



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 6, 2009

Ms. Lisa Constant
County Clerk/Local Registrar
Rockwall County
1101 Ridge Road, Suite 101
Rockwall, Texas 75087

OR2009-01597

Dear Ms. Constant:

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# 333091.

The Rockwall County Clerk (the "county clerk") received a request for digitized copies of all public documents and corresponding indices under the care of the county clerk, to include ten specified categories of records. You state that you will release the majority of the requested information. You inform us that you do not possess the divorce index or divorce records.¹ You assert that a portion of the requested information consists of records that are not subject to the Act. You claim that the submitted information is excepted from disclosure under section 552.115 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

¹The Act does not require a governmental body to release information that did not exist when a request for information was received, create responsive information, or obtain information that is not held by or on behalf of the county clerk. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266m 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²We 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.

Initially, we note that the requestor asks that the county clerk supply him with the requested information “on a ‘go forward’ basis.” The Act does not require a governmental body to comply with a continuing request to supply information on a periodic basis as such information is prepared in the future. Instead, the Act applies only to information that a governmental body possesses or has access to at the time it is requested.³

Next, you state that a portion of the requested information consists of probate records maintained by the county clerk on behalf of the judiciary. Records of the judiciary are not subject to required public disclosure under the Act.⁴ See Gov’t Code §§ 552.003(1)(A), (B) (definition of “governmental body” under Act specifically excludes the judiciary), .021 (Act generally requires disclosure of information maintained by “governmental body”). Based on your representations, we find that the probate records at issue consist of records of the judiciary that are not subject to release under the Act. We therefore conclude you do not need to release the requested probate records in response to the present request.⁵

We also address your statement that the submitted information is not computerized and “is not a digital image as requested by the original request.” We note that a governmental body is not required to produce the responsive information in the format requested or create new information to respond to the request for information. *AT&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex.1995); *Fish v. Dallas-Indep. Sch. Dist.*, 31 S.W.3d 678, 681(Tex. App.—Eastland 2000, pet. denied); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3, 342 at 3 (1982), 87 (1975). However, section 552.228 of the Government Code requires a governmental body to provide a copy of the public information in the requested medium if it has the technological ability to do so without the purchase of software or hardware. See Gov’t Code § 552.228(b)(1), (2). Accordingly, if the county clerk has the technological capability to provide the information at issue in the requested electronic format, it must do so; however, if the county clerk does not have the technological capability, it may release the information at issue in the submitted paper format or in another medium acceptable to the requestor. See Gov’t Code 552.222(c).

You raise section 552.115 of the Government Code as an exception to disclosure of the submitted information. Section 552.115 of the Government Code excepts from disclosure

³It is implicit in several provisions of the Act that the Act applies only to information already in existence. See Gov’t Code §§ 552.002, .021, .227, .351.

⁴Records of the judiciary may be public pursuant to other sources of law. Attorney General Opinions DM-166 at 2-3 1992) (public has general right to inspect and copy judicial records), H-826 (1976); Open Records Decision No. 25 (1974); see *Star Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (documents filed with courts are generally considered public and must be released).

⁵As our ruling is dispositive, we need not address your remaining arguments for this information.

certain birth and death records held by local registration officials. Section 552.115 provides in relevant part:

(a) A birth or death record maintained by the bureau of vital statistics of the Texas Department of Health⁶ or a local registration official is excepted from [required public disclosure], except that:

(1) a birth record is public information and available to the public on and after the 75th anniversary of the date of birth as shown on the record filed with the bureau of vital statistics or local registration official;

(2) a death record is public information and available to the public on and after the 25th anniversary of the date of death as shown on the record filed with the bureau of vital statistics or local registration official;

(3) a general birth index or a general death index established or maintained by the bureau of vital statistics or a local registration official is public information and available to the public to the extent the index relates to a birth record or death record that is public information and available to the public under Subdivision (1) or (2);

(4) a summary birth index or a summary death index prepared or maintained by the bureau of vital statistics or a local registration official is public information and available to the public[.]

(b) Notwithstanding Subsection (a), a general birth index or a summary birth index is not public information and is not available to the public if:

(1) the fact of an adoption or paternity determination can be revealed by the index; or

(2) the index contains specific identifying information relating to the parents of a child who is the subject of an adoption placement.

⁶We note that the Texas Department of Health became part of the Texas Department of State Health Services on September 1, 2004. See <http://www.tdh.state.tx.us>; see also Acts 2003, 78th Leg., R.S., ch. 198, eff. Sept. 1, 2003.

Gov't Code § 552.115(a)(1)-(4), (b). The indexes you have submitted consist of information that we understand was derived from birth and death records filed with the county clerk as local registrar. Section 181.23 of title 25 of the Texas Administrative Code provides, in part:

(b)

(1) General birth indexes maintained or established by the bureau of vital statistics or a local registration official shall be prepared by event year, in alphabetical order by surname of the registrant, followed by any given names or initials, the date of the event, the county of occurrence, the state or local file number, the name of the father, the maiden name of the mother, and sex of the registrant;

...

(3) A summary birth index maintained or established by the bureau of vital statistics or a local registration official shall be shall be prepared by event year, in alphabetical order by surname of the registrant, followed by any given names or initials, the date of the event, the county of occurrence, and sex of the registrant.

