



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 27, 2007

Ms. YuShan Chang
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P.O. Box 1562
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OR2007-12598

Dear Ms. Chang:

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# 290225.

The Houston Police Department (the "department") received two requests for "all memos, reports or other documents that indicate, record or otherwise memorialize instances of cross-contamination at the Houston Police Department Crime Lab during DNA analysis from January 2005 to present." You claim that the requested 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.¹

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code, which provides in part that

¹We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

Gov't Code § 552.022(a)(1). In this instance, Exhibits 3A, 4A, 5A, 7A, and 8A are completed investigations made by the department. This information must be released under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. The department seeks to withhold this information under section 552.103. We note, however, that this section is a discretionary exception to public disclosure that protects the governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 473 (1987) (section 552.103 may be waived). As such, section 552.103 does not qualify as other law that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold any portion of these investigations under section 552.103. However, because information subject to section 552.022(a)(1) may be withheld under sections 552.101, 552.108, and 552.130, we will address these claims for Exhibits 3A, 4A, 5A, 7A, and 8A.

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. This section encompasses information protected by other statutes. Section 261.201(a) of the Family Code provides as follows:

(a) 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). You state that Exhibits 4A and 7A were developed in investigations under chapter 261 of the Family Code and are thus within the scope of section 261.201 of the Family Code. *See* Fam. Code § 261.001(1), (4) (defining "abuse" and "neglect" for the purposes of chapter 261 of the Family Code). Based on these

representations and our review, we agree that these reports are confidential pursuant to section 261.201 of the Family Code. You do not indicate that the department has adopted a rule governing the release of this type of information; therefore, we assume that no such rule exists. Given that assumption, we conclude that Exhibits 4A and 7A are confidential pursuant to section 261.201 of the Family Code, and the department must withhold these exhibits in their entirety under section 552.101 of the Government Code.² See Open Records Decision No. 440 at 2 (1986) (predecessor statute).

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). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. This office has determined that common-law privacy is applicable to the identity of sexual assault victims. See Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Exhibit 5A pertains to a sexual assault. Thus, we conclude that you must withhold the identifying information of the sexual assault victim that we have marked in this report under section 552.101 in conjunction with common-law privacy.

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[.]” Occ. Code § 1703.306(a). The department must withhold the polygraph information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.108 of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(a)(2). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. See *id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state, and provide documentation showing, that the incident reports comprising Exhibits 3A and 8A relate to investigations where resulting charges were dropped against the suspects. You state that the investigations concluded in results other than conviction or deferred adjudication. Based on this representation and our review, we conclude that section 552.108(a)(2) is applicable to Exhibits 3A and 8A.

²As our ruling for Exhibits 4A and 7A is dispositive, we need not address your remaining claims against disclosure for this information.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976). Thus, with the exception of the basic front-page offense and arrest information, the department may withhold Exhibits 3A and 8A under section 552.108.³

Next, we will address your claims against disclosure for the remaining information that is not subject to section 552.022 of the Government Code. You assert that Exhibits 2, 3, 4, 5, 6, 7, 8, and 9 are excepted under section 552.103 of the Government Code, which provides in part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under section 552.103(a).

You provided us with a copy of a pleadings that show that current and former department employees are involved in current litigation that is pending in the United States District Court for the Southern District of Texas, C.A. number H-06-2650. The lawsuit challenges the DNA analysis of the department's crime laboratory. We note that DNA analysis is at issue in Exhibits 2, 3, 4, 5, 6, 7, 8, and 9. Upon review of your arguments and the submitted

³As our ruling is dispositive for this information, we need not address your remaining arguments.

information, we find that the department has demonstrated that it was involved in pending litigation when the request was received and that Exhibits 2, 3, 4, 5, 6, 7, 8, and 9 are related to that pending litigation. Therefore, the department may withhold these exhibits under section 552.103.⁴

We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, under section 552.101 of the Government Code, the department must withhold (1) Exhibits 4A and 7A in conjunction with section 261.201 of the Family Code; (2) the marked information in Exhibit 5A in conjunction with common-law privacy; and (3) the polygraph information in Exhibit 5A under section 1703.306 of the Occupations Code. With the exception of basic information which must be released, the department may withhold Exhibits 3A and 8A under section 552.108(a)(2) of the Government Code. Exhibits 2, 3, 4, 5, 6, 7, 8, and 9 may be withheld under section 552.103 of the Government Code. The remaining portions of the submitted information must be released to the requestor.

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

⁴As our ruling is dispositive for these exhibits, we need not address your remaining arguments except to note that basic information held to be public in *Houston Chronicle* is generally not excepted from public disclosure under section 552.103 of the Government Code. Open Records Decision No. 597 (1991). Thus, the basic information from the offense reports contained in Exhibits 6 and 9 may not be withheld from public disclosure under section 552.103.

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,



M. Alan Akin
Assistant Attorney General
Open Records Division

MAA/mcf

Ref: ID# 290225

Enc. Submitted documents

c: Mr. David W. Kiatta
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(w/o enclosures)