



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 20, 2016

Mr. Christopher B. Gilbert
Counsel for the Houston Independent School District
Thompson & Horton LLP
3200 Southwest Freeway, Suite 2000
Houston, Texas 77027

OR2016-13962

Dear Mr. Gilbert:

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# 615218.

The Houston Independent School District (the "district"), which you represent, received a request for all e-mails received by a named individual from past or former district board members during a specified time period.¹ You claim the submitted information is excepted from disclosure under sections 552.107, 552.111, 552.116, and 552.137 of the Government Code.² We have received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested third party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have submitted information that was not sent to the individual named in the request. Thus, this information, which we have marked, is not responsive to the present request. This ruling does not address the public availability of any information that

¹As the district did not submit a copy of the request for information, we take this description from the requestor's comments.

²Although you also raise section 552.101 of the Government Code in conjunction with section 552.107 and rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded that section 552.101 does not encompass discovery privileges or other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Furthermore, we note section 552.107 of the Government Code is the proper exception to claim for attorney-client privileged information not subject to section 552.022 of the Government Code. ORD 676. Additionally, although you also raise sections 552.102 and 552.103 of the Government Code, you have provided no arguments explaining how these exceptions are applicable to the submitted information. Therefore, we assume you no longer assert these exceptions. *See* Gov't Code §§ 552.301(e)(1)(A), .302.

is not responsive to the request and the district is not required to release that information in response to the request.

The United States Department of Education Family Policy Compliance Office has informed this office that the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code, 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.³ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). The district has submitted, among other things, unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of the education records.⁴ We will, however, address the applicability of the claimed exceptions to the submitted information.

Next, we note you have redacted portions of the responsive information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. *See* Gov’t Code § 552.301(a), (e)(1)(D). You do not assert, nor does our review of our records indicate, the district has been authorized to withhold the redacted information without seeking a ruling from this office. *Id.* § 552.301(a); Open Records Decision No. 673 (2000). As such, this information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we are unable to discern the nature of the redacted information. Therefore, the district has failed to comply with section 552.301 of the Government Code as to this information, and this information is presumed public under section 552.302. Accordingly, the district must release the redacted information. If you believe the redacted 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.

³A copy of this letter may be found on the Office of the Attorney General’s website: <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>

⁴In the future, if the district does obtain parental consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

Section 552.301 of the Government Code prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Gov't Code § 552.301. Pursuant to section 552.301(e), a governmental body that receives a request for information it wishes to withhold under an exception to disclosure must submit to this office within fifteen business days of receiving the request (1) written comments stating the reasons why the stated 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). We understand the district received the instant request for information on April 4, 2016. Accordingly, the fifteenth business day after receipt was April 25, 2016. As of the date of this letter, you have not submitted a copy of the written request for information. Consequently, we find the district failed to comply with the requirements of section 552.301(e) of the Government Code.

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 unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (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* ORD 630. You assert sections 552.107, 552.111, and 552.116 of the Government Code for the responsive information. However, these exceptions are discretionary in nature and do not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (attorney-client privileged under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). Accordingly, no portion of the responsive information may be withheld under sections 552.107, 552.111, or 552.116. However, section 552.137 of the Government Code can provide a compelling reason to overcome the presumption of openness. Thus, we will address the applicability of section 552.137 to the responsive information.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The e-mail addresses we have marked are not of the types specifically excluded by section 552.137(c). *See id.* § 552.137(c). However, we are unable to determine whether two of the personal e-mail addresses at issue, which are located within an e-mail communicating official business of the district, belong to district officials or employees. Thus, we rule conditionally. To the extent the two e-mail addresses we have indicated are the personal e-

mail addresses of district officials or employees, this information is not subject to section 552.137 and may not be withheld on that basis. *See Austin Bulldog v. Leffingwell*, No. 03-13-00604-CV (Tex. App.—Austin, April 8, 2016) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov’t Code § 552.137(a)). To the extent the two e-mail addresses we have indicated are not the personal e-mail addresses of district officials or employees, this information is subject to section 552.137 and must be withheld under section 552.137, unless the owners of the e-mail addresses affirmatively consent to their release. The district must withhold the remaining e-mail addresses that do not belong to district officials or employees, which we have marked, under section 552.137, unless the owners of the e-mail addresses affirmatively consent to their release. However, we find you have failed to demonstrate the remaining information is subject to section 552.137. Thus, the district may not withhold the remaining information under section 552.137. As you raise no other exceptions to disclosure, the remaining responsive 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.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,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/akg

Ref: ID# 615218

Enc. Submitted documents

c: Requestor
(w/o enclosures)