



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 20, 2003

Ms. Mia Settle-Vinson
Assistant City Attorney
City of Houston - Legal Department
P.O. Box 1562
Houston, Texas 77251-1562

OR2003-3367

Dear Ms. Settle-Vinson:

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# 181309.

The Houston Police Department (the "Department") received two media requests for information concerning the Department's crime lab. The Houston Chronicle (the "Chronicle") seeks the Identigene report on the re-testing of the DNA evidence in the Josiah Sutton case. The Associated Press (the "AP") seeks the DNA re-testing results for eight individuals, including Josiah Sutton. Additionally, the AP asks for a copy of a crime lab audit conducted by the Texas Department of Public Safety and Tarrant County. You inform us the Department will release the audit to the AP. However, you advise us that the Department does not have any responsive information with respect to seven of the eight individuals named in the AP's request. You assert the submitted responsive information is excepted from disclosure under section 552.101 of the Government Code. Also, we acknowledge our receipt of comments submitted by the law firm representing the Chronicle, the employer of one of the requestors. *See Gov't Code* § 552.304 (permitting interested third party to submit comments explaining why information should or should not be released). We have reviewed the submitted information and we have considered the arguments asserted by the Department and the Chronicle.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses confidentiality provisions such as Family Code section 58.007. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. The relevant language of section 58.007(c) reads as follows:

(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(c). The submitted documents indicate the individual whose information is at issue was a juvenile suspect who allegedly engaged in delinquent conduct that occurred after September 1, 1997.

Basing its argument primarily on section 54.02(h) of the Family Code, the Chronicle argues section 58.007 does not apply in this particular case because the juvenile was certified to stand trial as an adult. Section 54.02(h) provides the following:

(h) If the juvenile court waives jurisdiction, it shall state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court, and shall transfer the person to the appropriate court for criminal proceedings and cause the results of the diagnostic study of the person ordered under Subsection (d), including psychological information, to be transferred to the appropriate criminal prosecutor. *On transfer of the person for criminal proceedings, the person shall be dealt with as an adult and in accordance with the Code of Criminal Procedure.* The transfer of custody is an arrest.

Fam. Code § 54.02(h) (emphasis added). While the Chronicle stipulates the subject of the requested information met the definition of “child” under section 51.02 of the Family Code¹ at the time of arrest, the Chronicle contends that because the information at issue concerns

¹ A “child” is a person who is:

(A) ten years of age or older and under 17 years of age; or

(B) seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.

an individual who was certified to stand trial as an adult, any law enforcement records pertaining to this individual are no longer subject to the confidentiality aspects of section 58.007 of the Family Code.

We disagree with the Chronicle's assertion. Section 54.02(h) pertains to procedural matters in the prosecution of the offender, not access to offender records. Section 51.14 of the Family Code, the predecessor provision to section 58.007, governed public disclosure of law enforcement records concerning a "child" under the Juvenile Justice Code. In relevant part, this provision stated the following:

Except as provided by Article 15.27, Code of Criminal Procedure, and *except for files and records relating to a charge for which a child is transferred under Section 54.02 of this code to a criminal court for prosecution*, the law-enforcement files and records are not open to public inspection nor may their contents be disclosed to the public[.]

Fam. Code § 51.14(d) (repealed 1995) (emphasis added). This former provision expressly provided an exception to confidentiality for records of juvenile offenders who were certified to stand trial as an adult. However, when the 74th Legislature repealed section 51.14 and replaced it with section 58.007, it did not include any language providing such an exception to confidentiality as required by section 58.007(c). *See* Fam. Code § 58.007(c). Therefore, although an exception to confidentiality existed under the former law, the current law does not provide an exception to confidentiality. *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex. 1985) ("Every word excluded from a statute must be presumed to have been excluded for a reason."); *State v. Eversole*, 889 S.W.2d 418, 425 (Tex. App. — Houston [14th Dist.] 1994, pet. ref'd) ("when the legislature amends a particular statute and omits certain language of the former statute in its amended version, the legislature specifically intended that the omitted portion is no longer the law."); *Cook v. State*, 824 S.W.2d 634, 643 (Tex. App. — Dallas 1991, pet. ref'd) (court should give effect to intended change in statute's amendment and presume that every word excluded from amended statute must have been excluded for a purpose); *Durish v. Channelview Bank*, 809 S.W.2d 273, 277 (Tex. App. — Austin 1991, writ denied) (legislature's amendment indicates it intended to change original act by creating new right or withdrawing old one).

The Chronicle also cites to section 58.203 of the Family Code in support of its argument that the information is not confidential under section 58.007(c). Section 58.203 provides for automatic restriction of access to records relating to a person's juvenile case if the juvenile case was not certified for trial in criminal court under section 54.02. Fam. Code § 58.203(3). Thus, the Chronicle argues that because the offender was certified as an adult, his records are not afforded automatic restriction of access. While section 58.203 does not provide for automatic restriction of access if the juvenile case was certified for trial in criminal court, it neither precludes some restriction of access nor requires disclosure of the records. In fact, subchapter C, which includes section 58.203, has its own access provisions detailing how and to whom the information certified pursuant to section 58.203 may be released. Thus, the

records governed by subchapter C are different from those addressed in subchapter A, which includes section 58.007(c).

Lastly, in support of its argument that the information is not confidential under section 58.007(c), the Chronicle states that the offender's "criminal records are kept in computer form in Harris County's Justice Information Management System (JIMS) (as opposed to the Juvenile Justice Information System maintained by the State—see Tex. Family Code § 58.102)." This fact is not dispositive of whether the information is confidential under section 58.007(c). The statute takes this fact into consideration by providing that law enforcement records concerning a child may not be disclosed to the public and shall "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." Fam. Code § 58.007(c).

Accordingly, because the document at issue pertains to a "child" who allegedly engaged in delinquent conduct after September 1, 1997, we conclude the Department must withhold the responsive information under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code. See Fam. Code §§ 51.02(2) ("child" means a person who is ten years of age or older and under 17 years of age), 51.03(a) ("delinquent conduct" is conduct that violates a penal law of this state punishable by imprisonment), 58.007(c).

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# 181309

Enc: Submitted documents

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