



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 19, 2010

Ms. M. Ann Montgomery  
Assistant County and District Attorney  
Ellis County  
109 South Jackson  
Waxahachie, Texas 75165

OR2010-12648

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# 390988.

The Waxahachie Police Department (the "department") received a request for all records pertaining to the requestor's child, including four specified records, during a specified time period. You state the department will provide some of the requested information to the requestor. You claim the submitted incident reports are excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the department'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(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See Gov't Code § 552.301(b)*. In this instance, you state the department received the request for information on June 1, 2010. You did not, however, request a ruling from this office until June 16, 2010. Thus, we find the department 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 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). Although you assert the submitted information is excepted under section 552.108 of the Government Code, this section is discretionary in nature. It serves only to protect a governmental body's interests, and may be waived; as such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, no portion of the submitted information may be withheld under section 552.108 of the Government Code. However, because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will consider the applicability of this exception to 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 protected by other statutes, such as section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997, are confidential under section 58.007. The relevant language of section 58.007 reads:

(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.

...

(e) Law enforcement records and files concerning a child may be inspected or copied by a juvenile justice agency as that term is defined by Section 58.101, a criminal justice agency as that term is defined by Section 411.082, Government Code, the child, and the child's parent or guardian.

...

(j) Before a child or a child's parent or guardian may inspect or copy a record or file concerning the child under Subsection (e), the custodian of the record or file shall redact:

(1) any personally identifiable information about a juvenile suspect, offender, victim, or witness who is not the child; and

(2) any information that is excepted from required disclosure under Chapter 552, Government Code, or other law.

Fam. Code § 58.007(c), (e), (j). For purposes of section 58.007, "child" means a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See id.* § 51.02(2). Incident report number 1000011538 involves a sixteen-year-old individual arrested for possession of a controlled substance. Incident report number 1000010149 involves a sixteen-year-old individual arrested for driving under the influence and possession of a prohibited weapon, as well as a second sixteen-year-old individual cited for minor in consumption of alcohol. Thus, we find these reports involve juvenile delinquent conduct. *See id.* § 51.03(a) (defining juvenile "delinquent conduct" for the purposes of section 58.007). The requestor, however, is the parent of the juvenile arrestee listed in the reports. As such, you acknowledge the department may not use section 58.007(c) to withhold these reports from this requestor. *Id.* § 58.007(e). Section 58.007(j)(1), however, states that, before information is released to a parent under section 58.007(e), a custodian of records must redact any personally identifiable information about a juvenile suspect, offender, victim, or witness who is not the parent's child. *Id.* § 58.007(j)(1). Although the requestor is a parent of the arrestee listed in report number 1000010149, the requestor is not a parent of the other juvenile offender listed in that report. Thus, the department must withhold the identifying information, which we have marked, of the juvenile offender that is not the requestor's child listed in report number 1000010149 under section 552.101 of the Government Code in conjunction with section 58.007(j)(1) of the Family Code. Furthermore, section 58.007(j)(2) states the department must withhold any information that is excepted from disclosure under other law. *Id.* § 58.007(j)(2). Accordingly, we will consider your remaining claims against disclosure.

Section 552.101 also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential under federal and state law. 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. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Although you generally claim the remaining information is CHRI confidential under state and federal law, none of the remaining information was generated by the NCIC or TCIC. Accordingly, we find you have not demonstrated how any portion of the remaining information constitutes CHRI for purposes of chapter 411 or federal law, and no portion of this information may be withheld on this basis.

You also generally assert the remaining information is confidential under both common-law and constitutional privacy, which are also encompassed by section 552.101 of the Government Code. 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Although you generally assert the remaining information is protected under common-law privacy, you have not provided any arguments explaining how common-law privacy applies to this information. Furthermore, as previously noted, the requestor is a parent of one of the minor individuals whose information is at issue. As such, the requestor has a special right of access to any information that would be protected from public disclosure for the purpose of protecting her child's privacy interests. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles). Consequently, the department may not withhold the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

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. Open Records Decision No. 455 at 4 (1987). 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. *Id.* 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.* The scope of information protected is narrower than under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). In this instance, you have not provided any arguments explaining how constitutional privacy applies to this information. Furthermore, as previously discussed, the requestor has a right of access to any information that would be protected from public disclosure for the purpose of protecting her child's privacy interests. *See* Gov't Code § 552.023(b). Accordingly, none of the remaining

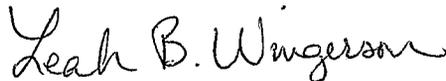
information may be withheld under section 552.101 of the Government Code in conjunction with constitutional privacy.

In summary, the department must withhold the marked juvenile- identifying information in report number 1000010149 under section 552.101 of the Government Code in conjunction with section 58.007(j)(1) of the Family Code. The remaining information must be released to this requestor.<sup>1</sup>

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,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/dls

Ref: ID# 390988

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>1</sup>Because the requestor has a right of access to certain information that otherwise would be excepted from release under the Act, the department must again seek a decision from this office if it receives a request for this information from a different requestor.