



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 14, 2014

Mr. Bradley A. Anderle
For the Town of Flower Mound
Taylor, Olson, Adkins, Sralla, Elam, LLP
6000 Western Place, Suite 200
Fort Worth, Texas 76107

OR2014-14281

Dear Mr. Anderle:

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# 533609.

The Town of Flower Mound (the "town"), which you represent, received a request for all police records pertaining to three named individuals and three specified addresses. You state the town will redact social security numbers under section 552.147 of the Government Code.¹ You state the town will release some responsive information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.130, and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹Section 552.147 of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

² We note the town failed to timely submit a portion of the information it seeks to withhold. *See* Gov't Code § 552.301(e) (requiring governmental body to submit within fifteen business days of receiving request for information comments explaining applicability of raised exceptions, copy of request for information, signed statement of date governmental body received request or evidence sufficient to establish date, and copy of information governmental body seeks to withhold or representative samples). Nonetheless, sections 552.101, 552.130, and 552.137 are mandatory exceptions to disclosure that can provide compelling reasons to overcome the presumption of openness caused by failure to comply with section 552.301. *See id.* §§ 552.007, .302. Thus, we will consider the applicability of these exceptions to the information submitted July 18, 2014, notwithstanding the town's violation of section 552.301 in requesting this decision.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses 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

(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). Upon review, we find the information we have marked was used or developed in investigations of alleged or suspected child abuse or neglect under chapter 261 of the Family Code. *See id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of section 261.201 of Family Code); *see also id.* § 101.003(a) (defining “child” for purposes of section 261.201 of Family Code). You do not indicate the town has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, we find the information is generally confidential under section 261.201 of the Family Code.

However, the requestor states she has been ordered by a court to conduct a social study with regard to the custody of one of the individuals named in the request. *See id.* § 107.051(b) (court ordered social study may be performed by domestic relations office). Section 261.201 of the Family Code provides that information encompassed by section 261.201(a) may be disclosed “for purposes consistent with [the Family Code] and applicable federal or state law.” *Id.* § 261.201(a). Chapter 411 of the Government Code constitutes “applicable state law” in this regard. Section 411.1285 of the Government Code provides in part that “[a] domestic relations office created under Chapter 203, Family Code, is entitled to obtain from the [Texas Department of Public Safety (“DPS”)] criminal history record information that relates to a person who is a party to a proceeding in which the domestic relations office is providing services permitted under Chapter 203, Family Code.” Gov’t Code § 411.1285(a); *see* Fam. Code ch. 203 (governing administration of domestic relations offices). Additionally, section 411.087 of the Government Code provides in part:

(a) [A] person, agency, department, political subdivision, or other entity that is authorized by this subchapter to obtain from the [DPS] criminal history record information maintained by the [DPS] that relates to another person is authorized to:

...

(2) obtain from any other criminal justice agency in this state criminal history record information maintained by that criminal justice agency that relates to that person.

Gov't Code § 411.087(a)(2). Criminal history record information ("CHRI") is defined as "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." *Id.* § 411.082(2). Thus, the information at issue contains CHRI. However, a domestic relations office may only receive CHRI if it relates to a person who is a party to a proceeding in which the domestic relations office is providing services permitted under chapter 203 of the Family Code. *See id.* § 411.1285(a); *see also* Open Records Decision No. 655 (1997) (discussing limitations on release of criminal history record information).

Therefore, if the town determines the information at issue is related to persons who are parties to a proceeding in which the requestor is providing services permitted under chapter 203 of the Family Code and release of the information is consistent with the Family Code, then the town must make CHRI available to the requestor and withhold the remaining information at issue under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. Although the town also raises common-law privacy for this information, we note a specific statutory right of access prevails over the common-law. *See CenterPoint Energy Houston Elec. LLC v. Harris County Toll Road*, 436 F.3d 541, 544 (5th Cir. 2006) (common-law controls only where there is no conflicting or controlling statutory law). The town must withhold the information at issue in its entirety under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code if the town determines either that the information at issue is not related to persons who are parties to a proceeding in which the requestor is providing services permitted under chapter 203 of the Family Code or that disclosure of the information is not consistent with the Family Code. *See* Fam. Code § 261.201(b)-(g), (k), (l) (listing entities authorized to receive section 261.201 information); Attorney General Opinion DM-353 at 4 n.6 (1995) (interagency transfer of information prohibited where confidentiality statute enumerates specific entities to which release of information is authorized and where potential receiving governmental body is not among statute's enumerated entities).

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. 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). Moreover, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public.

