



September 19, 2002

Mr. Lance Beversdorff
Staff Attorney
Texas Youth Commission
P.O. Box 4260
Austin, Texas 78765

OR2002-5296

Dear Mr. Beversdorff:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168875.

The Texas Youth Commission (the "commission") received a request for the masterfile concerning her son, a minor committed to the care of the commission.¹ You claim that a portion the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note, and you acknowledge, that the commission has not sought an open records decision from this office within the ten business day time period prescribed by section 552.301 of the Government Code. We also note that you have failed to provide a copy of the written request for information. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See Gov't Code § 552.302; Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). To overcome this presumption, the governmental body must show a compelling interest to withhold the information. *See Gov't Code § 552.302; Hancock*, 797 S.W.2d at 381. Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 at 2 (1977). As the presumption of openness can be overcome by a showing that information is confidential by law, we will consider your arguments under section 552.101.

¹As you have not submitted a copy of the request for information, we take our description of the request from your brief.

Next, we note that the submitted records include a sex offender registration form. Article 62.08 of the Code of Criminal Procedure provides that information contained in the sex offender registration database "is public information, with the exception of any information: (1) regarding the person's social security number, driver's license number, or telephone number; (2) that is required by the department under Article 62.02(b)(6); or (3) that would identify the victim of the offense for which the person is subject to registration." Therefore, the commission must release the marked sex offender registration form after redacting the registrant's social security number. *See generally*, Open Records Decision No. 525 (1989) (stating that Public Information Act's exceptions do not, as general rule, apply to information made public by other statutes); *see also* Open Records Decision No. 645 at 3 (1996) (interpreting predecessor to article 68.02 as requiring governmental bodies to withhold registrant's social security number, driver's license number, numeric street address, and telephone number as well as information that on its face would directly reveal identity of victim).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes, such as section 61.073 of the Human Resources Code, which provides:

The commission shall keep written records of all examinations and conclusions based on them and of all orders concerning the disposition or treatment of each child subject to its control. Except as provided by Section 61.093(c), these records are not public and are available only according to the provisions of Section 58.005, Family Code, and Chapter 61, Code of Criminal Procedure.

Section 58.005(a) of the Family Code provides that "[i]nformation obtained for the purpose of diagnosis, examination, evaluation, or treatment . . . of a child by [an agency] providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court" may only be disclosed to only certain individuals under certain circumstances. Some of the submitted documents consist of records of the examination and treatment of the individual at issue. In addition, several of the documents you seek to withhold under section 61.073 consist of records of the psychiatric counseling and treatment of this individual.

We recognize that section 61.073 encompasses the submitted mental health records as records of examination and treatment in general. We note, however, that chapter 611 of the Health and Safety Code specifically addresses the public availability of mental health records. Where information falls within both a general and a specific statutory provision, the specific provision prevails over the general. *See Cuellar v. State*, 521 S.W.2d 277 (Tex.Crim.App.1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones); Open Records Decision Nos. 598 (1991), 583 (1990), 451 (1986). Accordingly, we will address the mental health records at issue under

chapter 611 of the Health and Safety Code. Section 611.002 of the Health & Safety Code provides in pertinent part:

- (a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.
- (b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Under section 611.001, a “professional” is (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. A portion of the submitted information consists of records of the identity, diagnosis, evaluation, or treatment of a patient that are confidential with respect to the general public and may only be disclosed as provided under sections 611.004 and 611.0045 of the Health and Safety Code.

Section 611.0045 states in pertinent part:

- (a) Except as otherwise provided by this section, a patient is entitled to have access to the content of a confidential record made about the patient.
- (b) The professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient’s physical, mental, or emotional health.
- (c) If the professional denies access to any portion of a record, the professional shall give the patient a signed and dated written statement that having access to the record would be harmful to the patient’s physical, mental, or emotional health and shall include a copy of the written statement in the patient’s records. The statement must specify the portion of the record to which access is denied, the reason for the denial, and the duration of the denial.

....

- (f) The content of a confidential record shall be made available to a person listed by Section 611.004(a)(4) or (5) who is acting on the patient’s behalf.

Section 611.004(a)(4) provides in turn:

- (a) A professional may disclose confidential information only:

....

(4) to a person who has the written consent of the patient, or a parent if the patient is a minor, or a guardian if the patient has been adjudicated as incompetent to manage the patient's personal affairs.

In this case, the records at issue relate to a minor patient. The requestor is the patient's parent. The Texas Supreme Court addressed a parent's right of access to mental health records in *Abrams v. Jones*, 35 S.W.3d 620 (Tex. 2000). In that case, the Texas Supreme Court held that "when a parent seeks a child's mental health records 'on the patient's behalf,' [as provided in section 611.0045(f)], the parent steps into the shoes of the patient." *Abrams*, 35 S.W.3d at 626. The court determined that section 611.0045(f) affords third parties, including a parent, no greater rights of access to mental health records than those of the patient. *Id.* Thus, the court held, because section 611.0045(b) can limit a patient's own rights to the patient's records, section 611.0045(b) can also limit a parent's right to a patient's records when the parent stands in the patient's stead. *Id.* We therefore address the patient's right of access to the records under sections 611.0045(a) and (b).

