



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 1, 2013

Mr. Timothy E. Bray  
Deputy General Counsel  
Texas Department of State Health Services  
P.O. Box 149347  
Austin, Texas 78714-9347

OR2013-11875

Dear Mr. Bray:

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# 491394 (DSHS OR File 21530/2013).

The Rio Grande State Center (the "center") of the Texas Department of State Health Services (the "department") received a request for information pertaining to the treatment of a named individual at the center during a specified time period. You state the department will release some of the requested information. You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we must address the department's procedural 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, a governmental body is required to submit to this office within fifteen business days of receiving an open records request: (1) general

---

<sup>1</sup>We 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.

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. Gov't Code § 552.301(e)(1)(A)-(D). In this instance, you state the center received the request for information on April 5, 2013. Accordingly, the fifteen-business-day deadline for this request was April 26, 2013. However, you did not submit the information at issue until April 29, 2013. Consequently, we find the department failed to comply with the requirements of section 552.301 in requesting this decision from our office.

Under section 552.302 of the Government Code, the submitted information is therefore 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 (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). 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). You claim the submitted information is excepted under sections 552.103 and 552.108 of the Government Code. However, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 177 at 3 (1997) (statutory predecessor to section 552.108 subject to waiver); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). However, the interests of a governmental body other than the one that failed to comply with section 552.301 can provide a compelling reason for non-disclosure under section 552.302. *See* Open Records Decision No. 586 at 2-3 (1991). You inform us, and submit a letter stating, that the Cameron County District Attorney's Office (the "district attorney's office") asserts the information at issue should be withheld under sections 552.103 and 552.108 of the Government Code. Therefore, we will determine whether the department may withhold any of the information at issue on behalf of the district attorney's office under sections 552.103 and 552.108. Additionally, we will consider your claims under section 552.101 of the Government Code, which can provide a compelling reason for non-disclosure under section 552.302.

Next, we note some of the submitted information consists of completed reports made by or for department, which are subject to section 552.022(a)(1) of the Government Code. Pursuant to section 552.022(a)(1), completed investigations, reports, and evaluations are expressly public unless they are either excepted under section 552.108 of the Government Code or confidential under the Act or other law. Gov't Code § 552.022(a)(1). Although the district attorney's office raises section 552.103 of the Government Code, section 552.103 is

a discretionary exception to disclosure and does not make information confidential under the Act. *See id.* § 552.007; *Dallas Area Rapid Transit*, 4 S.W.3d 469; Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). Therefore, the department may not withhold the completed reports on the basis of section 552.103 of the Government Code. However, information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code. Thus, we will address the district attorney's office's argument under section 552.108 for the completed reports, as well as the remaining information. Further, because section 552.101 of the Government Code can make information confidential under the Act, we will consider the department's arguments under this exception for the completed reports, as well as the remaining information.

We will first address the district attorney's argument under section 552.108(a)(1) of the Government Code, as it is potentially the most encompassing. Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime ... if ... release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5 (1987)*. Where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

You state, and submit a representation from the district attorney's office stating, the submitted information pertains to a pending criminal investigation and prosecution. The district attorney's office states it objects to release of the information at issue because its release would interfere with the pending criminal investigation and prosecution. Based on these representations, we conclude section 552.108(a)(1) is applicable to the submitted information. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'dn.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

We note in your brief to this office, you state "the [Department of Family and Protective Services ("DFPS")] report could be released to the alleged victim's guardian" pursuant to section 711.601 of title 40 of the Texas Administrative Code. You contend, however, the report at issue "is confidential pursuant to" section 552.108 because "there is still an active law enforcement investigation." Accordingly, we must address whether the requestor has

a right of access to some of the information subject to section 552.108(a)(1) of the Government Code. In this instance, the requestor is an attorney representing the guardians of an individual who is listed as the alleged victim of abuse and neglect that occurred in the center, which is a department facility. As such, this requestor may have a right of access to the DFPS investigation report.

Section 48.101 of the Human Resources Code pertains to the disclosure of reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities and provides in pertinent part as follows:

(a) The following information is confidential and not subject to disclosure under [the Act]:

- (1) a report of abuse, neglect, or exploitation made under this chapter;
- (2) the identity of the person making the report; and
- (3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department or investigating state agency rule and applicable federal law.

...

(d) The executive commissioner [of the Texas Health and Human Services Commission] shall adopt rules providing for the release, on request, to a person who is the subject of a report of abuse, neglect, or exploitation or to that person's legal representative of otherwise confidential information relating to that report. The department or investigating state agency shall edit the information before release to protect the confidentiality of information relating to the reporter's identity and to protect any other individual whose safety or welfare may be endangered by disclosure.

