



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 9, 2013

Ms. Sandra Garcia
Assistant General Counsel
Office of General Counsel
Houston Community College
3100 Main Street
Houston, Texas 77002

OR2013-17494

Dear Ms. Garcia:

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# 501747.¹

Houston Community College (the "college") received three requests from two different requestors for (1) expense reports for two named individuals during a specified time period; (2) all e-mails and text messages between college trustees and two named individuals during a specified time period; and (3) complaints and related investigative reports or memoranda filed against a named individual during a specified time period, including e-mails or memos sent between two named individuals.² You state the college is releasing the requested information responsive to the first category of information. You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.108, 552.109, and 552.117 of the

¹This office originally assigned identification numbers 501747 and 501757 to these separate requests for a ruling. These requests have been combined and are being issued as one ruling with the identification number noted above.

²You state the college received clarification of the information requested by the first requestor. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request).

Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, the college seeks to withdraw its request for an open records decision with regard to the second category of information because, the college asserts, the second requestor's public information request for the information at issue was withdrawn by operation of law for failure to timely respond to a cost estimate for providing the requested records. Upon review of a copy of the cost estimate, we find it does not comply with the requirements of section 552.2615(a) of the Government Code. *See* Gov't Code § 552.2615(a). Accordingly, we conclude the second requestor's request for information was not withdrawn by operation of law. *See id.* § 552.2615(b).

Next, we must address the college's obligations under the Act. Section 552.301(b) requires a governmental body requesting an open records ruling from this office to "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request." *Id.* § 552.301(b). Further, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the claimed exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). The college received the first requests for the information at issue on July 18, 2013. You do not inform us the college was closed for any business days between July 18, 2013, and August 8, 2013. Accordingly, you were required to provide the information required by subsection 552.301(b) by August 1, 2013. Further, you were required to provide the information required by subsection 552.301(e) by August 8, 2013. While the college raised sections 552.101 and 552.108 for the third category of information within the ten-business-day time period as required by subsection 552.301(b), the college did not raise section 552.103 or section 552.107 of the Government Code until August 8, 2013.³ Moreover, although the college timely submitted information responsive to the third category of information, as of this date, the college has not submitted to this office a copy or representative sample of the information responsive to the second category of information. Accordingly, we conclude the college failed to comply with the procedural requirements mandated by section 552.301 of the Government Code with respect to its claims under sections 552.103 and 552.107 for the third category of information, as well as with respect

³Although you also raised sections 552.102, 552.109, and 552.117 of the Government Code for the third category of information, you have not provided any arguments to support these exceptions. Therefore, we assume you have withdrawn your claims these sections apply to the information responsive to the third category of information. *See* Gov't Code §§ 552.301, .302.

to each of its claimed exceptions to disclosure of the information responsive to the second category of information.

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. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994). Sections 552.103 and 552.107 of the Government Code are discretionary in nature. *See* Gov't Code § 552.007; *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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). In failing to comply with section 552.301(b) with respect to sections 552.103 and 552.107 for the information responsive to the third category of information, the college has waived those exceptions, and no portion of the third category of information may be withheld under section 552.103 or section 552.107 of the Government Code. However, we will consider your timely-raised claims under sections 552.101 and 552.108 for the third category of information.

The college raises section 552.101 of the Government Code in conjunction with the common-law informer's privilege and sections 552.103, 552.107, and 552.108 of the Government Code for the second category of information. The purpose of the informer's privilege is to protect the flow of information to a governmental body, rather than to protect a third person. Thus, the informer's privilege, unlike other claims under section 552.101, is discretionary and may be waived. *See* Open Records Decision No. 549 at 6 (1990). Because the college failed to comply with the procedural requirements of the Act with respect to the second category of information, the city has waived its claims under sections 552.101, 552.103, 552.107, and 552.108 of the Government Code for that information. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; *see also* Open Records Decision Nos. 676 at 10-11, 663 at 5, 177 (1977) (governmental body may waive statutory predecessor to section 552.108). The college also raised sections 552.102, 552.109, and 552.117 for the second category of information. These exceptions can provide compelling reasons to withhold information. However, because you have not submitted the requested information for our review, we have no basis for finding any of the information excepted from disclosure or confidential by law. Thus, we have no choice but to order the information responsive to the second category of information released pursuant to

section 552.302. If you believe such information is confidential and may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

Section 552.108(a)(1) of the Government Code 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(a)(1) must reasonably explain how and why this exception is applicable to the information at issue. *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 a pending investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5 (1987)*. 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 the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

You have provided an affidavit from the chief of the college’s police department (the “department”) demonstrating the department is conducting a criminal investigation into alleged illicit or illegal activity by the named individual. You state most of the submitted information is related to the department’s pending criminal investigation. Based upon your representation, we conclude release of the information at issue will 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 n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Accordingly, we find the college may withhold the information at issue, which we have marked, under section 552.108(a)(1) of the Government Code on behalf of the department.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. You raise 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). The informer’s privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer’s identity. *See Open Records Decision No. 208 at 1-2 (1978)*. The informer’s 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.” *Open Records*

Decision No. 279 at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. 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 (1988). We note, however, the purpose of the informer's privilege is to encourage "citizens" to report wrongful behavior to the appropriate officials. See *Roviaro v. United States*, 353 U.S. 53, 59 (1957). The privilege is not intended to protect the identities of public officials and employees who have a duty to report violations of the law.

You state portions of the remaining information identify a complainant who reported violations of law to the department. In this instance, because the public employee who reported the alleged activity was acting within the scope of his employment when filing a complaint, the informer's privilege does not protect the public employee's identity. Cf. *United States v. St. Regis Paper Co.*, 328 F. Supp. 660, 665 (W.D. Wis. 1971) (concluding public officer may not claim informer's reward for service it is his or her official duty to perform). Accordingly, the college may not withhold any portion of the remaining submitted information under section 552.101 in conjunction with the informer's privilege.

In summary, the college may withhold the information we marked under section 552.108(a)(1) of the Government Code on behalf of the department. The college must release the remaining requested information, including all the information responsive to the second category of information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 501747

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)