



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 21, 2010

Mr. W. Lee Auvenshine  
Assistant County and District Attorney  
Ellis County  
109 South Jackson  
Waxahachie, Texas 75165

OR2010-19237

Dear Mr. Auvenshine:

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# 403765.

The Ellis County Judge, Auditor, Human Services Department, and County and District Attorney's Office (collectively the "county") received four requests from two requestors for records relating to security cameras (the "cameras") installed in waiting and video-viewing rooms (the "rooms") at the county and district attorney's office. The first and second requests are for (1) information relating to a named business entity or any other company responsible for installing or maintaining the cameras; (2) recordings created by the cameras; (3) logs used to schedule meetings in the rooms; and (4) e-mails relating to scheduling the rooms or to the cameras, their capabilities, and any recordings produced. The third and fourth requests seek recordings of meetings involving attorneys and clients. You inform us the county is releasing some of the information responsive to the first and second requests. You state the county has no responsive scheduling logs or e-mails.<sup>1</sup> You claim portions of the submitted video recordings are excepted from disclosure under sections 552.101,

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<sup>1</sup>We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. 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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

552.107, 552.108, and 552.111 of the Government Code. Although you take no position on the public availability of the rest of the submitted information, you believe the remaining information may implicate the interests of FISK Security Integration Group ("FISK"). You inform us the county notified FISK of the instant request for the information in question and of its right to submit arguments to this office as to why the information should not be released.<sup>2</sup> We have considered the exceptions you claim and reviewed the information you submitted.

We first note an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to the party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from FISK. Therefore, as FISK has not demonstrated any of the information at issue is proprietary for purposes of the Act, the county may not withhold any of the submitted information on the basis of any interest FISK may have in the information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

We next note the county did not comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures a governmental body must follow in asking this office to determine whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301(a). Section 552.301(e) requires a governmental body to submit to this office, no later than the fifteenth business day after the date of its receipt of the request for information, (1) written comments stating reasons why the exceptions claimed apply to the information at issue; (2) a copy of the request for information; (3) a signed statement of the date of receipt of the request or evidence sufficient to establish that date; and (4) the specific information the governmental body seeks to withhold, or representative samples if the information is voluminous, labeled to indicate which exceptions apply to which parts of the information. *See id.* § 552.301(e)(1)-(2). Section 552.302 of the Government Code provides that if a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *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).

The county contends video recordings from the cameras contain information protected by sections 552.101 and 552.108 of the Government Code, the attorney-client privilege under section 552.107(1) of the Government Code, and the attorney work product privilege under section 552.111 of the Government Code. In this instance, the county neither provided

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<sup>2</sup>*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

comments sufficient to demonstrate the applicability of sections 552.101, 552.108, 552.107(1), and 552.111 to any of the submitted information nor directed our attention to any specific portions of the information at issue that would be protected by these exceptions. *See* Gov't Code § 552.301(e)(1)(A), (2). Additionally, the county did not submit a copy of the fourth request for information.<sup>3</sup> *See id.* § 552.301(e)(1)(B). Thus, the county did not comply with section 552.301 in requesting this decision, and the submitted information is therefore presumed to be public under section 552.302. This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Sections 552.107(1), 552.108, and 552.111 are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov't Code § 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). The county's claims under sections 552.107(1), 552.108, and 552.111 do not constitute compelling reasons for non-disclosure under section 552.302. In failing to comply with section 552.301(e), the county waived sections 552.107(1), 552.108, and 552.111 and may not withhold any of the submitted information under any of those exceptions. *See* Open Records Decision No. 663 at 5 (1999) (waiver of discretionary exceptions). As the applicability of section 552.101 of the Government Code can provide a compelling reason for non-disclosure, we will address that 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. This exception encompasses information other statutes make confidential. The county claims section 552.101 in conjunction with sections 261.201 and 264.408 of the Family Code. Section 261.201 of the Family Code provides in part:

(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

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<sup>3</sup>Our description of the fourth request is based on other information the county provided in requesting this decision.

used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a); *see id.* § 261.001(1) defining “abuse” for purposes of Fam. Code ch. 261; *see also id.* § 101.003 (defining “child” for purposes of Fam. Code tit. 5). The county believes the submitted video recordings may contain information encompassed by section 261.201. We note a child appears in the recordings relating to Room 435.<sup>4</sup> To the extent the specified segment of the recordings identifies a person who made a report of alleged or suspected child abuse or neglect or consists of information used or developed in an investigation of child abuse or neglect under chapter 261 of the Family Code, we conclude the county must withhold the information in question under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. *See id.* § 261.201(a)(1)-(2); Open Records Decision No. 440 at 2 (1986) (addressing predecessor statute). But to the extent the specified segment of the recordings neither identifies a person who made a report of alleged or suspected child abuse or neglect nor was used or developed in an investigation under chapter 261 of the Family Code, the county may not withhold the information in question under section 552.101 on the basis of section 261.201. We find the county has not demonstrated, and it does not otherwise appear to this office, that any of the remaining information at issue constitutes either a report of alleged or suspected child abuse or neglect made under chapter 261 of the Family Code or information used or developed in an investigation under chapter 261 or in providing services as a result of an investigation. We therefore conclude the county may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

