



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 13, 2004

Ms. Mary E. Reveles
Assistant County Attorney
Fort Bend County
301 Jackson Street, Suite 728
Richmond, Texas 77469-3108

OR2004-0283

Dear Ms. Reveles:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 194246.

The Fort Bend County Sheriff's Office (the "office") received a request for the following information: (1) the complete employee file and job description of Jeannie Gage; (2) the employee file of any "spokesperson" for the office since the year 2000; and (3) six categories of information regarding cases "where children were removed by Fort Bend County [Child Protective Services] CPS and involved the [office] for the year 2000, 2001, 2002, and 2003." You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, and 552.130 of the Government Code. We have reviewed the representative sample of information you submitted and considered the exceptions you claim.¹

Initially, you note that this office has previously ruled on this requestor's requests for information regarding allegations of abuse or neglect under Chapter 261 of the Family Code. See Open Records Letters Nos. 2000-2870 (2000), 2000-3398 (2000), 2000-2504 (2000), 2000-3461 (2000), 2001-0018 (2001), 2000-3784 (2000), and 2003-4098 (2003); see also Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under section 552.301). However, in this instance the requestor claims that the office policy regarding the release of Chapter 261 information has changed. Because the requestor claims that the circumstances have changed and because

¹ We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

the office has again submitted this information, we will address the information you submitted and consider the exceptions you claim.

We next address the requestor's assertion that the release of certain information protected by Chapter 261 by the office spokesperson to the media constitutes a waiver of the same information in other cases involving the office and CPS. We note that section 261.201 of the Family Code contains no provision for waiver of confidentiality. We also note that mandatory exceptions under the Public Information Act, such as section 552.101, are not waivable. *See Gov't Code § 552.007* (voluntary disclosure of certain information is allowed, unless disclosure is expressly prohibited by law or the information is confidential under law); *see also* Open Records Decision No. 400 (1983) (prohibition against selective disclosure does not apply when governmental body releases confidential information to the public). Here, the office claims that a portion of the requested information is confidential under section 261.201 of the Family Code. Thus, even if the office previously released some of the requested information to the public, the office would nevertheless be required to withhold the information in this instance if it were found to be confidential. Therefore, we will address the office's arguments under section 552.101 in conjunction with section 261.201.

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 another statute makes confidential. Section 261.201(a) of the Family Code provides as follows:

(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 note that the information found in Exhibits B-F that is responsive to item number three of the request, consists of reports, records, and working papers used or developed in an investigation made under chapter 261 of the Family Code. You state that neither the office nor CPS has adopted specific rules with regard to the release of this type of information. Therefore, the information contained in Exhibits B-F is confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (construing predecessor statute). Accordingly, you must not release this information. As our

ruling on item number three of the request is dispositive, we do not address your other arguments regarding this information.

We now address your arguments for the information responsive to items one and two of the request. Section 552.101 also encompasses statutes such as the Medical Practice Act (the "MPA"). Occ. Code §§ 151.001-165.160. Section 159.002 of the Occupations Code reads, in part:

(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 in 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.

Exhibit H of the submitted information contains a confidential medical record that is subject to the MPA. This document may be released only in accordance with the MPA. Open Records Decision No. 598 (1991). *See* Occ. Code §§ 159.002(c), .004, .005. We have marked the medical record subject to the MPA.

The submitted information also contains a mental health record. Section 611.002 of the Health and Safety Code applies to "[c]ommunications 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." *See also* Health & Safety Code § 611.001 (defining "patient" and "professional"). We have marked the information in Exhibit H of the submitted documents that is within the scope of section 611.002 and may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Health & Safety Code § 611.002(b); *see id.* §§ 611.004, .0045.

The information in Exhibit H contains fingerprint information that is subject to sections 560.001, 560.002, and 560.003 of the Government Code.² These sections, which are also encompassed by section 552.101, provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

² Sections 559.001, 559.002, and 559.003 of the Government Code were renumbered as sections 560.001, 560.002, and 560.003 of the Government Code by the 78th Legislature, effective September 1. *See* Act of May 20, 2003, 78th Leg., R.S., ch. 1275, § 2(78), 2003 Tex. Sess. Laws 4140, 4144.

