



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

September 4, 2008

Mr. William P. Chesser
City Attorney
City of Brownwood
P.O. Box 1389
Brownwood, Texas 76804

OR2008-12203

Dear Mr. Chesser:

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# 320924.

The Brownwood Police Department (the "department") received a request for three categories of information pertaining to a named officer. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that the Act authorizes the Office of the Attorney General to render decisions and opinions in two situations. The first occurs when a governmental body receives a written request for information from an individual or entity acting as a member of the public and requests a ruling from this office because the governmental body wishes to withhold responsive information in accordance with one of the Act's exceptions to disclosure. *See id.* §§ 552.301, .306. The second situation occurs when this office issues "materials, including detailed and comprehensive written decisions and opinions, that relate to or are based on [the Act]" in order to "maintain uniformity in the application, operation, and interpretation of [the Act.]" *Id.* § 552.011.

Thus, a request for an open records decision pursuant to section 552.301 must come from the governmental body that has received a written request for information. See Open Records Decision No. 542 (1990). Otherwise the attorney general is not required to issue a decision determining whether the information is excepted from disclosure to the public. *Id.* You state, and have submitted documentation showing, that, in addition to the request sent to the department, the requestor sent requests for information pertaining to the same officer to the Brown County District Attorney (the "district attorney") and the Texas Rangers (the "Rangers"). Although you argue that the information in the possession of the district attorney and the Rangers is excepted from disclosure, we note that the district attorney and the Rangers, not the department, have standing to request a ruling from this office pursuant to section 552.301 in regards to those requests. Therefore, we will only address the request received by the department in this ruling.

We next note that the submitted information consists of a completed investigation that is subject to section 552.022 of the Government Code. Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or expressly confidential under other law. Although you assert this information is excepted under section 552.103 of the Government Code, this section is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. 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 No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, the department may not withhold the submitted information under section 552.103. However, section 552.101 does constitute other law for purposes of section 552.022; therefore, we will consider whether this section requires you to withhold any of the information at issue.

The submitted information contains medical records, access to which is governed by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part 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). When medical records pertain to a minor, such records may only be released upon the parents' or legal guardians' 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; *see also id.* § 159.003 (exception to confidentiality in a civil action if the patient or a person on behalf of the patient is attempting to recover monetary damages for a physical condition). 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). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the portion of the submitted information that constitutes medical records and may only be released in accordance with the MPA.

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). Because the requested documents were used or developed in an investigation of sexual assault of a child and indecency with a child, the documents are within the scope of section 261.201 of the Family Code. *See id.* § 261.001(1)(E) (defining "abuse" as "sexual conduct harmful to a child's mental, emotional, or physical welfare"). 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 this assumption, we conclude that the remaining submitted information is confidential pursuant to section 261.201 of the Family Code.

We note that the requestor, as the attorney for the parents of one of the victims, argues that section 261.201(g) of the Family Code, "provides for the release of information to the parent or guardian of the victim." Section 261.201(g) of the Family Code provides that the Texas Department of Family and Protective Services ("DFPS"), upon request and subject to its own

rules, shall provide to the parent, managing conservator, or other legal representative of a child who is the subject of reported abuse or neglect information concerning the reported abuse or neglect that would otherwise be confidential under this section if DFPS has edited the information to protect the confidentiality of the identity of the person who made the report and any other person whose life or safety may be endangered by the disclosure. *See id.* § 261.201(g). However, section 261.201(g) applies to abuse and neglect records maintained by DFPS, not to records maintained by the Brownwood Police Department. Accordingly, if DFPS has created a file on this alleged abuse, the child's parent(s) may have the statutory right to review that file. *See id.*

The requestor also indicates that certain information should be released pursuant to section 1.60 of title 37 of the Texas Administrative Code. Section 1.60 provides that:

A report concerning an investigation of alleged child abuse or neglect, as well as any notes, statements or other documentary evidence gathered during such an investigation that are otherwise confidential pursuant to Chapter 261, Family Code, may be released to the parent or guardian of an alleged victim of abuse or neglect if:

- (1) the investigation is complete and no criminal charges are anticipated;
- (2) the parent or guardian provides acceptable proof of his/her relationship to the child victim; and
- (3) the parent or guardian requesting the report is not the person alleged to have committed the abuse or neglect.

37 T.A.C. § 1.60. While section 261.201(a) provides that information subject to section 261.201 may be released under rules adopted by the investigating agency, we note that section 1.60 is a rule adopted by the Department of Public Safety, not by the Brownwood Police Department. *See id.* Therefore, section 1.60 does not apply in this instance.

Finally, the requestor indicates that he has a right of access to the submitted information under section 552.023 of the Government Code. Section 552.023 provides that a person or person's authorized representative has a special right of access to information protected from public disclosure by laws intended to protect that person's privacy interests. *See Gov't Code 552.023.* We note, however, that section 261.201 has its own release provisions that govern the release of information made confidential by section 261.201(a), and none of the release provisions appear to apply in this instance. *See Fam. Code § 261.201(b)-(g).* Accordingly, the remaining submitted information must be withheld under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.

In summary, the medical records we have marked may only be released in accordance with the MPA. The remaining submitted information must be withheld under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. As our ruling is dispositive for this information, we need not address your remaining argument against disclosure.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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).

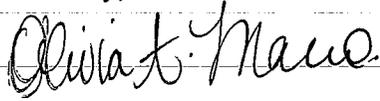
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in black ink that reads "Olivia A. Maceo". The signature is written in a cursive style with a large initial "O" and "M".

Olivia A. Maceo
Assistant Attorney General
Open Records Division

OM/mcf

Ref: ID# 320924

Enc. Submitted documents

c: Mr. Scott Ozmun
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(w/o enclosures)