



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 7, 2007

Mr. John C. West  
Office of the Inspector General  
Texas Department of Criminal Justice  
P.O. Box 13084  
Austin, Texas 78711

OR2007-11724

Dear Mr. West:

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# 288561.

The Texas Department of Criminal Justice (the "department") received a request from a staff attorney of the Texas Youth Commission (the "TYC") for information pertaining to complaints about the McFadden Ranch TYC facility (the "facility") made by employees of that facility. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.111, 552.114, 552.137, and 552.147 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.<sup>2</sup>

---

<sup>1</sup>Although you assert that the submitted information is excepted under sections 552.117 and 552.1175 of the Government Code, you have not submitted arguments explaining how these exceptions apply to the submitted information. *See* Gov't Code § 552.301(e)(1) (governmental body must explain applicability of raised exceptions). Therefore, we assume the department has withdrawn its claims under these sections. *See id.* §§ 552.301, 552.302. We also note that 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.

<sup>2</sup>The submitted information includes copies of an investigation report by the Texas Rangers about abuses at the facility. You assert that the department "does not believe [it] possess[es] the authority to release that report" and that "the other concerned state agencies, including the Texas Rangers and the Attorney General's Office would surely vehemently object to [the department] releasing their TYC investigative reports." *See* Gov't Code § 552.002(a) (defining public information). However, the Texas Rangers have informed us that they have already released this report to the requestor.

You seek to withhold the names of individuals who called to make complaints about the facility, but who wished to remain anonymous. You assert that “[t]o release those files which [sic] identify the callers asserting promised anonymity would destroy the promises made by [the department and] other state agencies, and would undermine the very intent of the Texas Legislature.” However, information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). Thus, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the requested information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

You assert that the submitted information contains education records. The United States Department of Education Family Policy Compliance Office (the “DOE”) 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 or an adult student’s consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.<sup>3</sup> Consequently, education records that are responsive to a request for information under the Act should not be submitted 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”).

FERPA contains provisions that govern access to education records that were transferred by an educational agency or institution to a third party. To the extent that the submitted information consists of education records that were obtained from an educational institution, so as to be governed by FERPA, we will not address the applicability of FERPA to them, because our office is prohibited from reviewing education records to determine whether appropriate redactions have been made under FERPA. Such determinations under FERPA must be made by the educational authorities from which education records were obtained. Thus, the department should contact the educational institution from which the information was obtained, as well as the DOE, regarding the applicability of FERPA to the submitted information. Accordingly, we do not address your arguments under section 552.114 of the Government Code. See Gov’t Code §§ 552.026 (incorporating FERPA into the Act), 552.114 (excepting from disclosure “student records”); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). To the extent that the information is not governed by FERPA, we will address your arguments against disclosure.

---

<sup>3</sup>A copy of this letter may be found on the Office of the Attorney General’s website: [http://www.oag.state.tx.us/opinopen/og\\_resources.shtml](http://www.oag.state.tx.us/opinopen/og_resources.shtml).

We next 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 requested information is excepted from public disclosure. Section 552.301(e-1) provides the following:

A governmental body that submits written comments to the attorney general under Subsection (e)(1)(A) shall send a copy of those comments to the person who requested the information from the governmental body. If the written comments disclose or contain the substance of the information requested, the copy of the comments provided to the person must be a redacted copy.

Gov't Code § 552.301(e-1). The department sent to the requestor a copy of its written comments submitted to this office pursuant to section 552.301(e)(1)(A), but it redacted its discussions of the exceptions asserted from the copy. After review of the copy of the department's brief sent to the requestor, we conclude that the department redacted information from the copy that does not disclose or contain the substance of the information requested; therefore, we conclude that the department failed to comply with the procedural requirements of section 552.301(e-1) 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 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, 552.108, and 552.111 of the Government Code are discretionary in nature; they serve only to protect a governmental body's interests and may be waived. *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 section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work-product privilege under section 552.111 or Texas Rule of Evidence 192.5 is not compelling reason to withhold information under section 552.302), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). *But see* Open Records Decision No. 586 at 2-3 (1991) (claim of another governmental body under statutory predecessor to section 552.108 can provide compelling reason for non-disclosure). In failing to comply with section 552.301, the department has waived its claims under these sections. The Texas Rangers and the Office of the Texas Attorney General have informed this office that those agencies have no objection to release of the submitted information; thus, the information may not be withheld under section 552.108 on the basis of the interests of those agencies. Therefore, the department may not withhold the submitted information under section 552.103, 552.108, or 552.111 of the Government Code. However, the remaining sections you assert can provide compelling reasons to overcome this presumption; therefore, we will consider whether these sections require you to withhold the submitted information.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information that other statutes make confidential. You argue that the submitted information is confidential under section 58.005(a) of the Family Code. This section provides the following:

(a) Records and files concerning a child, including personally identifiable information, and information obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment of a child by a public or private agency or institution providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court may be disclosed only to:

- (1) the professional staff or consultants of the agency or institution;
- (2) the judge, probation officers, and professional staff or consultants of the juvenile court;
- (3) an attorney for the child;
- (4) a governmental agency if the disclosure is required or authorized by law;
- (5) a person or entity to whom the child is referred for treatment or services if the agency or institution disclosing the information has entered into a written confidentiality agreement with the person or entity regarding the protection of the disclosed information;
- (6) the Texas Department of Criminal Justice and the Texas Juvenile Probation Commission for the purpose of maintaining statistical records of recidivism and for diagnosis and classification; or
- (7) with leave of the juvenile court, any other person, agency, or institution having a legitimate interest in the proceeding or in the work of the court.