(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. 560.002. 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. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

It does not appear to this office that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the office must withhold this information, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information when (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the public has no legitimate interest in the information. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). 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. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public

disclosure under common-law privacy: personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990) and some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Having reviewed the submitted information in Exhibits G and H, we find that some of the information is protected by common-law privacy and must therefore be withheld pursuant to section 552.101. We have marked this information.

You also assert that section 552.117 of the Government Code may be applicable to some of the submitted information found in Exhibits G and H. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Section 552.117(a)(2) excepts the same information regarding a peace officer regardless of whether the officer made an election under section 552.024.³ Thus, pursuant to section 552.117(a)(2), the office must withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of any individual who was a licensed peace officer at the time this request was received. Pursuant to section 552.117(a)(1), the office must withhold the same information for any employee or official who was not a licensed peace officer at the time this request was received but who elected, prior to the receipt of this request, to keep such information confidential. We have marked the types of information that may be confidential under section 552.117.

We note that social security numbers that are not otherwise excepted from disclosure under section 552.117 might nevertheless be excepted from disclosure under section 552.101 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 numbers at issue are 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 the social security numbers, the office should ensure that it did not obtain or maintain the social security numbers pursuant to any provision of law, enacted on or after October 1, 1990.

Finally, the submitted documents in Exhibits G and H contain information that is subject to section 552.130 of the Government Code. Section 552.130 provides in relevant part:

³ "Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Accordingly, you must withhold the Texas motor vehicle record information we have marked.

We now address your claims under section 552.108 of the Government Code for the remainder of the information found in Exhibit H which pertains to Ms. Gage's personal history information. Section 552.108(b)(1) excepts from public disclosure an internal record of a law enforcement agency that is maintained for internal use in matters relating to law enforcement or prosecution if "release of the internal record or notation would interfere with law enforcement or prosecution." Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in [a law enforcement agency], avoid detection, jeopardize officer safety, and generally undermine [law enforcement] efforts to effectuate the laws of this State." *City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.-Austin 2002, no pet.)

This office has stated that under the statutory predecessor to section 552.108(b), a governmental body may withhold information that would reveal law enforcement techniques or procedures. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 456 (1987) (release of forms containing information regarding location of off-duty police officers in advance would unduly interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would unduly interfere with law enforcement), 409 (1984) (if information regarding certain burglaries exhibit pattern that reveals investigative techniques, information is excepted under predecessor section 552.108), 341 (1982) (release of certain information from Department of Public Safety would unduly interfere with law enforcement because release would hamper departmental efforts to detect forgeries of drivers licenses), 252 (1980) (predecessor section 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted).

To claim this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common-law rules, and constitutional

limitations on use of force are not protected under section 552.108), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). Whether disclosure of particular records will interfere with law enforcement or prosecution must be decided on a case-by-case basis. *See* Attorney General Opinion MW-381 (1981).

You state that the release of Ms. Gage's complete personal history information could "interfere with the detection, investigation or prosecution of a crime[.]" You further explain that the "public release of such personal information could be used against Ms. Gage by various suspects and compromise her ability to perform her duties." Upon review, we conclude that you have not demonstrated that the release of this submitted information would interfere with law enforcement or crime prevention. Therefore, the office may not withhold the remainder of Ms. Gage's personnel information found in Exhibit H of the submitted documents. *See City of Fort Worth v. Cornyn*, 86 S.W.3d (Gov't Code § 552.108(b)(1) not applicable to personnel information obtained from third parties to aid police department in hiring decisions).

In summary, Exhibits B-F are excepted from disclosure pursuant to section 552.101 in conjunction with section 261.201 of the Family Code. The marked medical record in Exhibit H may only be released as provided under the MPA. The marked mental health record in Exhibit H may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. The office must also withhold the biometric information we have marked under section 552.101 in conjunction with section 560.003. Private information we have marked must be withheld under section 552.101. Present and former home addresses and telephone numbers, social security numbers, and family member information of individuals who were peace officers when this request was received must be withheld under section 552.117(a)(2). However, if the named individuals are not peace officers, but are current or former employees who elected, prior to the receipt of this request, to keep their information confidential, then the same information must be withheld under section 552.117(a)(1). The office must also withhold the Texas driver's license and motor vehicle information under section 552.130. The remaining information must be released to the requestor.

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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 194246

Enc. Submitted documents

c: Mr. Gary W. Gates, Jr.
2205 Avenue I #117
Rosenberg, Texas 77471
(w/o enclosures)