Hum. Res. Code § 48.101(a), (b), (d). You assert, and we agree, the information we have marked consists of a report of alleged abuse and neglect at the center that was developed by DFPS in an investigation conducted under chapter 48 of the Human Resources Code. *See id.* § 48.252(a)(1) (authorizing DFPS to conduct investigations in mental health facilities operated by the department); 40 T.A.C. § 711.1 (relating to chapter 48 of the Human Resources Code investigations in department facilities); *see also* 40 T.A.C. § 711.3(19)

(defining “facility” to include Rio Grande State Center for purposes of chapter 711). Such information must not be released to the public, except for a purpose consistent with chapter 48 or as provided by a department or investigating state agency rule or federal law. *See* Hum. Res. Code § 48.101(b)-(g) (permitting release of confidential information only in certain circumstances). As previously noted, the requestor is an attorney for the guardians of the victim listed in the marked report. Thus, pursuant to section 48.101(d), the marked report is subject to release pursuant to rules adopted by the executive commissioner of the Texas Health and Human Services Commission (the “commissioner”).

Subchapter G of chapter 711 of title 40 of the Texas Administrative Code was adopted by the commissioner to explain to whom and under what circumstances case records made confidential under section 48.101 may be released. 40 T.A.C. § 711.601. Section 711.601 of title 40 of the Texas Administrative Code applies to DFPS investigations of alleged abuse, exploitation, and neglect that occurred in department facilities. Section 711.601 provides that “[t]he reports, records, and working papers used by or developed in the investigative process, and the resulting investigative report, are confidential and may be disclosed only as allowed by law or this chapter.” *Id.* Section 711.613(1) of title 40 of the Texas Administrative Code provides for release of DFPS’s investigative reports in certain circumstances and states, in relevant part:

Upon request, the investigative report (with any information concealed that would reveal the identities of the reporter and any person served who is not the victim or alleged victim) may be released:

- (1) for facilities and their contractors, to the victim or alleged victim, guardian, or parent (if the victim or alleged victim is a child), in accordance with 25 TAC § 417.511(b) . . . [.]

*Id.* § 711.613(1). Section 417.511 of title 25 of the Texas Administrative Code concerns the confidentiality of information about investigations of abuse, neglect, and exploitation in department facilities. *See* 25 T.A.C. § 417.511. Section 417.511(b) provides in part as follows:

Upon request, the head of the facility will provide a copy of the investigative report to the (alleged) victim or guardian with the identities of other persons served and any information determined confidential by law concealed.

*Id.* § 417.511(b). As previously noted, the requestor is an attorney representing the guardians of the victim listed in the report. Further, the head of the center received the request for information. We note the center is a department facility for purposes of chapters 417 and 711. *See id.* § 417.503(10); 40 T.A.C. § 711.3(19). Accordingly, except for the identities of persons served who are not the victim and the identity of the reporting party, the requestor has a right of access to the report we have marked pursuant to section 48.101(d)

of the Human Resources Code in conjunction with section 711.613(1) of title 40 of the Texas Administration Code and section 417.511(b) of title 25 of the Texas Administrative Code. The department seeks to withhold this information under section 552.108(a)(1) of the Government Code. However, section 552.108 does not make information confidential by law. Additionally, general exceptions in the Act, like section 552.108, generally cannot impinge on a statutory right of access to information. *See, e.g.*, Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exception to disclosure under the Act). Therefore, the information to which the requestor has a right of access may not be withheld from him under section 552.108(a)(1). Accordingly, except for the identities of persons served who are not the victim and the identity of the reporting party, the department must release the report we have marked to this requestor pursuant to section 48.101(d) of the Human Resources Code in conjunction with section 711.613(1) of title 40 of the Texas Administration Code and section 417.511(b) of title 25 of the Texas Administrative Code. The department may withhold the remaining submitted information under section 552.108(a)(1) of the Government Code on behalf of the district attorney's office.<sup>2</sup>

In summary, except for the identities of persons served who are not the victim and the identity of the reporting party, the department must release the report we have marked to the requestor pursuant to section 48.101(d) of the Human Resources Code in conjunction with section 711.613(1) of title 40 of the Texas Administration Code and section 417.511(b) of title 25 of the Texas Administrative Code.<sup>3</sup> The department may withhold the remaining information under section 552.108(a)(1) of the Government Code on behalf of the district attorney's office.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

---

<sup>2</sup>As our ruling on this information is dispositive, we need not address your remaining argument against its disclosure.

<sup>3</sup>We note the information being released contains confidential information to which the requestor has a right of access. *See* Hum. Res. Code § 48.101(d); 25 T.A.C. § 417.511(b); 40 T.A.C. § 711.613(1). Thus, if the department receives another request for this particular information from a different requestor, then the department should again seek a decision from this office.

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer Luttrall".

Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/som

Ref: ID# 491394

Enc. Submitted documents

c: Requestor  
(w/o enclosures)