



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 7, 2011

Ms. Bridget G. Bateman
Assistant District Attorney
173rd Judicial District
Henderson County
109 West Corsicana, Suite 103
Athens, Texas 75751

OR2011-14573

Dear Ms. Bateman:

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# 432165.

The Henderson County Sheriff's Office (the "sheriff") received a request for information relating to two listed offenses and a named individual. You claim the requested information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we must address the sheriff'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(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. Gov't Code § 552.301(b). You have submitted a representation from the sheriff stating the sheriff received the request for information on July 14, 2011. Thus, the sheriff's ten-business-day deadline to request a ruling from this office under section 552.301(b) was July 28, 2011. However, you did not submit a request for a decision from this office on behalf of the sheriff until August 3, 2011. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). Thus, the sheriff failed to comply with the procedural requirements mandated by 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 unless the governmental body demonstrates 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 552.108 is a discretionary exception to disclosure that protects a governmental body's interests. *See* Open Records Decision Nos. 665 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, the sheriff's claim under section 552.108 is not a compelling reason to overcome the presumption of openness. Therefore, the sheriff may not withhold any of the submitted information under section 552.108 based on the sheriff's law enforcement interest. However, the need of another governmental body to withhold information under section 552.108 can provide a compelling reason under section 552.302. *See* Open Records Decision No. 586 at 2-3 (1991) (claim of another governmental body under statutory predecessor to section 552.108 can provide compelling reason for non-disclosure). On behalf of the Henderson County District Attorney's Office (the "district attorney"), you assert a law enforcement interest in the submitted information. Accordingly, we will address the district attorney's interest under section 552.108 for the submitted information. In addition, because section 552.101 of the Government Code can provide a compelling reason to overcome this presumption, we will consider whether this section requires the sheriff to withhold the submitted information as well.¹

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) [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

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

(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). The submitted information consists of three related incident reports. We note the submitted information was used or developed in investigations of alleged or suspected child abuse conducted by the sheriff under chapter 261 of the Family Code. *See id.* §§ 101.003(a) (defining “child” for purposes of section 261.201), 261.001(1) (defining “abuse” for purposes of section 261.201). Upon review, we find the submitted information is within the scope of section 261.201(a). There is no indication the requestor is a parent, managing conservator, or other legal representative of the child victims listed in Attachments #2 and #3. You do not indicate the sheriff has adopted a rule that governs the release of this type of information. Therefore, we assume no such rule exists. Given that

assumption, the sheriff must withhold Attachments #2 and #3 in their entirety under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.² *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

We note, however, the requestor is a stepparent of the child victim listed in the incident report for agency file number C11-05944, which is located in Attachments #1 and #4. This individual is not alleged to have committed the suspected abuse. As it is not clear whether the requestor is a parent, managing conservator, or other legal representative of the child victim at issue in this incident report for purposes of section 261.201(k), we must rule conditionally. If the requestor is not a parent, managing conservator, or other legal representative of the child victim at issue, then the sheriff must withhold Attachments #1 and #4 in their entirety under section 552.101 in conjunction with section 261.201(a) of the Government Code. If, however, the requestor is a parent, managing conservator, or other legal representative of the child victim in the incident report for agency file number C11-05944, then the sheriff may not withhold this information from the requestor on the basis of section 261.201(a). *See* Fam. Code § 261.201(k). Nevertheless, section 261.201(l)(1) provides that before a record concerning a child can be copied or inspected by the child's parent, managing conservator, or other legal representative under section 261.201(k), any personally identifiable information about a victim or witness under 18 years of age who is not the child's parent, managing conservator, or other legal representative child must be redacted. *See id.* § 261.201(l)(1). Attachments #1 and #4 contain identifying information of a child witness and victims other than the requestor's stepchild.³ Thus, if the requestor is a parent, managing conservator, or other legal representative of the child victim at issue, then, pursuant to section 552.101 of the Government Code in conjunction with section 261.201(l)(1) of the Family Code, the sheriff must withhold the following information that identifies the child victims and witness in Attachments #1 and #4, other than the requestor's stepchild: (1) the information we have marked in Attachment #1; (2) the recording of the child victim other than the requestor's stepchild we have marked in Attachment #4; and (3) the portions of the recording of the requestor's stepchild we have noted in Attachment #4. In addition, section 261.201(l)(2) provides any information that is excepted from required disclosure under the Act or other law must be withheld from disclosure. *Id.* § 261.201(l)(2). Accordingly, if the requestor is a parent, managing conservator, or other legal representative of the child victim in the incident report for agency file number C11-05944, then we must address whether this information is otherwise excepted from disclosure under sections 552.101 and 552.108 of the Government Code.

