claims. 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[.]” *Id.* § 552.108(a)(1). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The department seeks to withhold all of the submitted information under section 552.108(a)(1). In the alternative, the department seeks to withhold all identifying information of victims and witnesses on this basis. The department states, and has provided the affidavit of an officer of the department for the purpose of demonstrating, that the submitted information is related to an ongoing criminal investigation. The officer’s affidavit states, however, that the case to which the submitted information pertains has been officially

²We have posted a copy of the DOE’s letter on the Attorney General’s website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

closed. Thus, the department's affidavit contradicts its representation that an investigation is ongoing. Under these circumstances, we are unable to find that the release of the submitted information would interfere with the detection, investigation, or prosecution of crime. See Gov't Code § 552.108(a)(1); *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). We therefore conclude that the department may not withhold any of the submitted information under section 552.108(a)(1) of the Government Code.

The department also claims section 552.108(b)(1), which excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov't Code § 552.108(b)(1). Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.). To demonstrate the applicability of section 552.108(b)(1), a governmental body must explain how and why release of the requested information would interfere with law enforcement and crime prevention. See Open Records Decision No. 562 at 10 (1990). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. See, e.g., Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (information regarding location of off-duty police officers), 413 (1984) (sketch showing security measures to be used at next execution). The statutory predecessor to section 552.108(b)(1) was not applicable to generally known policies and procedures. See, e.g., Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

We note that the information at issue consists of records of a routine police investigation. We find that the department has not demonstrated that these records contain any information that, if released, would interfere with law enforcement or crime prevention. We therefore conclude that the department may not withhold any of the submitted information under section 552.108(b)(1) of the Government Code.

Turning to the department's other exceptions to disclosure, section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. We understand the department to raise section 552.101 in conjunction with section 58.007 of the Family Code, which provides in part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). Section 58.007(c) is applicable to records of juvenile conduct that occurred on or after September 1, 1997. *See* Act of June 2, 1997, 75th Leg., R.S., ch. 1086, §§ 20, 55(a), 1997 Tex. Gen. Laws 4179, 4187, 4199; Open Records Decision No. 644 (1996). The juvenile must have been at least 10 years old and less than 17 years of age when the conduct occurred. *See* Fam. Code § 51.02(2) (defining “child” for purposes of Fam. Code tit. 3). Section 58.007(c) is not applicable to information that relates to a juvenile as a complainant, victim, witness, or other involved party and not as a suspect or offender. The department has not demonstrated, and it does not otherwise appear to this office, that the submitted information involves a suspect or offender who was less than 17 years of age at the time of the incident to which the information pertains. We therefore conclude that the department may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.

The department also raises section 552.101 in conjunction with the common-law informer’s privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer’s privilege protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer’s identity. *See* Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” *See* Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5.

The department seeks to withhold all of the submitted information under the informer's privilege. In the alternative, the department seeks to withhold the identifying information of victims and witnesses on that basis. The department contends that the individuals in question reported violations of the Penal Code. We note that witnesses who provide information in the course of an investigation but do not make the initial report of the violation are not informants for the purposes of the common-law informer's privilege. We also note that, although the submitted information involves two individuals who claimed to have been victims of criminal offenses, the information reflects that each of the alleged offenders knows the alleged victim's identity. We therefore conclude that the department has not demonstrated that the common-law informer's privilege is applicable to any of the information at issue and may not withhold any of the information on that basis under section 552.101 of the Government Code.

Lastly, section 552.135 of the Government Code provides in part:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

Gov't Code § 552.135(a)-(c). The department also seeks to withhold all of the submitted information under section 552.135 or, in the alternative, the identities of victims and witnesses. We note that section 552.135 protects an informer's identity, but does not protect witness information or statements. Although the submitted information does identify the two individuals who reported alleged crimes to the department, there is no indication that either of those individuals is a current or former student or employee of the district. Thus, neither of the two alleged crime victims is an informer for the purposes of section 552.135. *See id.* § 552.135(a) (defining "informer" as "a student or a former student or an employee or former

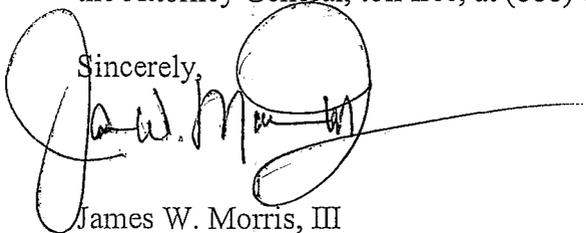
employee of a school district who has furnished a report of another person's possible violation of criminal, civil, or regulatory law to the school district or proper regulatory enforcement authority"). We therefore conclude that the department may not withhold any of the submitted information under section 552.135 of the Government Code.

In summary, none of the submitted information may be withheld under section 552.108, section 552.101, or section 552.135 of the Government Code. As the department claims no other exception to disclosure, all of the submitted information, including the redacted information, must be released.

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 W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 370311

Enc: Submitted documents

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