



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 19, 2010

Mr. Rodolfo Ramirez
Assistant District Attorney
Fort Bend County District Attorney's Office
301 Jackson, Room 101
Richmond, Texas 77469

OR2010-03922

Dear Mr. Ramirez:

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# 373058.

The Fort Bend County District Attorney's Office (the "district attorney") received two requests from an investigator with the Texas Education Agency (the "TEA") for information pertaining to a named individual and specified incident. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we must address the district attorney's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. You inform us that the district attorney received the first request for information on December 21, 2009. Thus, the tenth business day was January 7, 2010. However, your request for a ruling from this office is postmarked January 8, 2010. *See* Gov't Code § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find you have failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released; the governmental body can overcome this presumption only by demonstrating a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A

compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Section 552.101 of the Government Code can provide a compelling reason to overcome this presumption; therefore, we will consider whether this section requires you to withhold the submitted information.

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 information made confidential by other statutes, including section 261.201 of the Family Code, which provides in relevant part:

(a) Except as provided by Section 261.203, the 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). Upon review, we find that the submitted information consists of a report of alleged or suspected child abuse or neglect made under chapter 261. *See id.* § 261.001(1), (4) (defining "abuse" and "neglect" for purposes of section 261.201); *id.* § 101.003(a) (defining "child" as a person under eighteen years of age who is not and has not been married and who has not had the disabilities of minority removed for general purposes). Therefore, this report falls within the scope of section 261.201. You have not indicated that the district attorney has adopted a rule governing the release of this type of information. Accordingly, we assume no such rule exists. Therefore, the submitted information is generally confidential under section 261.201 of the Family Code. Section 261.201(a) provides, however, that information encompassed by subsection (a) may be disclosed "for purposes consistent with [the Family Code] and applicable federal or state law." *Id.* § 261.201(a).

We note that section 22.082 of the Education Code constitutes "applicable state law" in this instance. Section 22.082 provides that the TEA "may obtain from any law enforcement or criminal justice agency all criminal history record information ["CHRI"] and all records contained in any closed criminal investigation file that relate to a specific applicant for or holder of a certificate issued under Subchapter B, Chapter 21." Educ. Code § 22.082. CHRI consists of "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." Gov't Code § 411.082(2); *see also*

id. §§ 411.090 (SBEC is entitled to obtain CHRI from Department of Public Safety ["DPS"] about a person who has applied to [SBEC] for certificate under subchapter B, chapter 21, Education Code), 411.087(a)(2) (agency that is entitled to obtain CHRI from DPS is also authorized to "obtain from any other criminal justice agency in this state criminal history record information maintained by that [agency]"); *cf. Brookshire v. Houston Indep. Sch. Dist.*, 508 S.W.2d 675, 678-79 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) (when legislature defines term in one statute and uses same term in relation to same subject matter in later statute, later use of term is same as previously defined).

As previously noted, the requestor is an investigator for the TEA, which has assumed the duties of the SBEC. The requestor states that the TEA is conducting an investigation of an individual who either has applied for or currently holds educator credentials.¹ The requestor seeks access to all offense, incident, and investigative reports regarding a charge against the named individual. Accordingly, the requestor has a right of access under section 22.082 of the Education Code to CHRI regarding the individual or all records contained in a closed criminal investigation file relating to the individual. You do not inform us, and the submitted information does not otherwise reflect, whether the criminal investigation to which the information pertains is closed. Accordingly, we must rule in the alternative.

Thus, if the information is not contained in a closed investigation file, and the district attorney determines that the release of CHRI is consistent with the Family Code, then the district attorney must release information from the submitted documents that shows the type of allegations made and whether there was an arrest, information, indictment, detention, conviction, or other formal charges and their dispositions. *Id.* In that event, the district attorney must withhold the rest of the submitted information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. If the submitted information is not contained in a closed investigation file, and the district attorney determines that the release of CHRI is not consistent with the Family Code, then the submitted information must be withheld from the requestor in its entirety under section 552.101 in conjunction with section 261.201. *See* Attorney General Opinions DM-353 at 4 n. 6 (1995) (finding interagency transfer of information prohibited where confidentiality statute enumerates specific entities to which release of information is authorized and where potential receiving governmental body is not among statute's enumerated entities), JM-590 at 4-5 (1986); Fam. Code § 261.201(b)-(g) (listing entities authorized to receive Fam. Code § 261.201 information).

If the submitted information is contained in a closed investigation file, and if the district attorney determines that release of the information is consistent with the Family Code, then the submitted information may not be withheld under section 261.201 pursuant to section 22.082 of the Education Code. *See* Open Records Decision No. 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under statutory

¹The Seventy-ninth Texas legislature passed House Bill 1116, which required the transfer of SBEC's administrative functions and services to the TEA, effective September 1, 2005.

predecessor to Act). Accordingly, in the event the district attorney determines that release of the information is consistent with the Family Code, we must nevertheless consider whether the submitted information is otherwise excepted from disclosure.

We understand you to claim that a portion of the submitted information contains confidential medical records. Section 552.101 encompasses the Medical Practices Act (the "MPA"). Occ. Code §§ 151.001-165.160. Section 159.002 of the Occupations Code provides in relevant part:

(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(a), (b), (c). This office has concluded that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find you have failed to demonstrate how any portion of the submitted information constitutes a physician-patient communication or a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician. Accordingly, the district attorney may not withhold any portion of the submitted information under section 552.101 in conjunction with the MPA.

We note portions of the remaining information are subject to section 552.130 of the Government Code, which provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). We have marked Texas motor vehicle record information that is generally confidential under section 552.130 of the Government Code.

Since the information at issue includes confidential information pursuant to section 552.130 of the Government Code, the question becomes whether the requestor in this case, as a TEA investigator, may nevertheless obtain the records at issue. Because section 22.082 of the Education Code authorizes the requestor to obtain the information in its entirety while section 552.130 of the Government Code excepts from disclosure portions of the information, section 22.082 conflicts with section 552.130. Where statutes are in irreconcilable conflict, the specific provision prevails as an exception to the general provision unless the general provision was enacted later and there is clear evidence that the legislature intended the general provision to prevail. *See id.* § 311.026(b), *City of Lake Dallas v. Lake Cities Mun. Util Auth.*, 555 S.W.2d 163, 168 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

In this instance, section 552.130 of the Government Code specifically protects Texas motor vehicle record information and contains its own access provisions. Therefore, we find section 552.130 is not a general exception under the Act. Furthermore, because section 552.130 specifically protects Texas motor vehicle record information while section 22.082 of the Education Code provides TEA with a general right of access, we find the confidentiality provision found in section 552.130 is more specific than the general right of access provided to TEA by section 22.082. Accordingly, notwithstanding section 22.082, we conclude the district attorney must withhold the marked Texas motor vehicle record information under section 552.130 of the Government Code.

We note you also assert that some of the submitted information is excepted under section 552.101 in conjunction with common-law privacy.² However, because the requestor in this instance has a statutory right of access to the information at issue, the district attorney may not withhold any of this information from the requestor pursuant to section 552.101 in conjunction with common-law privacy. *See* Open Records Decision Nos. 623 at 3 (1994) (exceptions in the Act generally inapplicable to information that statutes expressly make public), 613 at 4 (1993) (exceptions in Act cannot impinge in statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act).

In summary, if the information is not contained in a closed investigation file, and the district attorney determines that the release of CHRI is consistent with the Family Code, then the district attorney must release information from the submitted documents that shows the type of allegations made and whether there was an arrest, information, indictment, detention, conviction, or other formal charges and their dispositions. In that event, the district attorney must withhold the rest of the submitted information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

² Common-law privacy 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 (Tex. 1976).

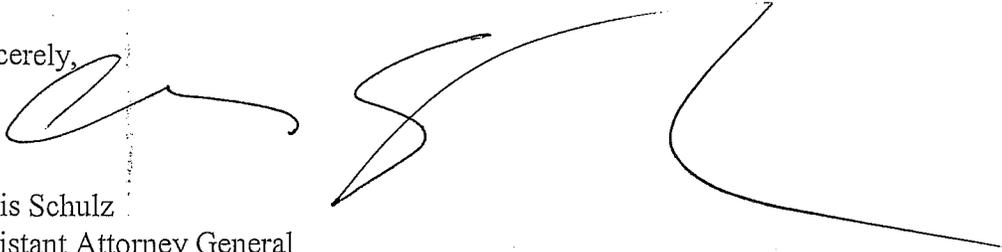
If the submitted information is not contained in a closed investigation file, and the district attorney determines that the release of CHRI is not consistent with the Family Code, then the submitted information must be withheld from the requestor in its entirety under section 552.101 in conjunction with section 261.201.

Finally, if the submitted information is contained in a closed investigation file, and if the district attorney determines that release of the information is consistent with the Family Code, then the district attorney must withhold the information we have marked under section 552.130 of the Government Code, and release the remaining information to this requestor.³

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 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,



Chris Schulz
Assistant Attorney General
Open Records Division

CS/cc

Ref: ID# 373058

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

³ We note that because the requestor has a special right of access to the submitted information in this instance, the district attorney must again seek a decision from this office if it receives another request for the same information from another requestor.