



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 7, 2011

Ms. Moira Schilke
Assistant District Attorney
Denton County District Attorney's Office
P.O. Box 2850
Denton, Texas 76202

OR2011-03172

Dear Ms. Schilke:

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# 410738.

The Denton County District Attorney's Office (the "district attorney") received a request for a specified entire criminal prosecution file. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

First, we must address the district attorney's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen 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

¹We assume 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.

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* Gov't Code § 552.301(e). You state, and the request reflects, the district attorney received the request for information on December 8, 2010. You do not inform us the district attorney was closed for any business days between December 8, 2010 and January 3, 2011. Thus, the district attorney's fifteen-business-day deadline was December 29, 2010. However, your brief explaining why the stated exceptions apply and the representative sample of information requested was sent in an envelope postmarked January 3, 2011. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Thus, we find the district attorney failed to comply with the requirements mandated by section 552.301(e).

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 that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *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); Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). Although you raise section 552.108 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and which may be waived. *See* Open Records Decision Nos. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Accordingly, your claim under section 552.108 does not provide a compelling reason for non-disclosure, and the district attorney may not withhold any of the submitted information on the basis of your claims under this section. However, sections 552.101, 552.130, and 552.137 of the Government Code can provide compelling reasons to overcome this presumption; therefore, we will consider whether these exceptions require the district attorney to withhold the submitted records.²

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 section encompasses information protected by other statutes. Section 261.201(a) of the Family Code provides as follows:

²The Office of the Attorney General will raise a mandatory exception such as section 552.137 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).

(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 . . . 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.

Fam. Code § 261.201(a), (k). In this instance, you state the submitted prosecution file consists of files, reports, records, communications, and working papers used or developed in an investigation of child abuse. *See id.* § 261.001(1)(E) (definition of “abuse” includes indecency with a child under section 21.11, Penal Code); *see also* Penal Code § 21.11(a) (defining “child” for purposes Penal Code section 21.11 as person under 17 years of age). However, you also state the district attorney, in prosecuting the abuse, did not itself investigate the child abuse. Accordingly, we find the district attorney’s records that pertain to the prosecution of the abuse were not used or developed in any investigation under chapter 261 and may not be withheld under section 552.101 as such. However, we have marked the submitted records that reflect they were used or developed by the Corinth Police Department, the Lake Dallas Police Department, and the Texas Department of Family and Protective Services in those agencies’ investigations of child abuse. Although the requestor in this instance represents the parents of the child victim, because the district attorney is not the investigating agency with respect to this marked information, it may not release the information pursuant to section 261.201(k). *See* Fam. Code § 261.201(k) (permitting an investigating agency to release information otherwise confidential under subsection 261.201(a) in certain circumstances). Thus, the district attorney must withhold

the information we marked 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 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). 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. *See id.* at 683. Generally, only information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. However, a governmental body is required to withhold an entire report when identifying information is inextricably intertwined with other releasable information or when the requestor knows the identity of the alleged victim. *See* Open Records Decision Nos. 393 (1983), 339 (1982); *see also* Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). In this case, the submitted information reveals the requestor knows the identity of the alleged victim. Thus, withholding only the alleged victim's identifying information from the requestor would not preserve the victim's common-law right to privacy. However, as noted above, the requestor is an attorney representing the parents of the minor victim whose private information is at issue. As such, pursuant to section 552.023(b) the requestor has a special right of access to information that would ordinarily be withheld to protect his clients' daughter's privacy interests. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person or person's representative to whom information relates on grounds that information is considered confidential under privacy principles). Therefore, the remaining information may not be withheld on the basis of common-law privacy.

Section 552.101 of the Government Code also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center 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.* Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety ("DPS") maintains, except 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. Similarly, 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 have marked the portion of the remaining information is confidential pursuant to chapter 411. The district attorney must withhold this marked information under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.

Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code. Section 560.003 provides that “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” *Id.* §§ 560.001 (defining “biometric identifier” to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). Upon review, we have marked a fingerprint in the submitted information. You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of this fingerprint in this case. Therefore, the district attorney must withhold the fingerprint we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title, or registration issued by a Texas agency. *Id.* § 552.130(a)(1), (2). The district attorney must withhold the Texas driver’s license number we marked in the submitted information under section 552.130 of the Government Code.

We note the remaining information contains e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). We note the requestor has a right to his clients’ e-mail addresses under section 552.137(b). *Id.* § 552.137(b). The e-mail addresses we marked are not excluded by subsection (c). Therefore, the district attorney must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners have affirmatively consented to their public disclosure.

Finally, some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the

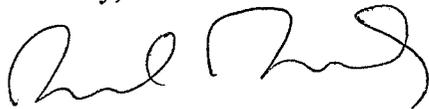
governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the district attorney must withhold the information we marked under 552.101 of the Government Code in conjunction with section 261.201 of the Family Code, chapter 411 of the Government Code, and section 560.003 of the Government Code. The district attorney must also withhold the Texas driver's license number we marked under section 552.130 of the Government Code. Unless their owners have affirmatively consented to their public disclosure, the district attorney must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code.³ The remaining information must be released, but any information protected by copyright must be released in accordance with copyright law.⁴

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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/tf

³Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision, including fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, Texas driver's license numbers under section 552.130 of the Government Code, and personal e-mail addresses under section 552.137 of the Government Code.

⁴Because this requestor has a right of access under section 552.023 of the Government Code to information being released that may be confidential with respect to the general public, the district attorney must again seek a ruling from this office if it receives another request for this information from another requestor.

Ref: ID# 410738

Enc. Submitted documents

c: Requestor
(w/o enclosures)