



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 9, 2012

Mr. Tony Resendez
For Harlandale Independent School District
Walsh, Anderson, Gallegos, Green and Treviño, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2012-06810

Dear Mr. Resendez:

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# 453243.

The Harlandale Independent School District (the "district"), which you represent, received a request for a specified investigation.¹ You inform us the district will withhold driver's license numbers under section 552.130 of the Government Code, bank account numbers under section 552.136 of the Government Code, and personal e-mail addresses under section 552.137 of the Government Code, pursuant to Open Record Decision No. 684 (2009).² You also inform us the district will redact social security numbers under

¹You inform us the district asked for and received clarification of the request. *See* Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

²We note Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers under section 552.130(a)(1) of the Government Code, bank account numbers under section 552.136 of the Government Code, and the e-mail addresses of member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. However, on September 1, 2011, the Texas legislature amended sections 552.130 and 552.136 to allow a governmental body to redact the information described in subsections 552.130(a)(1) and 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code §§ 552.130(c), .136(c). If a governmental body redacts information described in subsection 552.130(a)(1), it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). In addition, if a governmental body redacts information described in subsection 552.136(b), it must notify the requestor in accordance with section 552.136(e). *See id.* §552.136(e).

section 552.147 of the Government Code.³ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you inform us that the district redacted student-identifying information in the submitted information pursuant to the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code.⁴ We note FERPA is not applicable to law enforcement records maintained by the district’s police department (the “department”) that were created by the department for a law enforcement purpose. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8. Upon review, we find the submitted information consists of law enforcement records that were created by the department for a law enforcement purpose. Thus, this information is not subject to FERPA, and no portion of it may be withheld on that basis.

Next, we note some of the submitted information consists of checks, invoices, vouchers, and other information subject to section 552.022(a)(3) of the Government Code. Section 552.022(a)(3) provides that “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body” is subject to required public disclosure unless it is made confidential under this chapter or “other law.” Gov’t Code § 552.022(a)(3). Although you raise sections 552.103 and 552.108 of the Government Code for the submitted information, these sections are discretionary exceptions to disclosure and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, S.W.3d 69, 475-6 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Therefore, the district may not withhold the submitted information subject to section 552.022(a)(3), which we have marked, under section 552.103 or section 552.108. However, because section 552.101 of the Government Code is “other law” for purposes of section 552.022, we will consider your argument under this section for all of the submitted information. In addition, we note some of the information subject to

Thus, the statutory amendments to subsections 552.130(a)(1) and 552.136(b) superceded Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsections 552.130(a)(1) and 552.136(b) in accordance with sections 552.130 and 552.136, not Open Records Decision No. 684.

³Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act. *See* Gov’t Code § 552.147(b).

⁴The 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 process under the Act. The DOE has determined that 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>.

section 552.022(a)(3) contains bank routing numbers subject to section 552.136 of the Government Code.⁵ Accordingly, because section 552.136 makes information confidential under the Act, we will consider its applicability to this information. *See* Gov't Code §§ 552.117, .136 (providing for "confidentiality" of information). We will also consider your arguments under sections 552.103 and 552.108 for the submitted information not subject to section 552.022(a)(3).

We first address your claim under section 552.101 of the Government Code for the submitted information. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *See id.* § 552.101. Section 552.101 encompasses information protected by other statutes. You assert most of the submitted information is excepted from disclosure under section 552.101 in conjunction with article 20.02 of the Code of Criminal Procedure. Article 20.02(a) provides "[t]he proceedings of the grand jury shall be secret." Crim. Proc. Code art. 20.02(a). Article 20.02, however, does not define "proceedings" for purposes of subsection (a). Therefore, we have reviewed case law for guidance and found that Texas courts have not often addressed the confidentiality of grand jury subpoenas under article 20.02. Nevertheless, the court in *In re Reed* addressed the issue of what constitutes "proceedings" for purposes of article 20.02(a) and stated that although the court was aware of the policy goals behind grand jury secrecy, the trial court did not err in determining the grand jury summonses at issue were not proceedings under article 20.02. *See In re Reed*, 227 S.W.3d 273, 276 (Tex. App.—San Antonio 2007, orig. proceeding). The court further stated that the term "proceedings" could "reasonably be understood as encompassing matters that take place before the grand jury, such as witness testimony and deliberations." *Id.* at 276. The court also discussed that, unlike federal law, article 20.02 does not expressly make subpoenas confidential. *See id.*; FED. R. CRIM. P. 6(e)(6).