(c)

(1) A general death index maintained or established by the bureau of vital statistics or a local registration official shall be prepared by event year, in alphabetical order by surname of the registrant, followed by any given names or initials; the date of the event; the county of occurrence; the registrant's social security number, sex, and marital status; the name of the registrant's spouse, if applicable; and the state or local file number.

...

(3) A summary death index maintained or established by the bureau of vital statistics or a local registration official shall be prepared by event year in alphabetical order by surname of the registrant, followed by any given names or initials, the date of the event, the county of occurrence, and sex of the registrant.

25 T.A.C § 181.23(a),(b). Thus, section 181.23 of title 25 of the Texas Administrative Code prescribes the format of birth and death indexes required to be compiled and maintained by

the bureau of vital statistics and local registrars. We note that, although the submitted indexes do not comply with the specific requirements for the format of birth and death indexes promulgated by section 181.23, they do contain some of the categories of information specified in these regulations. Both summary birth and summary death indexes as prescribed by the above regulations contain the registrant's surname, given name or initials, date of the event, county of the occurrence, and sex. Both summary birth and death indexes are declared in subsection (a) of section 552.115 to be "public information and available to the public." Thus, unless section 552.115(b) is applicable, the above-stated categories of information in the submitted indexes are not excepted from required public disclosure under section 552.115 and must be released to the requestor.

However, we also note that the submitted indexes contain more information than would be contained within a summary birth or death index. Section 181.23(b)(1) specifies that a general birth index shall include the name of the father and the maiden name of the mother in addition to the categories of information found in a summary birth index. Section 181.23(c)(1) specifies that a general death index shall include social security number, marital status, the name of the registrant's spouse, if applicable, and the state or local file number, in addition to the categories of information found in a summary death index. We will therefore determine whether the remaining information may be withheld under section 552.115 as part of a general birth or death index.

Section 552.115(a)(3) provides that a general birth index is public information to the extent the index relates to a birth record that would be subject to release under section 552.115(a)(1). Some of the remaining information contained in the submitted birth index, specifically, the name of the father and the maiden name of the mother, is general index information that relates to birth records that are not public under 552.115(a)(1) because 75 years have not yet passed since the birth of the registrant. *See* Gov't Code 552.115(a)(1). Therefore, this information, which we have marked, is excepted from disclosure under section 552.115(a)(3). Upon review of the submitted "Death List" index, however, we find that none of the remaining listed information is general index information under section 181.23(c)(1). Accordingly, none of the remaining information in the submitted "Death List" index may be withheld under section 552.115(a)(3).⁷

Next, we note that, pursuant to section 552.115(b), an index is not public if the fact of an adoption or paternity determination could be revealed or if the index contains specific identifying information relating to the parents of the child who is the subject of an adoption placement. You state that "the current compiled general index may include specific identifying information relating to parents of a child who is the subject of an adoption placement," but you do not identify any specific record that so relates. Therefore, we must

⁷We note that the submitted "Death List" index contains columns entitled "Recp #" as well as "Book" and "Page". However, it is not clear to this office that these categories would be considered a "local file number" for purposes of section 181.23(c)(1).

rule conditionally. To the extent that any of the information in the submitted birth index that is not otherwise excepted under section 552.115(a)(3) reveals adoptions or paternity determinations, or specifically identifies the parents of a child who is the subject of an adoption placement, then such information is excepted from disclosure under section 552.115(b) and must be withheld.

Finally, we note that the submitted indexes contain additional categories of information that are not included in either type of birth or death index as prescribed by section 181.23. We believe that the purpose behind section 552.115, that of preventing fraud, is one of the purposes behind the above-quoted administrative rules that dictate certain categories of information that comprise each type of birth and death index. Because the remaining categories of information in the submitted indexes are not public information under section 552.115, and the above-referenced administrative rules do not provide for the release of this information, we believe this information, derived from or related to a source birth or death record, is made confidential under section 552.101 of the Government Code in conjunction with the above-referenced administrative rules.⁸ We have marked this information.

In summary, the county clerk must withhold the information we have marked in the submitted birth index under section 552.115(a)(3). Further, if any of the remaining information in the submitted birth index reveals adoptions or paternity determinations, or specifically identifies the parents of a child who is the subject of an adoption placement, that information must be withheld under section 552.115(b). The county clerk must also withhold the information we have marked in the submitted birth index and in the submitted "Death List" under section 552.101 in conjunction with Section 181.23 of title 25 of the Texas Administrative Code. The remaining information must be released.

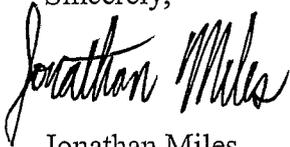
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

⁸Absent specific authority, a governmental body may not generally promulgate a rule that makes information confidential so as to except the information from required public disclosure pursuant to section 552.101 of the Act. *See* Gov't Code § 552.101; *see also* Open Records Decision Nos. 484 (1987), 392 (1983), 216 (1978). In the instant case, however, this office has found that the Texas Department of State Health Services (formerly the Texas Department of Health) has been granted specific authority by the legislature to promulgate administrative rules that dictate the public availability of information contained in and derived from vital records. *See* Open Records Decision No. 596 (1991).

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in cursive script that reads "Jonathan Miles".

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 333091

Enc. Submitted documents

c: Requestor
(w/o enclosures)