



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 20, 2007

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

OR2007-15303

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# 293822.

The Texas Department of Criminal Justice's Office of the Inspector General (the "OIG") received a request for information pertaining to an investigation involving a named Texas Youth Commission (the "TYC") employee. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state that some of the submitted information has been obtained pursuant to grand jury subpoenas. The judiciary is expressly excluded from the requirements of the Act. *See* Gov't Code § 552.003(1)(B). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary and is therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by another person or entity acting as an agent for a grand jury are considered to be records in the constructive possession of the grand jury and therefore are not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 398

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<sup>1</sup>Although you also raise sections 552.117 and 552.1175 of the Government Code, you have submitted no arguments in support of the applicability of those exceptions. *See* Gov't Code § 552.301(e)(1)(A). Therefore, you have provided this office with no basis for finding information confidential for these purposes.

(1983). *But see* ORD 513 at 4 (defining limits of judiciary exclusion). The fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean that such information is in the grand jury's constructive possession when the same information is also held in the other person's or entity's own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD 513. Thus, to the extent that the OIG has possession of the information at issue as an agent of the grand jury, such information is in the grand jury's constructive possession and is not subject to the Act. This decision does not address the public availability of any such information. To the extent that the OIG does not have possession of the information at issue as an agent of the grand jury, the information is subject to the Act and must be released unless it falls within an exception to public disclosure.

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). Under section 51.02 of the Family Code, a “child” is a person who is “ten years of age or older and under 17 years of age.” *See* Fam. Code § 51.02(2)(A). The submitted information involves an eighteen year old. Therefore, the OIG may not withhold the submitted information under section 552.101 of the Government Code in conjunction with section 58.005 of the Family Code.

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 information system[.]” *Id.* § 58.307. A “[l]ocal juvenile justice information 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 that much of the submitted information was either obtained from the TYC, or is based on records held by the TYC. However, you have not established that this information came from a local juvenile justice information system for purposes of section 58.301. Therefore, you have not established that the information is confidential under section 58.307, and the OIG 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).

The OIG also asserts that the submitted documents are subject to section 552.108 of the Government Code. Section 552.108(b)(2) excepts “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]” *See* Gov’t Code § 552.108(b)(2). Section 552.108(b)(2) is applicable only if the information at issue relates to a concluded criminal case that did not result in a conviction or a deferred adjudication. 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 that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You do not state whether the submitted information relates to a closed investigation, nor do you state whether the investigation at issue has concluded in a final result other than conviction or deferred adjudication. Therefore, we find that you have failed to demonstrate the applicability of

section 552.108(b)(2) to the submitted information, and it may not be withheld on this basis. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain why stated exceptions apply that would allow the information to be withheld).

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which provides:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (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. Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Open Records Decision No. 598 (1991). Medical records may be released only as provided under the MPA. *Id.* Upon review, we agree that the submitted information contains medical records subject to the MPA. We have marked the medical records that may be released only in accordance with the MPA.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found that common-law privacy generally protects the identifying information of juvenile offenders. *See* Open Records Decision No. 394 (1983). In this instance, it appears that this person may not have been in the custody of TYC at the time of his relationship with the TYC employee. However, we cannot determine if this is indeed the case. Accordingly, we must rule conditionally. To the extent the OIG determines the relationship between the TYC employee and this individual took place during his confinement with the TYC, the information we have marked must be withheld under section 552.101 in conjunction with common-law privacy. This information may not be withheld if the OIG determines that the relationship between the TYC employee and this individual took place after his release.

In summary, to the extent that the submitted information is held by the OIG as an agent of the grand jury, such information is in the grand jury's constructive possession and is not subject to disclosure under the Act. The OIG must withhold the marked medical records pursuant to section 552.101 of the Government Code in conjunction with 159.002 of the Occupations Code. Further, to the extent the OIG determines the relationship between the TYC employee and the individual took place during his confinement with the TYC, the OIG must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information must be released.<sup>2</sup>

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).

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<sup>2</sup>We note that this information contains social security numbers. 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.

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,



Chanita Chantaplin-McLelland  
Assistant Attorney General  
Open Records Division

CC/jb

Ref: ID# 293822

Enc. Submitted documents

cc: Mr. Jesse Chavez  
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(w/o enclosures)