Section 552.108(a) of the Government Code provides in relevant part the following:

²As our ruling is dispositive, we do not address your argument to withhold this information.

³We note Attachment #4 consists of two separate recordings of interviews with two victims, one of whom is the stepchild of the requestor, and nine additional copies of those recordings.

Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

- (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
- (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1)-(2). Section 552.108(a)(1) is mutually exclusive of section 552.108(a)(2). Section 552.108(a)(1) protects information that pertains to a specific pending criminal investigation or prosecution. In contrast, section 552.108(a)(2) protects information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why the exception it claims is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

The district attorney states the incident report for agency file number C11-05944 pertains to a pending criminal investigation by the sheriff and a pending grand jury by the district attorney. However, the district attorney also asserts this information is excepted from disclosure under section 552.108(a)(2) because it is a completed report related to an investigation that did not result in conviction or deferred adjudication. Accordingly, because the district attorney has provided this office with conflicting arguments, we find you have failed to sufficiently demonstrate the applicability of section 552.108. *See Gov't Code* § 552.301(e)(1)(A) (governmental body must provide comments explaining why claimed exceptions to disclosure apply). Therefore, we conclude the sheriff may not withhold the information at issue under section 552.108(a)(1) or 552.108(a)(2).

Section 552.101 also encompasses section 1703.306 of the Occupations Code, which provides the following:

- (a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:
 - (1) the examinee or any other person specifically designated in writing by the examinee;
 - (2) the person that requested the examination;

(3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;

(4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. The submitted information contains polygraph information that is confidential under section 1703.306, and the requestor does not appear to have a right of access to the information under that section. Accordingly, if the requestor is a parent, managing conservator, or other legal representative of the child victim in the incident report for agency file number C11-05944, then the sheriff must withhold the information we have marked in Attachment #1 under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types 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. Some of the information on the recording of the requestor's stepchild in Attachment #4 is highly intimate or embarrassing and is not of legitimate concern to the public. Therefore, the sheriff must withhold this information, which we have noted, under section 552.101 in conjunction with common-law privacy.

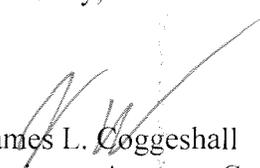
In summary, the sheriff must withhold Attachments #2 and #3 under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. If the requestor is not a parent, managing conservator, or other legal representative of the child victim in the incident report for agency file number C11-05944, then the sheriff must also withhold Attachments #1 and #4 in their entirety under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. If, however, the requestor is a parent, managing conservator, or other legal representative of the child victim in the

incident report for agency file number C11-05944, we conclude the following: (1) the sheriff must withhold under section 552.101 of the Government Code in conjunction with section 261.201(l)(1) of the Family Code the information we have marked in Attachment #1; (2) the sheriff must withhold under section 552.101 of the Government Code in conjunction with section 261.201(l)(1) of the Family Code the recording of the child victim other than the requestor's stepchild we have marked in Attachment #4; (3) the sheriff must withhold under section 552.101 of the Government Code in conjunction with section 261.201(l)(1) of the Family Code the portions of the recording of the requestor's stepchild we have noted in Attachment #4; (4) the sheriff must withhold the information we have marked in Attachment #1 under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code; (5) the sheriff must withhold the portions of the recording of the requestor's stepchild we have noted in Attachment #4 under section 552.101 of the Government Code in conjunction with common-law privacy; and (6) the sheriff must release the remaining information in Attachments #1 and #4 to this requestor pursuant to section 261.201(k) of the Family Code.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/ag

Ref: ID# 432165

Enc. Submitted documents

c: Requestor
(w/o enclosures)