



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 18, 2007

Mr. Cary L. Bovey
Brenham City Attorney
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Austin, Texas 78750

OR2007-07729

Dear Mr. Bovey:

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# 281508.

The Brenham Police Department (the "department"), which you represent, received a request for records involving police activity at the requestor's address.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the department's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether submitted information is excepted from public disclosure. 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) general 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. You state that

¹As you have not submitted a copy of the request, we take our description from your brief.

the department received the request for information on March 26, 2007.² Thus, the fifteen day deadline to comply with section 552.301(e) was April 17, 2007. As of this date, you have not submitted to this office a copy of the written request for information. Consequently, the department failed to comply with the procedural requirements mandated by section 552.301.

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 submitted information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Sections 552.103 and 552.108 are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *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 section 552.103); Open Record Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). In failing to comply with section 552.301, the department has waived its claims under sections 552.103 and 552.108. However, sections 552.101, 552.130, and 552.147 of the Government Code can provide compelling reasons to overcome this presumption. Therefore, we will consider the department's claims under these exceptions.

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. Section 552.101 encompasses information made confidential by other statutes, such as section 58.007 of the Family Code. The relevant language of section 58.007 reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are

²You inform our office that the department was closed for business on April 6, 2007.

separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). The information you have submitted as Exhibits F, I, and L consists of law enforcement records of juveniles who engaged in delinquent conduct or conduct indicating a need for supervision after September 1, 1997. *See* Fam. Code § 51.03(b) (defining “delinquent conduct” and “conduct indicating a need for supervision” for purposes of title 3 of the Family Code). You do not indicate, nor does it appear, that any of the exceptions in section 58.007 apply to the information at issue. Therefore, Exhibits F, I, and L are confidential under section 58.007(c) of the Family Code and must be withheld in their entirety under section 552.101 of the Government Code.³

Section 552.101 of the Government Code also encompasses section 261.201(a) of the Family Code, which provides as follows:

The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Id. § 261.201(a). Exhibit G was used or developed in an investigation of the alleged sexual assault of a child. Thus, we find that this information is within the scope of section 261.201 of the Family Code. You have not indicated that the department has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, the information in Exhibit G is confidential pursuant to section 261.201 of the Family Code.⁴ *See* Open Records Decision No. 440 at 2 (1986)

³As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.

⁴As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.

(predecessor statute). Accordingly, the department must withhold Exhibit G from disclosure under section 552.101 of the Government Code as information made confidential by law.⁵

Section 552.101 encompasses the Medical Practice Act (the “MPA”), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides as follows:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code. § 159.002(b), (c). Medical records must be released upon the patient’s signed, written consent, provided that the consent specifies: (1) the information to be covered by the release; (2) reasons or purposes for the release; and (3) the person to whom the information is to be released. *Id.* §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Although the department raises section 159.002, you have failed to demonstrate how any portion of the remaining information constitutes medical records subject to the MPA. Therefore, none of the remaining information may be withheld on that basis.

Section 552.101 also encompasses chapter 611 of the Health and Safety Code. Section 611.002 provides in part the following:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002(a). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045

⁵We note, however, that if the Texas Department of Family and Protective Services has created a file on this alleged abuse, the child’s parent(s) may have the statutory right to review the file. *See* Fam. Code § 261.201(g); Act of June 2, 2003, 78th Leg., R.S., ch. 198, § 1.27, 2003 Tex. Sess. Law Serv. 611, 641 (“A reference in law to the Department of Protective and Regulatory Service means the Department of Family and Protective Services.”).

provide for access to mental health records only by certain individuals. *See* ORD 565 (1990). Upon review, we find that the department has failed to demonstrate how any portion of the remaining information is subject to chapter 611 of the Health and Safety Code. Accordingly, the department may not withhold any portion of the remaining information on that basis.

Section 552.101 additionally encompasses section 773.091 of the Health and Safety Code, the Emergency Medical Services Act, which provides:

(a) A communication between certified emergency medical services personnel or a physician providing medical supervision and a patient that is made in the course of providing emergency medical services to the patient is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

...

