



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 19, 2010

Ms. M. Ann Montgomery  
Assistant Ellis County & District Attorney  
Ellis County & District Attorney's Office  
1201 North Highway 77, Suite 104  
Waxahachie, Texas 75165-7832

OR2010-02516

Dear Ms. Montgomery:

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# 370827.

The Ellis County Sheriff's Office (the "sheriff") received a request from two requestors for (1) information on any calls and reports made by the sheriff pertaining to a specified address and two named individuals during a specified period of time and (2) records showing how many adults claimed the specified address as their primary residence. 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, we note the sheriff did not submit information responsive to the portion of the request seeking records showing how many adults claimed the specified address as their primary residence. To the extent any information responsive to this portion of the request existed on the date the sheriff received the request, we assume the sheriff has released it. If the sheriff has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body

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<sup>1</sup>Although you initially raised section 552.103 of the Government Code, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume that you have withdrawn this exception. *See* Gov't Code §§ 552.301, 552.302.

concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, it appears most of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-00637 (2010). In that ruling, we determined the sheriff (1) must withhold marked information under section 552.101 of the Government Code in conjunction with common-law privacy and section 552.130 of the Government Code, (2) may withhold marked information under section 552.108(a)(2) of the Government Code, and (3) must release the remaining information. You seek to withhold the information you have indicated, including the information that appears to have been previously addressed by this office. Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the sheriff may not now withhold the previously released information unless its release is expressly prohibited by law or the information is confidential by law. You seek to withhold the information you have indicated, including the information that appears to have been previously released under Open Records Letter No. 2010-00637, under section 552.108. Section 552.108 does not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 586 (1991) (governmental body may waive section 552.108). Therefore, to the extent the sheriff released any portion of the submitted information pursuant to Open Records Letter No. 2010-00637, the sheriff may not now withhold such information under section 552.108. Thus, with regard to any portion of the submitted information that was previously requested and ruled on by this office, we conclude that the sheriff must continue to withhold or release that information in accordance with Open Records Letter No. 2010-00637. To the extent the submitted information was not encompassed by the prior ruling, we will consider your arguments against disclosure.

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. Section 552.101 encompasses section 261.201 of the Family Code, which provides as follows:

- (a) [T]he following information is confidential, is not subject to public release under [the Act] 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, audiotapes, videotapes, 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 assert the submitted information is confidential under section 261.201. Upon review, however, we find you have not demonstrated that any of the information at issue involves a report of alleged or suspected child abuse or neglect made under chapter 261 or demonstrated how this information was used or developed in an investigation under chapter 261. *See id.* § 261.201(a); *see also id.* §§ 261.001(1), (4) (definition of “abuse” and “neglect” for purposes of chapter 261 of the Family Code); *id.* § 101.003(a) (defining “child” for purposes of this section 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). Accordingly, we conclude none of the submitted information is confidential under section 261.201 of the Family Code, and it may not be withheld under section 552.101 on that basis.

You also claim the submitted information is confidential under section 58.007 of the Family Code, which is also encompassed by section 552.101 of the Government Code. Section 58.007 provides, in relevant part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

*Id.* § 58.007(c). Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007(c). *See id.* § 51.03(a), (b)

(defining “delinquent conduct” and “conduct indicating a need for supervision”). For purposes of section 58.007, a “child” is a person who is ten years of age or older and under seventeen years of age. *See id.* § 51.02(2). You assert that the information at issue consists of juvenile law enforcement records subject to section 58.007 of the Family Code. However, upon review, we find that none of the submitted information pertains to a juvenile engaged in delinquent conduct or conduct indicating a need for supervision for purposes of section 58.007(c). Therefore, we conclude you have failed to establish section 58.007(c) of the Family Code is applicable to any of the submitted information, and it may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.108(a)(2) 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). Section 552.108(a)(2) is applicable only if the information at issue relates to a concluded criminal case that did not result in a conviction or 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 the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A). You state the submitted information pertains to closed cases that did not conclude in a conviction or deferred adjudication. Based on your representation and our review, we conclude that section 552.108(a)(2) is generally applicable the information you have indicated.

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 Publishing 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). *See* Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). We note basic information described in *Houston Chronicle* does not include information subject to section 552.130 of the Government Code. Thus, with the exception of basic information, the sheriff may withhold the information you have indicated under section 552.108(a)(2) of the Government Code, to the extent it has not previously been ruled upon in Open Records Letter No. 2010-00637.<sup>2</sup> We note the sheriff has the discretion to release all or part of the information under section 552.108 that is not otherwise made confidential by law. *See* Gov’t Code § 552.007; Open Records Decision No. 177 at 3 (1977) (statutory predecessor to Gov’t Code § 552.108 did not prohibit release of information).

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<sup>2</sup>As our ruling is dispositive, we need not address your argument under section 552.108(b)(2) of the Government Code for this information.

You assert the basic information is protected by common-law privacy. Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *See id.* at 681-82. 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 workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. Upon review, we find a portion of the narrative pertaining to one of the incidents at issue is highly intimate or embarrassing and not of legitimate public interest. Accordingly, in releasing the basic information, the sheriff must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, none of the remaining basic information constitutes information that is highly intimate or embarrassing and not of legitimate public interest. Therefore, none of this information may be withheld on the basis of common-law privacy.

You contend the remaining basic information is excepted from public disclosure under constitutional privacy, which is also encompassed by section 552.101 of the Government Code. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)).

Upon review, we find the sheriff has not demonstrated how any of the remaining basic information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the sheriff may not withhold any of the information at issue under section 552.101 on the basis of constitutional privacy.

In summary, to the extent any portion of the information at issue was ruled upon in Open Records Letter No. 2010-00637, the sheriff must continue to rely on that ruling as a previous determination and withhold or release the identical information in accordance with that ruling. To the extent it has not previously been ruled upon in Open Records Letter No. 2010-00637, the sheriff may withhold the information you have indicated under

section 552.108(a)(2) of the Government Code, with the exception of basic information. From the basic information the sheriff must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The remaining basic 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](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 information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/eeg

Ref: ID# 370827

Enc. Submitted documents

c: Requestor  
(w/o enclosures)