



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 27, 1994

Ms. Annette Jones
Police Legal Adviser
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

OR94-267

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code (former V.T.C.S. article 6252-17a).¹ Your request was assigned ID# 21329.

The Waco Police Department (the "department") has received a request for information for narrative police reports in a sexual assault case which occurred on or about March 31, 1992. You advise us in your request that "[n]o arrests have been made in the case and the case has been suspended. If additional information can be developed in the case, the arrest and prosecution of the assailant may be possible." You have submitted copies of the requested information for our review and contend that this information is excepted from disclosure by sections 552.101, 552.103 and 552.108 of the Government Code.

Section 552.101 of the act excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Under section 552.101, information may be withheld on the basis of common-law privacy if it is highly intimate or embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and there is no legitimate public interest in its disclosure. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex.1976), *cert.denied*, 430 U.S. 931 (1977); Open Records Decision

¹The Seventy-third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

Nos. 579 at 2, 562 at 9, 561 at 5, 554 at 3 (1990). The detailed description and identity of a victim of sexual assault is ordinarily protected by common-law privacy. Open Records Decision No. 393 (1985); 339 (1982).

The report at issue here consists of a detailed statement by the investigating officer, a statement of the complainant, and the victim's medical information and physical evidence. Information which either identifies or would tend to identify the victim must be withheld under common-law privacy. *Id.* Although the requestor is aware of the identity of the victim in this case, the statements in the police reports about the sexual assault are similarly protected from disclosure by common-law privacy. We have marked those portions of the police reports that you must withhold to protect the victim's common-law privacy interests.²

Section 552.101 also prohibits disclosure of information considered confidential by statutory law. Some of the requested information in the police report is specifically exempted from disclosure by the Medical Practice Act. V.T.C.S. art. 4495b, § 5.08(b). Section 5.08(b) provides:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

The police report contains medical records regarding the victim that were created by a physician and must be withheld from public disclosure under section 552.101 in conjunction with the Medical Practice Act.

You also contend that section 552.103 excepts the requested information from required public disclosure. For section 552.103 to apply, a governmental body must demonstrate that the requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). In this instance, the department states that the activity in the case has been suspended. We note that the documents submitted reflect no activity in the case beyond May 1992. Moreover, nothing in the file indicates that the county or district attorney is actively seeking prosecution; thus, litigation is not pending or reasonably anticipated. *See* Open Records Decision No. 582 (1990). Consequently, the remaining information not otherwise protected by common-law privacy is not excepted from disclosure under section 552.103.

²The department also argues that the requested records discuss possible suspects in the case and that this "information might cast a false light on those persons, who have never been charged with the crime." In Open Records Decision No. 579 (1990), however, this office specifically held that the statutory predecessor to Section 552.101 did not incorporate the common-law tort of false-light privacy. Rather, the privacy aspect of this provision excepts only private facts in accordance with the *Industrial Foundation* common-law privacy test. *See id.* at 7.

The department contends that section 552.108 also excepts the information from disclosure. Section 552.108 provides:

(a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure].

(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 [required public disclosure].

Traditionally, when applying section 552.108, our office has distinguished between cases that are still under active investigation and those that are closed. In cases that are still under active investigation, this section exempts from disclosure all information except that generally found on the first page of the offense report. *See generally Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Once a case is closed, information may be withheld under section 552.108 only if its release "will unduly interfere with law enforcement or crime prevention." *See Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Attorney General Opinion MW-466 (1982); Open Records Decision Nos. 444, 434 (1986). The department has not explained how release of the information would unduly interfere with law enforcement or crime prevention beyond protecting the victim's common-law privacy interests. Therefore, any remaining information not prohibited from disclosure by common-law privacy must be disclosed.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/JCH/AMS/sbm

Ref.: ID# 21329

Enclosures: Marked documents

cc: Mr. Jeffrey L. McMinn
126 Villita
San Antonio, Texas 78205
(w/o enclosures)