Subsequent to the ruling in *Reed*, the 80th Legislature, modeling federal law, added subsection (h) to article 20.02 to address grand jury subpoenas. *See* Crim. Proc. Code art. 20.02; *see also* FED. R. CRIM. P. 6(e)(6) ("Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury."). Article 20.02(h) states that "[a] subpoena or summons relating to a grand jury proceeding or investigation must be kept secret to the extent and for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury." Crim. Proc. Code art. 20.02(h). This provision, however, does not define or explain what factors constitute "necessary to prevent the unauthorized disclosure of a matter before the grand jury." *Id.* Because article 20.02(h) is modeled on federal law, we reviewed federal case law for guidance on a definition or explanation of the factors that would constitute "necessary to prevent the unauthorized disclosure of a matter before the grand jury" for the purposes of keeping grand

⁵The 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).

jury subpoenas secret. Our review of federal case law revealed that federal courts have ruled inconsistently on the issue of whether or not grand jury subpoenas must be kept secret. FED. R. CRIM. P. 6(e)(6) advisory committee's note (stating federal case law has not consistently stated whether or not subpoenas are protected by rule 6(e)). Furthermore, even if we considered article 20.02 to be a confidentiality provision, information withheld under this statute would only be secret "for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury." *Id.*

You have not submitted any arguments explaining how the matter upon which the submitted information was based is still "before the grand jury" to warrant keeping the information secret. Therefore, upon review of article 20.02 and related case law, it is not apparent, and you have not otherwise explained, how this provision makes any of the submitted information confidential. *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Consequently, the district may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with article 20.02 of the Code of Criminal Procedure.

Next, we address the submitted information that is subject to section 552.022(a)(3) of the Government Code. Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code, which provides that "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." Gov't Code § 560.003; *see also id.* §§ 560.001(1) (defining "biometric identifier" to include fingerprints), .002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual's biometric identifier to another person unless individual consents to disclosure). Therefore, the district must withhold the fingerprints we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.⁶

Section 552.136 of the Government Code provides "[n]otwithstanding any other provision of [the Act], 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." *See id.* § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Therefore, the district must withhold the bank routing numbers we have marked under section 552.136 of the Government Code.

We note some of the remaining information that is subject to section 552.022(a)(3) of the Government Code 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. *See* Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See*

⁶We note Open Records Decision No. 684 is also a previous determination to all governmental bodies authorizing them to withhold fingerprint information under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, without the necessity of requesting an attorney general decision.

id.; see also Open Records Decision No. 109 (1975). 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. Accordingly, as no other exceptions to disclosure are raised for the remaining information subject to section 552.022(a)(3) of the Government Code, the district must release it; however, any information protected by copyright may only be released in accordance with copyright law.

Finally, we address your remaining claims for the submitted information not subject to section 552.022(a)(3) 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[.]” Gov’t Code § 552.108(a)(1). 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). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. See Open Records Decision No. 474 at 4-5 (1987). You inform us that the department has forwarded the submitted information to the Bexar County District Attorney’s Office (the “district attorney’s office”). You state the district attorney’s office has informed you that the information at issue pertains to a pending criminal prosecution. Based on your representations and our review, we conclude 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) (court delineates law enforcement interests that are present in active cases), *writ ref’d per curiam*, 536 S.W.2d 559 (Tex. 1976). Therefore, section 552.108(a)(1) is applicable to the information at issue.

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 531 S.W.2d 186-7; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of basic information, the information not subject to section 552.022(a)(3) may be withheld under section 552.108(a)(1) of the Government Code.⁷

In summary, the district must withhold the information subject to section 552.022(a)(3) of the Government Code that we have marked under (1) section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code and (2) section 552.136 of the Government Code. With the exception of basic information, the information not

⁷As our ruling is dispositive, we need not address your remaining arguments against disclosure, except to note the basic information held to be public in *Houston Chronicle* is generally not excepted from disclosure under section 552.103 of the Government Code. See Open Records Decision No. 597 (1991).

subject to section 552.022(a)(3) of the Government Code may be withheld under section 552.108(a)(1) of the Government Code. The remaining information must be released; however, any of the remaining information subject to section 552.022(a)(3) of the Government Code that is protected by copyright 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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/dls

Ref: ID# 453243

Enc. Submitted documents

c: Requestor
(w/o enclosures)