



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 25, 2004

Ms. Karen Rabon
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2004-4235

Dear Ms. Rabon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 202233.

The Office of the Attorney General (the "OAG") received a request for certain medical information pertaining to a youth who died in the custody of the Texas Youth Commission (the "commission"). You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered your claimed exceptions to disclosure and have reviewed the submitted information. We have also considered the comments submitted by the commission. *See* Gov't Code § 552.304 (stating that interested party may submit comments explaining why requested records should or should not be released).

The OAG acknowledges, and we agree, that it failed to seek an open records decision from this office within the statutory ten business day period. *See* Gov't Code § 552.301. The OAG's delay in this matter results in the presumption that the requested information is public. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ). In order to overcome this presumption of openness, the OAG must provide compelling reasons why the information should not be disclosed. *Hancock*, 797 S.W.2d at 381. Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). The applicability of section 552.101 can provide a compelling reason to withhold information from disclosure. Furthermore, the need of a governmental body, other than the entity that failed to timely comply with procedural requirements of the Public

Information Act, may, in appropriate circumstances, be a compelling reason for non-disclosure. *See* Open Records Decision No. 586 (1991) (need of another governmental body to withhold information under Gov't Code § 552.108 may provide compelling reason for non-disclosure when governmental body that received request failed to timely seek open records decision under Gov't Code § 552.301). In this instance, the commission asserts that the release of the submitted records will harm its litigation interests. We find that the commission's assertion of its interest in having the requested information withheld constitutes a compelling demonstration sufficient to overcome the heightened presumption of openness. *See id.*; *see also* Open Records Decision Nos. 469 (1987) (university may withhold information under Gov't Code § 552.103 predecessor to protect district attorney's interest in anticipated criminal litigation), 121 (1976) (same). *But see 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); Open Records Decision Nos. 542 at 4 (1990) (statutory predecessor to Gov't Code § 552.103 may be waived), 522 at 4 (1989) (discretionary exceptions in general). We will, therefore, address your submitted arguments.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. Gov't Code § 552.101. You assert that the submitted records are confidential under section 61.073 of the Human Resources Code. Section 61.073 provides:

The commission shall keep written records of all examinations and conclusions based on them and of all orders concerning the disposition or treatment of each child subject to its control. Except as provided by Section 61.093(c), these records and all other information concerning a child, including personally identifiable information, are not public and are available only according to the provisions of Section 58.005, Family Code, Section 61.0731, Human Resources Code, and Chapter 61, Code of Criminal Procedure.

Hum. Res. Code § 61.073. You state that Exhibits D through F detail examination and treatment records of the youth while he was in the custody of the commission. You explain that the commission is one of the OAG's client agencies and the submitted records were forwarded to the OAG for the purpose of representing the commission in litigation. Based on your representations and our review of the exhibits, we find that the records are confidential under section 61.073 and are available only as provided in section 58.005 of the Family Code, section 61.0731 of the Human Resources Code, and chapter 61 of the Code of Criminal Procedure.

Section 61.093(c) of the Human Resources Code authorizes the disclosure of information relating to a child who has escaped from custody. Chapter 61 of the Code of Criminal Procedure is applicable to information that pertains to criminal combinations and street

gangs. Section 58.005(a) of the Family Code provides that “[i]nformation obtained for the purpose of diagnosis, examination, evaluation, or treatment . . . of a child by [an agency] providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court” may only be disclosed to certain individuals under certain circumstances. Section 61.0731 of the Human Resources Code provides that certain information concerning a child may be released to the child and the child’s parent or guardian, or to a person having a legitimate need for the information, only under certain conditions. Neither section 61.093(c) nor the provisions of chapter 61 of the Code of Criminal Procedure apply in this instance. The commission states that the requestor has failed to provide evidence that he is a party to whom the information at issue may be disclosed pursuant to section 58.005 of the Family Code. Finally, we note that section 61.0731 of the Human Resources Code gives the commission the discretion to release examination and treatment records to the parents of the youth or to a person having a legitimate need for the information. Since the records at issue are not available under the enumerated provisions, we determine that the OAG must withhold Exhibits D through F under section 552.101 of the Government Code in conjunction with section 61.073 of the Human Resources Code.¹

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body

¹Because we are able to make a determination under section 552.101, we need not address your arguments under section 552.103.

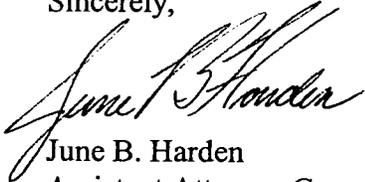
fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/seg

Ref: ID# 202233

Enc: Submitted documents

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