The present request requires the town to compile unspecified law enforcement records concerning the individuals named in the request, thus implicating the named individuals' rights to privacy. Therefore, to the extent the town maintains law enforcement records depicting any of the named individuals as a suspect, arrestee, or criminal defendant, the town must generally withhold any such information under section 552.101 in conjunction with common-law privacy.³ However, as previously noted, the requestor states she is conducting a court-ordered social study and may have a right of access to portions of the requested information under chapter 411 of the Government Code. *See* Gov't Code §§ 411.087(a)(2), .1285(a); *see also* Fam. Code § 107.051(b). Accordingly, if the town determines the requestor represents a domestic relations office created under chapter 203 of the Family Code that is providing services to persons who are parties to a proceeding under chapter 203 of the Family Code, then we find this requestor has a right of access to any CHRI pertaining to those persons contained in the information at issue. *See Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.—Fort Worth 2009, no pet.) (statutory provision controls and preempts common law only when statute directly conflicts with common law principle); *CenterPoint Energy*, 436 F.3d at 544. Thus, to the extent the town maintains any law enforcement records depicting any of the named individuals as a suspect, arrestee, or criminal defendant, the town must release information that shows identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions, and must withhold any remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. However, if the town determines the requestor does not represent a domestic relations office created under chapter 203 of the Family Code that is providing services to a person who is a party to a proceeding under chapter 203 of the Family Code, then, to the extent the town maintains any law enforcement records depicting any of the named individuals as a suspect, arrestee, or criminal defendant, the town must withhold any such information in its entirety under section 552.101 of the Government Code in conjunction with common-law privacy. We note you have submitted information that does not depict any of the named individuals as a suspect, arrestee, or criminal defendant; thus, this information is not part of a criminal history compilation and may not be withheld under section 552.101 on that basis. Therefore, we will consider your arguments against disclosure of this information.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides in relevant part the following:

³ As our ruling is dispositive, we do not address your other argument to withhold this information.

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 at 3-4 (1988), 370 at 2 (1983), 343 at 1 (1982). Upon review, we find a portion of the submitted information constitutes medical records. Accordingly, the town must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses laws that make 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 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.* at 10-12. Section 411.083 of the Government Code deems confidential CHRI 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) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for criminal justice purposes. *See id.* § 411.089(b)(1). The submitted information contains a Federal Bureau of Investigation ("FBI") number that constitutes CHRI generated by the FBI. Accordingly, we find the FBI number we have marked must be withheld under section 552.101 in conjunction with section 411.083 of the Government Code and federal law. However, you have failed to demonstrate how the remaining information you have marked constitutes confidential CHRI for purposes of chapter 411. As a result, the town may not withhold any of the remaining information under section 552.101 in conjunction with section 411.083 of the Government Code.

Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code, which provides “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” *Id.* § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). There is no indication the requestor has a right of access to this information under section 560.002. *See id.* § 560.002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual’s biometric identifier to another person unless the individual consents to disclosure). Accordingly, the town must withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

We note the doctrine of common-law privacy also excepts the types of information considered intimate and embarrassing by the Texas Supreme Court, which are delineated in *Industrial Foundation, Indus. Found.*, 540 S.W.2d at 683. This office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find the information we have marked within the submitted documents, as well as the information we have indicated on the submitted CD, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. You state that while the town has the technological capability to redact both audio and video information from the .mpg file on the submitted CD, it does not have the technological capability to edit or redact information from the other media files. The remaining media files include an audio recording and a video recording, both of which contain information subject to common-law privacy. We agree the town must withhold the video recording in its entirety under section 552.101 in conjunction with common-law privacy. However, because the town has the ability to copy the audio recording to submit it for our review, we believe the town has the capacity to redact the information we have indicated under common-law privacy. Accordingly, the town must withhold the audible private information, but may not withhold the remainder of the audio recording on this basis. Thus, the town must withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate public concern. Consequently, the town may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

You state the town will redact the information you have marked under section 552.130(c) of the Government Code.⁴ Section 552.130 provides information relating to a motor vehicle operator’s or driver’s license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. Gov’t Code § 552.130(a). Upon review, we find the motor vehicle record

⁴We note section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov’t Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

information you have marked, as well as the additional information we have marked in the submitted documents and indicated on the submitted CD, is subject to section 552.130 of the Government Code. As previously noted, you state the town does not have the technological capacity to redact information from media files on the submitted CD, other than the .mpg file. One of the submitted media files containing motor vehicle record information is an audio file. However, as we noted, because the town has the ability to copy the audio recording to submit it for our review, we believe the town has the capacity to redact the information we have indicated under section 552.130 of the Government Code. Accordingly, the town must withhold the audible motor vehicle information, but may not withhold the remainder of the audio recording on this basis. Thus, the town must withhold the motor vehicle record information you have marked, as well as the additional information we have marked and indicated, under section 552.130 of the Government Code.

In summary, if the town determines the information we have marked under section 261.201 of the Family Code is related to persons who are parties to a proceeding in which the requestor is providing services permitted under chapter 203 of the Family Code and release of the information is consistent with the Family Code, then the town must make the CHRI available to the requestor and withhold the remaining information at issue under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The town must withhold the information we have marked in its entirety under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code if the town determines either that the report is not related to persons who are parties to a proceeding in which the requestor is providing services permitted under chapter 203 of the Family Code or that disclosure of the information is not consistent with the Family Code. Additionally, to the extent the town maintains law enforcement records depicting any of the named individuals as a suspect, arrestee, or criminal defendant, the town must withhold any such information under section 552.101 of the Government Code in conjunction with common-law privacy. However, if the information at issue is related to persons who are parties to a proceeding in which the requestor is providing services permitted under chapter 203 of the Family Code, then the town must make CHRI available to the requestor. In that instance, the town must withhold the remaining information, to the extent it exists, under section 552.101 of the Government Code in conjunction with common-law privacy. Finally, the town must withhold (1) the information we have marked under section 552.101 of the Government Code in conjunction with the MPA; (2) the FBI number we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law; (3) the fingerprint we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; (4) the information we have marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy; and (5) the motor vehicle record information you have marked, and the additional information we have marked and indicated, under section 552.130 of the Government Code. The remaining information must be released.

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,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/ac

Ref: ID# 533609

Enc. Submitted documents

c: Requestor
(w/o enclosures)