Fam. Code § 58.005(a). After review of your arguments, we agree that some of the submitted information is confidential under section 58.005. As we have no indication that the requestor would have a right of access to this information section 58.005(a)(1)-(7), the department must withhold this information, which we have marked, under section 552.101 of the Government Code. However, you have not established that the remaining information

is confidential under section 58.005; therefore, the department may not withhold the remaining information under section 552.101 on that ground. *See id.* § 51.02(2)(A) (for Title 3 of Family Code, “child” defined as person ten years of age or older and under seventeen years of age).

Section 552.101 also encompasses section 58.307 of the Family Code, which restricts access to “[i]nformation that is part of a local juvenile justice system.” *Id.* § 58.307. A “local juvenile justice system” is “a county or multicounty computerized database of information concerning children, with data entry and access by the partner agencies that are members of the system.” *See id.* § 58.301(4). You assert the submitted information contains “criminal history reports” that the department obtained from the TYC; however, you have not established that this information came from a local juvenile justice system for purposes of section 58.301. Therefore, you have not established that the remaining information is confidential under section 58.307 and the department may not withhold it under section 552.101 on that ground. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public).

Section 552.101 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.

Fam. Code § 261.201(a). After review of your arguments, we find you have failed to establish that the remaining complaint investigations consist of files, reports, records, communications, or working papers used or developed in an investigation under chapter 261. *See id.* §§ 101.003(a) (defining “child” for purposes of section 261.201 as “person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes”). Therefore, the remaining information is not confidential under section 261.201, and the department may not withhold it under section 552.101 on that ground.

Section 552.101 also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides the following:

(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 may be released only as provided under the MPA. Open Records Decision No. 598 (1991). The remaining information does not contain any medical records; therefore, the department may not withhold the submitted information under section 552.101 in conjunction with the MPA.

Section 552.101 also encompasses section 1703.306 of the Occupations Code. Section 1703.306(a) provides that “[a] polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person[.]” You have not identified the information that you assert was acquired from a polygraph examination nor, upon review, are we able to identify any polygraph information. See Gov’t Code § 552.302(e)(2). Therefore, we find you have not established that any of the submitted information is confidential polygraph information under section 1703.306, and the department may not withhold it under section 552.101 on that ground.

Section 552.101 also encompasses information protected by common-law privacy. Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Bd.*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we address the department’s section 552.102(a) claim in conjunction with common-law privacy under section 552.101 of the Government Code.

The common-law right to privacy protects information that (1) contains highly intimate or embarrassing facts about a person’s private affairs such that its release would be highly objectionable to a reasonable person and (2) is of no legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. The types 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. This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990). But this office has found that the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

The submitted information includes investigations of alleged sexual assault at the facility. Generally, only the information that either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy. However, a governmental body is required to withhold an entire report when identifying information is inextricably intertwined with other releasable information or when the requestor knows the identity of the alleged victim. *See* Open Records Decisions Nos. 393 (1983), 339 (1982); *see also* Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). Based on the circumstances surrounding the request and the requestor's relationship with the accused, we believe the requestor knows the identity of the alleged victims. Thus, withholding only the identifying information from the requestor would not preserve the victims' common-law right to privacy. We therefore conclude that the department must withhold these reports, which we have marked, in their entirety pursuant to the common-law privacy principles incorporated by section 552.101 of the Government Code.

The remaining information contains identifying information of youths committed to the care of the TYC. Upon review, we conclude that this information is protected under common-law privacy; therefore, the department must also withhold this identifying information, which we have marked, pursuant to section 552.101 of the Government Code. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 58.007. We find that the remaining information is not protected under common-law privacy, and it may not be withheld under section 552.101 on that basis.

We note that some of the remaining information is excepted under section 552.130 of the Government Code, which provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). The department must withhold the Texas motor vehicle record information we have marked under section 552.130.

The department asserts that some of the remaining information is excepted under section 552.137 of the Government Code. Section 552.137 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). *See* Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the department must withhold the e-mail addresses we have marked under section 552.137.

Finally, we note that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, to the extent that the submitted information contains education records that were obtained from the educational institution that created them, the department should contact the educational institution and the DOE regarding the applicability of FERPA to this information. To the extent the information is not subject to FERPA, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 58.005 of the Family Code and common-law privacy, the information we have marked under section 552.130 of the Government Code, and the information we have marked under 552.137 of the Government Code. The department must release the remaining information to the requestor, but any copyrighted information may only be released in accordance with copyright law.

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).

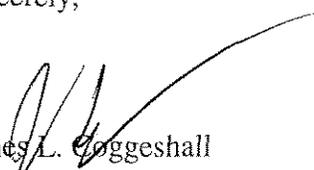
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/jh

Ref: ID# 288561

Enc. Submitted documents

c: Mr. Dewey Poteet  
Staff Attorney for Personnel Matters  
Texas Youth Commission  
P.O. Box 4260  
Austin, Texas 78765  
(w/o enclosures)