



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 30, 2014

Mr. Keith R. Bradford
Assistant County Attorney
County of Nacogdoches
101 West Main Street, Room 230
Nacogdoches, Texas 75961

OR2014-13190

Dear Mr. Bradford:

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# 533189.

The Nacogdoches County Attorney's Office (the "county attorney's office") received a request for the monthly lists of dispositions dated during a specified time period. You indicate you have no information pertaining to a portion of the time period at issue.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.152 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public 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 of the Family Code provides, in part, as follows:

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. 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), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²Although you do not raise section 552.101 or section 552.152 of the Government Code in your brief, we understand you to raise these exceptions based on the submitted arguments.

(a) [T]he following information is confidential, is not subject to public release under Chapter 552, Government Code, 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.

Fam. Code § 261.201(a). Some of the submitted information relates to investigations of alleged or suspected child abuse or neglect. *See id.* §§ 261.001 (defining “abuse” and “neglect” for purposes of chapter 261 of the Family Code), 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). Accordingly, we find this information is subject to chapter 261 of the Family Code. You do not indicate the county attorney’s office has adopted a rule that governs the release of this type of information. Therefore, we assume no such regulation exists. Given that assumption, we conclude the information at issue, a representative sample of which we have marked, is confidential pursuant to section 261.201 of the Family Code. Accordingly, the county attorney’s office must withhold the types of information we marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.³ *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

You assert the remaining information is excepted under section 552.108 of the Government Code, which provides the following:

(a) 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; [or]

(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[.]

...

³As our ruling is dispositive, we need not address your argument against disclosure of this information.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation[.]

Gov't Code § 552.108(a)(1)-(2), (b)(1)-(3)(A). A governmental body raising section 552.108 must reasonably explain the applicability of section 552.108. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You have submitted a statement from the Nacogdoches County District Attorney's Office (the "district attorney's office") arguing, "Based on the varied reasons for disposition of some cases listed in the reports[.] release of such information could compromise the ability of [the district attorney's] office to effectively prosecute co-defendant and companion cases[.]" In addition, you indicate some of the submitted information relates to cases that concluded in a final result other than conviction or deferred adjudication.

A governmental body claiming subsection 552.108(a)(2) or subsection 552.108(b)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See Gov't Code* § 552.108(a)(2), (b)(2). Upon review of the submitted information, we find some of the information at issue, a representative sample of which we have marked, consists of internal records or notations that relate to cases that have been closed and that did not result in conviction or deferred adjudication. Accordingly, the county attorney's office may withhold the types of information we marked under section 552.108(b)(2) of the Government Code. However, you have not explained how any of the remaining information at issue pertains to any specific investigation that concluded in a final result other than a conviction or deferred adjudication. Thus, you have failed to demonstrate the applicability of either subsection 552.108(a)(2) or subsection 552.108(b)(2) to the remaining information, and the county attorney's office may not withhold any of the remaining information on that basis.

A governmental body claiming subsection 552.108(a)(1) or 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* § 552.108(a)(1), (b)(1); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You do not inform us how any portion of the remaining information pertains to any specific

ongoing criminal investigation or prosecution, nor have you demonstrated how release of any of the remaining information would interfere in some way with the detection, investigation, or prosecution of crime. Thus, you have failed to demonstrate the applicability of subsection 552.108(a)(1) or subsection 552.108(b)(1) to the remaining information. Lastly, you have not demonstrated the information at issue was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation. *See id.* § 552.108(b)(3)(A). Thus, you have failed to demonstrate the applicability of subsection 552.108(b)(3)(A). Therefore, the county attorney's office may not withhold any of the remaining information under section 552.108.

We understand you to seek to withhold the remaining information under section 552.152 of the Government Code. Section 552.152 provides as follows:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Id. § 552.152. The district attorney's office argues release of the submitted information "could compromise the safety of . . . law enforcement officers in ongoing investigations." We note the submitted information does not contain the identities of any law enforcement officers. Upon review, we find you have not demonstrated how the release of any of the remaining information would subject an employee of the county attorney's office or the district attorney's office to a substantial risk of physical harm. Accordingly, the county attorney's office may not withhold any of the remaining information at issue under section 552.152 of the Government Code.

We also understand you to claim the remaining information is excepted from required disclosure under section 552.101 of the Government Code in conjunction with the common-law physical safety exception. For many years, this office determined section 552.101, in conjunction with the common-law right to privacy, protected information from disclosure when "special circumstances" exist in which the disclosure of information would place an individual in imminent danger of physical harm. *See, e.g.,* Open Records Decision Nos. 169 (1977) (special circumstances required to protect information must be more than mere desire for privacy or generalized fear of harassment or retribution), 123 (1976) (information protected by common-law right of privacy if disclosure presents tangible physical danger). However, the Texas Supreme Court has held freedom from physical harm does not fall under the common-law right to privacy. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112 (Tex. 2011) (holding "freedom from physical harm is an independent interest protected under law, untethered to the right of privacy"). Instead, in *Cox*, the court recognized, for the first time, a separate common-law physical safety exception to required disclosure that exists independent of the common-law right to privacy. *Id.* at 118. Pursuant to this common-law physical safety exception, "information may be withheld [from public release] if disclosure would create a

substantial threat of physical harm.” *Id.* In applying this new standard, the court noted “deference must be afforded” law enforcement experts regarding the probability of harm, but further cautioned, “vague assertions of risk will not carry the day.” *Id.* at 119. The district attorney’s office argues release of the submitted information “could compromise the safety of witnesses . . . in ongoing investigations.” We note the submitted information does not contain the identities of any witnesses. Upon review, we conclude you have made only vague assertions of risk of harm that could result from the disclosure of any of the remaining information. Accordingly, the county attorney’s office may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

In summary, the county attorney’s office must withhold the types of information we marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The county attorney’s office may withhold the types of information we marked under section 552.108(a)(2) of the Government Code. The county attorney’s office must release the remaining 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.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 providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 533189

Enc. Submitted documents

c: Requestor
(w/o enclosures)