Section 611.0045(a) gives a patient a right of access to the requested information, except as provided by other subsections of section 611.0045. *See* Open Records Decision No. 565 at 3 (1990) (upon written consent of subject, mental health records must be released). Section 611.0045(b) permits the professional to deny a patient access to any portion of that patient's mental health records if the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health. Section 611.0045(c) establishes the procedure that a professional must follow when denying access to the patient's records. Here, you contend that release of the records at issue would have a detrimental effect on the patient. Based on your arguments and our review of the documents, we understand you to assert that a professional has determined that release of the records would be harmful to the patient's physical, mental, or emotional health. We therefore determine that, under section 552.101 in conjunction with section 611.0045(b) of the Health and Safety Code, the commission must withhold the records we have marked. The professional making the determination to deny access must also submit a written denial of access to the requestor as required by section 611.0045(c) of the Health and Safety Code.

Next, we note that several of the documents, which we have marked, consist of records of examination and treatment but are not mental health records. We address these documents under section 61.073 of the Human Resources Code. As noted, section 61.073 requires that except as provided by section 61.093(c), records of examination and treatment of an individual in the custody of the commission are not public and are available only as provided in section 58.005 of the Family Code and chapter 61 of the Code of Criminal Procedure. We find that the requestor is not a party to whom the information at issue may be disclosed pursuant to section 58.005 of the Family Code. We further find that section 61.093(c) of the Human Resources Code and chapter 61 of the Code of Criminal Procedure do not apply in this instance. Accordingly, we determine that the commission must withhold the

examination and treatment records we have marked under section 552.101 of the Government Code in conjunction with section 61.073 of the Human Resources Code.

We also note that the submitted records include law enforcement and court records concerning juvenile conduct. Section 552.101 also encompasses section 58.007 of the Family Code, which provides that juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential. Section 58.007 states in pertinent part:

(b) Except as provided by Article 15.27, Code of Criminal Procedure, the records and files of a juvenile court, a clerk of court, a juvenile probation department, or a prosecuting attorney relating to a child who is a party to a proceeding under this title are open to inspection only by:

- (1) the judge, probation officers, and professional staff or consultants of a juvenile court;
- (2) a juvenile justice agency as that term is defined by Section 58.101;
- (3) an attorney for a party to the proceeding;
- (4) a public or private agency or institution providing supervision of the child by arrangement of the juvenile court, or having custody of the child under juvenile court order; or
- (5) with leave of the juvenile court, any other person, agency, or institution having a legitimate interest in the proceeding or in the work of the court.

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(b),(c). We have marked documents that are subject to section 58.007. It does not appear that any of the access provisions in that section have been met. Accordingly, these documents are confidential pursuant to section 58.007 of the Family Code and must be withheld under section 552.101 of the Government Code.

We also note that the submitted information includes records that are subject to section 261.201 of the Family Code, which provides in part:

(a) The 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, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

We have marked information that relates to an allegation of child abuse or neglect within the scope of section 261.201 of the Family Code. You have not indicated that the investigating agency has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, the marked information is confidential pursuant to section 261.201 of the Family Code and must be withheld under section 552.101 of the Government Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

The submitted information also includes fingerprint information that is subject to sections 559.001, 559.002, and 559.003 of the Government Code. These provisions of the Government Code provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) “Biometric identifier” means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) “Governmental body” has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

As noted above, the fingerprints contained in the sex offender registration form must be released. *See* Gov't Code § 559.002(1)(B) (disclosure required by state law other than Public Information Act); *see also* Crim. Proc. Code art. 62.08. However, the release of other fingerprints contained in the file does not appear to be permitted under section 559.002. Therefore, under section 552.101 in conjunction with section 559.003 of the Government Code, the commission must withhold the fingerprint information that we have marked.

The submitted information also includes a copy of an identification card issued by the State of Texas. Section 552.130 of the Government Code excepts from disclosure "a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document." Thus, you must withhold the photocopy of the state-issued personal identification document, which we have marked.

Finally, we note that the submitted information includes social security number information. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for

concluding that the social security number in the submitted information is confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the commission pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, the commission must withhold the mental health record information and other treatment information that we have marked. Marked juvenile law enforcement records and information concerning alleged child abuse are confidential pursuant to provisions of the Family Code and must be withheld. The commission must also withhold the marked fingerprint information and the photocopy of the Texas-issued personal identification document. Social security number information must also be withheld if it was obtained or maintained pursuant to a law enacted after October 1, 1990. All other information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

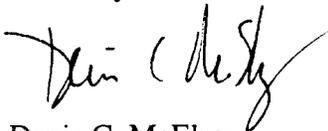
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/sdk

Ref: ID# 168875

Enc. Submitted documents

c: Ms. Sharla Rocka
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(w/o enclosures)