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(a), (b), (g). In this instance, you claim that some of the remaining information is subject to chapter 773 of the Health and Safety Code. However, we find that the information at issue does not consist of communications between certified emergency medical services personnel providing medical supervision and a patient that is made in the course of providing emergency medical services to the patient. *See id.* § 773.091(a). Furthermore, the information does not consist of a record of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that was created by emergency medical services personnel or maintained by an emergency medical services provider. *See id.* § 773.091(b). Therefore, section 773.091 is inapplicable to the information at issue, and no portion of it may be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states

obtain from the federal government or other states. ORD 565. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Texas Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with chapter 411, subchapter F. Therefore, the CHRI we have marked must be withheld under section 552.101 in conjunction with federal law and chapter 411 of the Government Code.

You note that the submitted information contains fingerprint information. Chapter 560 of the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov’t Code §§ 560.001 (defining “biometric identifier” to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). Therefore, the department must withhold the fingerprint information in Exhibit K under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

We have marked information in Exhibit E that is confidential under section 552.101 in conjunction with common-law privacy. Furthermore, we note that Exhibit J contains information that is considered highly intimate or embarrassing and of no legitimate concern to the public. In most cases, only this information would be excepted from disclosure under section 552.101 in conjunction with common-law privacy. In this instance, however, the requestor knows the identity of the individual involved. Therefore, withholding only the nature of the incident would not preserve the individual’s common-law right of privacy.

Cf. Open Records Decision No. 393 (1983) (because identifying information was inextricably intertwined with other releasable information, governmental body was required to withhold entire report). Accordingly, Exhibit J is confidential in its entirety under section 552.101 of the Government Code in conjunction with common-law privacy.

We note, however, that the requestor is the spouse of the individual whose information is at issue in Exhibit E, and the parent of the individual whose information is at issue in Exhibit J. As such, if the requestor is the authorized representative of either of the individuals at issue, the requestor has a right of access to the submitted information pursuant to section 552.023 of the Government Code and the department must release the submitted information to her. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person or person's representative to whom information relates on grounds that information is considered confidential under privacy principles). If the requestor does not have a right of access to the submitted information pursuant to section 552.023, then the department must withhold the information we have marked in Exhibit E and all of Exhibit J under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 excepts from public disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). We note, however, that section 552.130 protects privacy interests. Thus, the requestor has a right of access to her own Texas motor vehicle record information. *See* Gov't Code § 552.023 (section 552.023 gives a person or the person's authorized representative a special right of access to information that is excepted from public disclosure under laws intended to protect that person's privacy interest as subject of the information); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Furthermore, the submitted information reflects that the requestor is the spouse or parent of the individuals to whom the remaining section 552.130 information pertains. *See* Gov't Code § 552.023. As such, she may have a special right of access to the remaining section 552.130 information as the authorized representative of the individuals to whom it pertains. If the requestor is seeking the information on behalf of her spouse or children, then she has a right of access to the information at issue, and the department may not withhold any of this information under section 552.130.

Finally, you claim that the submitted information contains social security numbers subject to section 552.147 of the Government Code. Section 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. Section 552.147 is based on privacy concerns as well. Accordingly, pursuant to section 552.023, the requestor has a right of access to her own social security number, as well as her spouse's and children's social security numbers if she is acting as their authorized representative, and the department may not withhold them under section 552.147 of the Government Code. However, the department may withhold the submitted social security

number that belongs to an individual other than the requestor, her spouse, or her children under section 552.147 of the Government Code.

In summary, the department must withhold Exhibits F, I, and L under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code. The department must withhold Exhibit G under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The department must withhold the information that we have marked under section 552.101 in conjunction with section 411.083. The department must withhold the fingerprint information in Exhibit K under section 552.101 in conjunction with section 560.003 of the Government Code. To the extent the requestor does not have a right of access pursuant to section 552.023, the department must also withhold the information we have marked in Exhibit E and all of the information in Exhibit J under section 552.101 in conjunction with common-law privacy, as well as the marked Texas motor vehicle record information under section 552.130. The department may withhold social security numbers under section 552.147 unless the requestor has a right of access to them. The remaining information must be released to the requestor.⁶

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the

⁶As the requestor has a right of access to information in the submitted documents that would otherwise be exempted from release under the Act, should the department receive another request for this information from a different requestor, the department should again seek our decision.

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 Office of the Attorney General 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. 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,



Loan Hong-Turney
Assistant Attorney General
Open Records Division

LH/sdk

Ref: ID# 281508

Enc. Submitted documents

c: Ms. Eva Meyer
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(w/o enclosures)