Section 552.101 of the Government Code also encompasses section 264.408 of the Family Code, which provides in part:

(a) The files, reports, records, communications, and working papers used or developed in providing services under this chapter are confidential and not subject to public release under [the Act], and may only be disclosed for purposes consistent with this chapter. Disclosure may be to:

(1) the [Texas Department of Family and Protective Services (the “department”)], department employees, law enforcement agencies, prosecuting attorneys, medical professionals, and other state agencies that provide services to children and families; and

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<sup>4</sup>The child appears in a segment dated September 20, 2010 and beginning at 11:55 a.m. and concluding at 12.15 p.m.

(2) the attorney for the child who is the subject of the records and a court-appointed volunteer advocate appointed for the child under Section 107.031 [of the Family Code].

*Id.* § 264.408(a). Section 264.408 provides for the confidentiality of information used or developed in providing services under chapter 264 of the Family Code, which pertains to child welfare services. *See id.* § 264.002 (duties of department). To the extent the specified segment of the recordings relating to Room 435 is related to the provision of services under chapter 264 of the Family Code, we conclude the county must withhold the information in question under section 552.101 of the Government Code in conjunction with section 264.408 of the Family Code. But to the extent the specified segment of the recordings is not related to the provision of services under chapter 264 of the Family Code, the county may not withhold the information in question under section 552.101 on the basis of section 264.408. We find the county has not demonstrated, and the submitted information does not itself reflect, that any of the remaining information at issue is related to the provision of services under chapter 264 of the Family Code. We therefore conclude the county may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 264.408 of the Family Code.

Section 552.101 also encompasses section 58.007 of the Family Code, which provides in 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.

Fam. Code § 58.007(c). Section 58.007(c) is applicable to records of juvenile conduct that occurred on or after September 1, 1997. *See Act of June 2, 1997, 75<sup>th</sup> Leg., R.S., ch. 1086, §§ 20, 55(a), 1997 Tex. Gen. Laws 4179, 4187, 4199; Open Records Decision No. 644 (1996).* The juvenile must have been at least 10 years old and less than 17 years of age when

the conduct occurred. See Fam. Code § 51.02(2) (defining "child" for purposes of Fam. Code tit. 3). Section 58.007(c) is not applicable to information that relates to a juvenile as a complainant, victim, witness, or other involved party and not as a suspect or offender. The county indicates section 58.007(c) may be applicable to some of the submitted information. The county has not demonstrated, however, and it does not otherwise appear to this office, that any of the information at issue either identifies or otherwise pertains to a juvenile suspect or offender. We therefore conclude the county may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.

The county also claims section 552.101 in conjunction with constitutional and common-law rights to privacy. Constitutional privacy under section 552.101 encompasses two types of interests. 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 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. See *Fadjo v. Coon*, 633 F.2d 1172 (5<sup>th</sup> Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5<sup>th</sup> Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. See ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). The county has not demonstrated, and it does not otherwise appear to this office, that any of the submitted information falls within any constitutionally protected zone of privacy or that any individual's privacy interest outweighs the public's interest in the information at issue. We therefore conclude the county may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with constitutional privacy.

Common-law privacy under section 552.101 protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. 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 elements of the test must be established. *Id.* at 681-82. Common-law privacy encompasses the specific types of information held to be intimate or embarrassing in *Industrial Foundation*. See *id.* at 683 (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). This office has determined other types of information also are private under section 552.101. See generally Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). This office also has concluded a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to

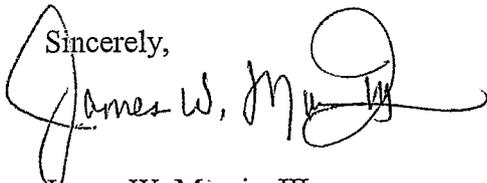
a reasonable person, and is generally not of legitimate public interest. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). The county has not demonstrated, and it does not otherwise appear to this office, that any of the information at issue is highly intimate or embarrassing and not a matter of legitimate public interest. We therefore conclude the county may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary: (1) the county must withhold the specified segment of the recordings relating to Room 435 under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code to the extent the information in question identifies a person who made a report of alleged or suspected child abuse or neglect or consists of information used or developed in an investigation under chapter 261 of the Family Code; and (2) the county must withhold the specified segment of the recordings relating to Room 435 under section 552.101 of the Government Code in conjunction with section 264.408 of the Family Code to the extent the information in question is related to the provision of services under chapter 264 of the Family Code. The county must release the rest of the submitted information.

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,



James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/dls

Ref: ID# 403765

Enc: Submitted information

c: Requestors  
(w/o enclosures)

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