



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 24, 2006

Ms. Julie Joe  
Assistant County Attorney  
Travis County  
P.O. Box 1748  
Austin, Texas 78767

OR2006-00790

Dear Ms. Joe:

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# 240718.

The Travis County District Attorney's Office (the "district attorney") received a request for all information regarding a named individual's conviction for criminal solicitation of a minor from that individual's attorney. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note the submitted information includes an affidavit for warrant of arrest and detention signed by a magistrate, as well as an unsigned copy of the same affidavit. Article 15.26 of the Code of Criminal Procedure provides:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is *public information*, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

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<sup>1</sup>We assume that the 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 that those records contain substantially different types of information than that submitted to this office.

Code Crim. Proc. art. 15.26 (emphasis added). These affidavits are made public by this provision. The exceptions found in the Act do not, as a general rule, apply to information that is made public by other statutes. *See* Open Records Decision No. 525 (1989) (statutory predecessor). Therefore, the submitted affidavits for warrant of arrest and detention, which we have marked, must be released to the requestor.

The submitted information also includes an affidavit to support a search warrant. This document is subject to article 18.01 of the Code of Criminal Procedure, which provides in part:

(b) No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested. The affidavit is public information if executed, and the magistrate's clerk shall make a copy of the affidavit available for public inspection in the clerk's office during normal business hours.

Crim. Proc. Code art. 18.01(b). Therefore, to the extent that the search warrant affidavit that we have marked was submitted in support of a search warrant that was executed, the affidavit must be released in accordance with article 18.01(b) of the Code of Criminal Procedure.

The submitted information also includes documents that are subject to chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002 provides in part the following:

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.

Health & Safety Code § 611.002(a). Section 611.001 defines a "professional" as (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. Mental health records may only be released in accordance with the access provisions of sections 611.004 and 611.0045 of the Health and Safety Code. *See* Open Records Decision No. 565 (1990). These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. Health & Safety Code § 611.004, .0045. In this instance, the requestor is the attorney for the patient to whom the mental health records pertain and may have a right of access to them. The district attorney may only release the marked mental health records in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

Next, we note, and you acknowledge, that following receipt of the request the district attorney did not seek an open records decision from this office with regard to the submitted information within the ten-day statutory deadline imposed by section 552.301(b) of the Government Code. *See* Gov't Code § 552.301(b). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake, or when information is confidential under other law. Open Records Decision No. 150 (1977). Because the applicability of sections 552.101 and 552.137 of the Government Code can each provide a compelling reason to withhold information, we will address the applicability of these exceptions to the remaining submitted information.

Next, we note the remaining submitted information includes court-filed documents. Information filed with a court is generally a matter of public record and may not be withheld from disclosure. Gov't Code § 552.022(a)(17); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). Therefore, under section 552.022, these court documents must be released unless they are confidential under other law. Because section 552.101 constitutes other law for purposes of section 552.022, we will consider your arguments under this exception for all the remaining submitted information, including the court-filed documents.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information made confidential by statute. You claim the submitted information is confidential under section 261.201 of the Family Code. Section 261.201 provides:

(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.

Family Code § 261.201(a). You have not demonstrated, nor is it apparent from our review, that the submitted information was used or developed in an investigation under chapter 261. Thus, we conclude that this information is not within the scope of section 261.201 of the Family Code. Accordingly, the district attorney may not withhold the remaining submitted information on the basis that it is confidential under section 261.201.

However, section 552.101 also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The information protected by constitutional privacy must concern the "most intimate aspects of human affairs." *See id.* at 5; *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985). We have marked the submitted information that is confidential under constitutional privacy and that the district attorney must withhold under section 552.101.

Finally, we note the remaining submitted information includes e-mail addresses that are excepted under section 552.137 of the Government Code.<sup>2</sup> Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). We have marked e-mail addresses in the submitted information that are not of a type specifically excluded by section 552.137(c).<sup>3</sup> Therefore, the district attorney must withhold these marked e-mail addresses in accordance with section 552.137 unless the district attorney receives consent for their release.<sup>4</sup>

In summary, the marked affidavits for warrant of arrest and detention must be released pursuant to article 15.26 of the Code of Criminal Procedure. To the extent that the marked search warrant affidavit was submitted in support of a search warrant that was executed, the affidavit must be released in accordance with article 18.01(b) of the Code of Criminal

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>3</sup>We note requestor has a special right of access to his client's e-mail addresses. *See* Gov't Code § 552.023 (person or person's authorized representative has special right of access to information relating to person and protected from public disclosure by laws intended to protect that person's privacy interests). