



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

July 2, 2010

Mr. Lester Blizzard
Assistant District Attorney
Galveston County
600 59th Street, Suite 1001
Galveston, Texas 77551-4137

OR2010-09850

Dear Mr. Blizzard:

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# 385281.

The Galveston County District Attorney's Office (the "district attorney") received a request for eighteen categories of information pertaining to eight cases. You state the district attorney does not have some of the requested items in its possession.¹ You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code.² We have considered the exception you claim and reviewed the submitted information.³

Initially, we must address the district attorney's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen

¹We note the Act does not require a governmental body to release information that did not exist at the time the request for information was received or create new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²Although you initially raised sections 552.102 through 552.130 of the Government Code, you do not present any arguments against disclosure under these sections. Thus, we assume you no longer urge these exceptions. Gov't Code §§ 552.301, .302.

³We 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.

business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). In this instance, the district attorney did not submit a copy of the information requested until after the fifteen business day deadline.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists 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, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Section 552.101 of the Government Code can provide a compelling reason to withhold information; therefore, we will consider whether or not any of the submitted information is excepted from disclosure under this exception.

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.

...

(k) Notwithstanding Subsection (a), an investigating agency, other than the [Texas Department of Family and Protective Services] or the Texas Youth

Commission, on request, shall provide to the parent, managing conservator, or other legal representative of a child who is the subject of reported abuse or neglect, or to the child if the child is at least 18 years of age, information concerning the reported abuse or neglect that would otherwise be confidential under this section. The investigating agency shall withhold information under this subsection if the parent, managing conservator, or other legal representative of the child requesting the information is alleged to have committed the abuse or neglect.

(l) Before a child or a parent, managing conservator, or other legal representative of a child may inspect or copy a record or file concerning the child under Subsection (k), the custodian of the record or file must redact:

(1) any personally identifiable information about a victim or witness under 18 years of age unless that victim or witness is:

(A) the child who is the subject of the report; or

(B) another child of the parent, managing conservator, or other legal representative requesting the information;

(2) any information that is excepted from required disclosure under [the Act], or other law; and

(3) the identity of the person who made the report.

Fam. Code § 261.201(a), (k), (l). Upon review, we find the submitted information consists of information used or developed in an investigation under chapter 261. *See id.* § 261.001(1) (defining “abuse” and “neglect” for purposes of Fam. Code ch. 261). Accordingly, we find the submitted information is generally confidential under section 261.201 of the Family Code.

We note, however, the requestor may be the legal representative of a parent of the children who were the victims listed in the submitted information, and this parent is not alleged to have committed the suspected abuse. As it is not clear whether the requestor is the legal representative of the parent for purposes of section 261.201(k), we must rule conditionally. If the requestor is not the legal representative of the parent, the submitted information is confidential under section 261.201(a) of the Family Code and must be withheld in its entirety under section 552.101 of the Government Code. If the requestor is the legal representative of the parent in this instance, the district attorney may not use section 261.201(a) to withhold the information at issue from this requestor. *Id.* § 261.201(k). However, we note that section 261.201(l) also provides that before a legal representative of a parent can copy and inspect a record of a child under section 261.201(k), any personally identifiable information about a victim or witness under 18 years of age who is not the parents’ child and the identity of the party who made the report must be redacted. *Id.* § 261.201(l)(1), (3).

Section 261.201(l)(2) also states any information that is excepted from required disclosure under the Act or other law may still be withheld from disclosure. *Id.* § 261.201(l)(2). To the extent the requestor is the legal representative of the parent, so that the district attorney may not withhold the submitted information under section 261.201(a) of the Family Code, we will consider your remaining arguments under section 552.101.

We further note the submitted documents contain information regarding a child witness who is not the subject of the report and is not a child of the parent represented by the requestor. Thus, the district attorney must withhold the identifying information of the child witness, which we have marked, under section 552.101 in conjunction with section 261.201(l)(1) of the Family Code. The district attorney must also withhold the identifying information of the reporting party, which we have marked, under section 552.101 in conjunction with section 261.201(l)(3) of the Family Code.⁴

Section 552.101 also encompasses chapter 611 of the Health and Safety Code. Section 611.002 provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health and Safety Code § 611.002(a)-(b); *see also id.* § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to information that section 611.002 makes confidential only by certain individuals. *See id.* §§ 611.004, 611.0045; Open Records Decision No. 565 (1990). We have marked mental health records that are confidential under section 611.002 of the Health and Safety Code but must be released if the requestor is authorized to obtain those records under sections 611.004 and 611.0045 of the Health and Safety Code. *See* Health and Safety Code § 611.004(a)(4) (professional may disclose confidential information to person who has patient’s written consent or to parent of minor patient).

Section 552.101 also encompasses the MPA, subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part:

(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.

⁴As our ruling is dispositive for the information we have marked under subsections 261.201(l)(1) and 261.201(l)(3), we need not address your argument for this information under the common-law informer’s privilege.

(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). Information that is 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 that 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). We have also found when a file is created as the result of a hospital stay, all of the documents in the file relating to diagnosis and treatment constitute either physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. 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). You argue that the submitted information includes the victims' medical records. Upon review, we find none of the remaining information consists of the victims' medical records. We find, however, that you have submitted medical records pertaining to the defendant. We have marked the medical records that the district attorney may release only in accordance with the MPA.

We note that section 552.101 encompasses section 411.153 of the Government Code, which provides as follows:

- (a) A DNA record stored in the DNA database is confidential and is not subject to disclosure under the public information law, Chapter 552.
- (b) A person commits an offense if the person knowingly discloses to an unauthorized recipient information in a DNA record or information related to a DNA analysis of a sample collected under this subchapter.
- (c) An offense under this section is a state jail felony.
- (d) A violation under this section constitutes official misconduct.

Gov't Code § 411.153. A “DNA record” means the results of a forensic DNA analysis performed by a DNA laboratory. *See id.* § 411.141(6)-(7). “Forensic analysis” is defined as “a medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the

connection of the evidence to a criminal action.” *See* Crim. Proc. Code art. 38.35(4); *see also* Gov’t Code § 411.141(10) (providing that “forensic analysis” has meaning assigned by Crim. Proc. Code art. 38.35). A “DNA database” means “one or more databases that contain forensic DNA records maintained by the director [of the Texas Department of Public Safety (the “DPS”)].” Gov’t Code § 411.141(5); *see id.* § 411.001(3).

The director of the DPS is required to establish certain procedures for DNA laboratories. *See id.* §§ 411.144(a), .142(h) (requiring director to establish standards for DNA analysis). Section 411.144 of the Government Code provides that a DNA laboratory conducting a forensic DNA analysis under subchapter G of chapter 411 shall comply with subchapter G and the rules adopted under subchapter G. *See id.* § 411.144(d); 37 T.A.C. § 28.82(a). The DPS has adopted rules that govern the regulation of forensic DNA laboratories in this state. *See* 37 T.A.C. §§ 28.81, .82 (describing minimum standards by which a forensic DNA laboratory must abide); *see also* Gov’t Code § 411.147(b).

In this instance, some of the submitted documents are DNA records relating to DNA analyses of samples collected under subchapter G of chapter 411 of the Government Code. The documents in question are contained in records of a criminal investigation. The documents appear to be the result of forensic DNA analyses performed by a DNA laboratory in accordance with DPS regulations. We therefore conclude that you must withhold the DNA records that we have marked under section 552.101 of the Government Code in conjunction with section 411.153 of the Government Code.

Section 552.101 also encompasses section 411.083 of the Government Code. Criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. *Id.* § 411.083(a); Open Records Decision No. 565 (1990). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. ORD 565. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 deems confidential CHRI that the Texas Department of Public Safety (“DPS”) maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Upon review, we conclude the information we have marked must be withheld under section 552.101 of the Government Code in conjunction with chapter 411 and federal law.

