



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 24, 1994

Mr. Jeffrey M. Stark
Matthews, Carlton & Stein, L.L.P.
12222 Merit Drive, Suite 800
Dallas, Texas 75251

OR94-658

Dear Mr. Stark:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 28105.

Cherokee County (the "county"), which you represent, has received a request for information relating to the death of a county jail inmate. Specifically, the requestor seeks "information in Cherokee County's custody relating to the deaths of Mr. Jacobs or Michael Gene Garner." We understand that the county has released some of the requested information in accordance with Open Records Letter Nos. 94-187 (1994) and 93-354 (1993), which addressed the availability of the same information. You seek our decision with respect to the remaining information, which you have submitted to us for review, and claim that it is not subject to the Open Records Act. In the alternative, you claim that sections 552.107(1) and 552.111 of the Government Code except some of the submitted information from required public disclosure.

We first address your argument that the submitted information is not subject to the Open Records Act. Specifically, you claim that the submitted information does not constitute "public records" as defined by section 552.002 of the Government Code. Section 552.021 of the act provides in pertinent part:

(a) Information is public information if, under a law or ordinance or *in connection with the transaction of official business*, it is collected, assembled, or maintained:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.021 (emphasis added). You reason that the submitted information does not constitute "public records" because it was collected by a private corporation for its own purposes.

We have examined the information submitted to us for review. Much, if not all, of it appears to be an investigation conducted by Cover X Corporation, the county's liability insurer, to determine the extent of the county's potential liability arising from the death of Robbie Lynn Jacobs. The county clearly maintains this information "in connection with the transaction of official business." Accordingly, we conclude that the submitted information is subject to the Open Records Act under section 552.021(a)(1).

Your alternative claim is that the county may withhold the requested information under sections 552.107(1) and 552.111 of the Government Code. We note, however, that you have failed to request a decision within the ten days mandated by the Open Records Act. Section 552.301(a) of the Government Code provides:

A governmental body that receives a written request for information that it considers to be within one of the exceptions under Subchapter C must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions. The governmental body must ask for the attorney general's decision within a reasonable time but not later than the 10th calendar day after the date of receiving the written request.

Section 552.302 provides:

If a governmental body does not request an attorney general decision as provided by Section 552.301(a), the information requested in writing is presumed to be public information.

The request is dated June 28, 1994, and appears to have been received by the county on that date. You requested a determination of this office by letter dated August 4, 1994. On the basis of these facts, we conclude that the county failed to request a decision within the 10 day period section 552.301(a) of the Government Code mandates.¹

¹We recognize that the requestor entered into an agreement providing "that Cherokee County is not required to forward to the Attorney General's Office a written request as described by Section 552.301 of the Government Code, with regard to information it considers to fall within one of the exceptions stated in Subchapter C, Sections 552.101 *et. seq.*, until July 15, 1994." We question whether a third party may release a governmental body from its obligations under the Open Records Act. We need not reach this question, however, because the county failed to abide by the terms of its agreement with the requestor by

When a governmental body fails to request a decision within ten days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982) at 1-2. The governmental body must show a compelling reason to withhold the information to overcome this presumption. See *Hancock*, 797 S.W.2d at 381 *supra*. Normally, a governmental body can overcome the presumption of openness by a compelling demonstration that the governmental body should not release the requested information to the public, *i.e.*, that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 (1977) at 2. You have not made a compelling demonstration that the county should not release the submitted information to the public. See, *e.g.*, Open Records Decision No. 630 (1994). Accordingly, we conclude that the county may not withhold the requested information under sections 552.107(1) and 552.111 of the Government Code.

We note, however, that section 552.101 of the Government Code, on two grounds, and section 552.117 of the Government Code may prohibit release of some of the requested information. See Gov't Code § 552.352 (prohibiting release of confidential information); Open Records Decision Nos. 481, 480, 470 (1987) (concluding that attorney general may assert section 552.101 on behalf of a governmental body). Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." First, section 552.101 in conjunction with common-law privacy excepts some of the requested information from required public disclosure. Information may be withheld under common-law privacy if it meets the criteria the Texas Supreme Court articulated for section 552.101 in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under *Industrial Foundation*, a governmental body must withhold information on common-law privacy grounds only if the information is highly intimate or embarrassing *and* it is of no legitimate concern to the public. While common-law privacy may protect an individual's medical history, see, *e.g.*, Open Records Decision Nos. 455 (1987); 422 (1984), it does not protect all medically related information, see Open Records Decision No. 478 (1987). Individual determinations are required.² Open Records Decision No. 370 (1983).

(Footnote continued)

failing to request a decision on or before July 15, 1994. By any reckoning, then, the county's August 4, 1994, request falls short of the standard set forth in section 552.301 of the Government Code.

²This office had determined that common-law privacy protects the following information: the kinds of prescription drugs a person is taking, Open Records Decision No. 455 (1987); the results of mandatory urine testing, *id.*; illnesses, operations, and physical handicaps of applicants, *id.*; the fact that a person attempted suicide, Open Records Decision No. 422 (1984); the names of parents of victims of sudden infant death syndrome, Attorney General Opinion JM-81 (1983); and information regarding drug

The submitted information includes information concerning the kinds of drugs prescribed to a person. We conclude that this information is intimate or embarrassing. In addition, this information is of no legitimate concern to the public. We conclude, therefore, that the county must withhold the marked information under section 552.101 of the Government Code.

Second, we note that the submitted information includes social security numbers that may be excepted under section 552.101. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(vii). In relevant part, the 1990 amendments to the federal Social Security Act make confidential social security account numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We note that hiring an individual after October 1, 1990, is not the same as obtaining an individual's social security number pursuant to a law enacted on or after October 1, 1990. For example, an employer is required to obtain a new employee's social security number for tax purposes under a law that predates October 1, 1990, and thus, a social security number obtained under this law is not made confidential by the 1990 amendments to the Social Security Act. Based on the information that you have provided, we are unable to determine whether the social security numbers at issue here are confidential under federal law. On the other hand, section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Therefore, prior to releasing *any* social security number contained in these documents, you should ensure that it was not obtained pursuant to a law enacted on or after October 1, 1990.

Finally, we note that section 552.117 of the Government Code may apply to portions of the submitted information. In pertinent part, section 552.117 excepts from disclosure the social security number, home addresses and telephone numbers of all peace officers, as defined by article 2.12 of the Code of Criminal Procedure, and the home addresses and telephone numbers of all current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold any social security number, home address or telephone number of a peace officer that appears in the requested documents. In addition, section 552.117 requires you to withhold any home address or telephone number of an official or employee who requested that this information be kept confidential under section 552.024. You may not, however, withhold the home address or telephone number of an official or employee who made the request for confidentiality under section 552.024 after this request for the documents was made.

(Footnote continued)

overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress, Open Records Decision No. 343 (1982).

Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay H. Guajardo
Assistant Attorney General
Open Government Section

KHG/GCK/rho

Ref.: ID# 28105

Enclosures: Marked documents

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