



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 27, 2003

Ms. Sheri Bryce Dye
Assistant Criminal District Attorney
Bexar County
300 Dolorosa, 5th Floor
San Antonio, Texas 78205-3030

OR2003-2098

Dear Ms. Dye:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178401.

The Bexar County District Attorney's Office (the "District Attorney") received a request for "any documents concerning any investigation by Bexar County involving, or regarding my client[.]" You assert the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. We have reviewed the information you submitted and we have considered the exceptions you claim.

Initially, we note the submitted information is subject to section 552.022 of the Government Code, which provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, section 552.022(a)(1) makes the requested information expressly public because it pertains to a completed investigation. Therefore, the District Attorney may withhold this information only to the extent it is made confidential under other law or is otherwise protected by section 552.108 of the Government Code. Accordingly, though the District Attorney claims sections 552.103 and 552.111, these exceptions are discretionary and thus, do not constitute other law for the purposes of section 552.022. *See* Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103), 473 (1987) (governmental body may waive section 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the District Attorney may not withhold the submitted information under sections 552.103 and 552.111 of the Government Code.

Next, we note the Medical Practice Act (the "MPA") governs some information in the submitted documents.¹ Section 159.002 of the MPA provides, in part, as follows:

(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.

Occ. Code § 159.002(b), (c). The MPA permits disclosure of MPA records to the patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. Occ. Code §§ 159.003, .004, .005. The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Here, the medical records at issue concern the client of the requestor. Therefore, the District Attorney may release the MPA records, which we have marked, only in accordance with the MPA. Open Records Decision No. 598 (1991).

Also, we note the submitted information contains polygraph records, which are governed by section 1703.306 of the Occupations Code. Section 1703.306 states the following:

¹ Under the rules of statutory construction, a specific statute prevails over a more general statute. Gov't Code § 311.026; *City of Dallas v. Mitchell*, 870 S.W.2d. 21 (Tex. 1994).

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

Occ. Code § 1703.306. Here, the requestor represents one of the examinees. Access to polygraph information is governed by section 1703.306 of the Occupations Code. *See* Occ. Code § 1703.306. Therefore, though the polygraph information contains private victim-identifying information,² section 1703.306(a)(1) expressly provides the examinee's representative with access to the information. Accordingly, upon receipt of proper consent, the District Attorney must release to the requestor his client's polygraph information, without redactions. We have marked the information to be released. Additionally, we have marked the polygraph information of another examinee that is confidential under section 1703.306 of the Occupations Code.

Lastly, you assert section 552.108, in connection with your assertion of attorney work product, and argue that because the requestor seeks the District Attorney's "entire" criminal case file, the information is excepted from disclosure in its entirety pursuant to the holding in *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994) (discovery request for district attorney's entire litigation file may be denied because decision of what to include in file necessarily reveals prosecutor's mental impressions or legal reasoning). Section 552.108 reads in pertinent part:

(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:

....

² This ruling subsequently addresses the issue of victim-identifying information.

(4) it is information that:

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

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from [required public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

We agree the request for information encompasses the prosecutor's entire case file. *Curry* provides the release of such information would reveal the prosecutor's mental impressions or legal reasoning. Accordingly, except as otherwise noted in this ruling, the District Attorney may withhold the prosecution file pursuant to subsection 552.108(a)(4)(B) of the Government Code.

Section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company 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).

Generally, basic information includes the identification and description of the complainant. Open Records Decision No. 127 (1976). However, section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common-law privacy. For information to be protected from public disclosure under common-law privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information when (1) it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Industrial Found.*, 540 S.W.2d at 683. In this instance, the information pertains to a criminal investigation into allegations of official oppression involving sexual harassment in the workplace. See Penal Code § 39.03(a)(3). After reviewing the information, we believe the identifying information of the victim is highly intimate or embarrassing and the public has no legitimate interest in this information. See *Industrial Found.*, 540 S.W.2d at 685.

Therefore, the District Attorney must withhold identifying information of the victim from basic information under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the District Attorney must release the marked documents only in accordance with the MPA. Further, the District Attorney must withhold the polygraph information, which we have marked, under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. However, if and when the requestor provides the proper authorization for release, the District Attorney must release the polygraph information of the requestor's client under section 1703.306. With the exception of basic information, the District Attorney may withhold the remainder of the file pursuant to section 552.108 of the Government Code. With respect to basic information, the District Attorney must withhold victim-identifying information as required by section 552.101 of the Government Code in conjunction with common-law privacy.

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 Dep't of Pub. 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,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 178401

Enc: Submitted documents

c: Mr. David Hansen
Schwartz & Eichelbaum, P.C.
4201 West Parmer Lane, Suite A-100
Austin, Texas 78727
(w/o enclosures)