



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 17, 2012

Ms. Ann Manning
Attorney for Lubbock Independent School District
Underwood, Wilson, Berry, Stein & Johnson, P.C.
P.O. Box 16197
Lubbock, Texas 79490

OR2012-02587

Dear Ms. Manning:

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# 445904.

The Lubbock Independent School District (the "district"), which you represent, received a request for contracts, audits and other investigations, and communications related to a named business during a specified time period. You indicate some of the requested information does not exist.¹ You also state some information has been released to the requestor. You claim the submitted information is excepted from disclosure under sections 552.108 and 552.116 of the Government Code.² We have considered the claimed exceptions and reviewed the submitted information. We have considered comments received from an interested third party. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990).

²Although you also raise section 552.022 of the Government Code, we note this section is not an exception to disclosure. Section 552.022 lists 18 categories of information that are subject to required public disclosure unless the information is confidential under the Act or other law, but does not itself make any information confidential. *See* Gov't Code § 552.022(a)(1).

Initially, we note portions of Exhibit 4 are subject to section 552.022 of the Government Code. Section 552.022(a) makes the following categories of information subject to required public disclosure, unless the information is “made confidential under [the Act] or other law”:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov’t Code § 552.022(a)(1), (3). In this instance, Exhibit 4 contains completed reports and investigations that are subject to subsection 552.022(a)(1) and must be released unless they are excepted under section 552.108 or made confidential under the Act or other law. Exhibit 4 also contains invoices and contracts subject to subsection 552.022(a)(3) that must be released unless they are made confidential under the Act or other law. You raise section 552.108 of the Government Code for this information. However, section 552.108 is a discretionary exception that may be waived and does not make information confidential under the Act. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). As such, the information subject to section 552.022(a)(3) may not be withheld under section 552.108. However, information subject to subsection 552.022(a)(1) may be withheld if it is excepted by section 552.108. Therefore, we will address your argument under section 552.108 for the information subject to section 552.022(a)(1). In addition, we note portions of the information subject to release under section 552.022(a) are also subject to section 552.136 of the Government Code, which makes information confidential under the Act.³ Thus, we will also address this exception to disclosure, in addition to your arguments against disclosure for the information not subject to section 552.022(a).

Section 552.136 of the Government Code provides that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). An access device number is one that may be used to “(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument,” and includes an account number. *Id.* § 552.136(a). The district must withhold the information we have marked under section 552.136. As no additional exceptions to disclosure are raised for the remaining

³ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information subject to subsection 552.022(a)(3), which we have marked, it must be released to the requestor.

You raise section 552.108 for the remaining information in Exhibit 4, which is either not subject to section 552.022 or is subject to subsection 552.022(a)(1). 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[.]” Gov’t Code § 552.108(a)(1). A governmental body must reasonably explain how release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 applies to information held by a “law enforcement agency.” However, section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5 (1987)*. Thus, where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

You state Exhibit 4 consists of information turned over to the Lubbock County District Attorney’s Office (the “district attorney’s office”). We have received a letter from the district attorney’s office stating the information at issue relates to a pending criminal investigation and objecting to its release because disclosure would interfere with the investigation. Based on the representations of the district attorney’s office, we conclude release of the remaining information in Exhibit 4 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) (specifying law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Therefore, the district may withhold the remaining information in Exhibit 4 under section 552.108(a)(1) of the Government Code on behalf of the district attorney’s office.

You raise section 552.116 of the Government Code for Exhibit 3. Section 552.116 provides as follows:

- (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also

maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state Exhibit 3 consists of audit working papers prepared or maintained in the course of an audit authorized by the district's Board of Trustees pursuant to Board Policies BAA and CH. Based on your representations and our review of the information at issue, we agree section 552.116 is applicable in this instance. Therefore, the district may withhold Exhibit 3 under section 552.116 of the Government Code.

In summary, the district must release the information in Exhibit 4 we have marked under section 552.022(a)(3) of the Government Code. In releasing this information, the district must withhold the information we marked under section 552.136 of the Government Code. The district may withhold Exhibit 3 under section 552.116 of the Government Code and the remaining information in Exhibit 4 under section 552.108(a)(1) of the Government Code.

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,

A handwritten signature in cursive script that reads "Misty Haberer Barham".

Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/agn

Ref: ID # 445904

Enc. Submitted documents

c: Requestor
(w/o enclosures)