Section 552.101 also encompasses the common-law informer’s privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969).

The informer's privilege protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. *See* Open Records Decision Nos. 515 at 3 (1998), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." *See* Open Records Decision No. 279 at 2 (1981) (citing Wigmore, *Evidence*, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The privilege excepts the informer's statement only to the extent necessary to protect the informer's identity. *See* Open Records Decision No. 549 at 5 (1990).

The district attorney indicates the informer in the submitted information reported a violation of the Penal Code. The district attorney seeks to withhold some of the remaining information, including statements of the informer and witnesses, under the informer's privilege. We conclude that none of the remaining information at issue may be withheld under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

The district attorney also seeks to withhold some of the remaining information under section 552.101 in conjunction with the doctrine of common-law privacy. Common-law privacy 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). The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. The submitted information relates to sexual assault or another sex-related offense. Generally, only information that either identifies or tends to identify a victim of sexual assault or another sex-related offense must be withheld under common-law privacy. However, a governmental body is required to withhold an entire report when this identifying information is inextricably intertwined with other releasable information or when the requestor knows the identity of the alleged victim. *See* Open Records Decisions Nos. 393 (1983), 339 (1982); *see also* Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld).

In this instance, the submitted information demonstrates that the requestor knows the identity of the alleged sexual assault victims. However, as noted above, the requestor may be the legal representative of the parent of the alleged victims. Under section 552.023 of the Government Code, a person's authorized representative has a special right of access to private information that would otherwise be excepted from public disclosure. *See* Gov't Code § 552.023; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself or person for whom she

is authorized representative). Accordingly, the district attorney may not withhold any of the remaining information pertaining to the children from this requestor under section 552.101 in conjunction with common-law privacy. We note, however, the remaining information includes photographs depicting only an unclothed adult female, which appear to have been taken at her home. The district attorney must withhold these photographs, which we have marked, under section 552.101 in conjunction with common-law privacy.

We note a portion of the remaining information is subject to section 552.130 of the Government Code.⁵ Section 552.130 provides information relating to a motor vehicle operator's license or driver's license issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1). Thus, the district attorney must withhold the Texas driver's license number we have marked under section 552.130.⁶

In summary, if the requestor is not the legal representative of the parent of the child victims, the district attorney must withhold the submitted information in its entirety under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. However, if the requestor is the legal representative of the parent of the child victims, then the district attorney must withhold the information we have marked under section 552.101 of the Government Code in conjunction with sections 261.201(l)(1) and 261.201(l)(3) of the Family Code. In that instance, the district attorney: (1) must release or withhold the marked mental health records in accordance with chapter 611; (2) may only release the marked medical records in accordance with the MPA; (3) must withhold the DNA records that we have marked under section 552.101 of the Government Code in conjunction with section 411.153 of the Government Code; (4) must withhold the criminal history record information we have marked under section 552.101 of the Government Code in conjunction with chapter 411 and federal law; (5) must withhold the photographs we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, and (6) must withhold the Texas driver's license number we have marked under section 552.130 of the Government Code, and (7) must release the remaining information.⁷

⁵The Office of the Attorney General will raise a mandatory exception like section 552.130 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

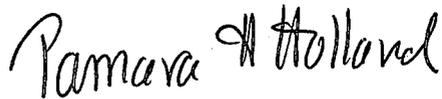
⁶We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

⁷The requestor has a special right of access under section 261.201(k) of the Family Code and section 552.023 of the Government Code to the information being released. If the district attorney receives another request for this same information from an individual who does not have a right of access to the information, the district attorney should request another ruling. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 673 (2001).

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,



Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/jb

Ref: ID# 385281

Enc. Submitted documents

c: Requestor
(w/o enclosures)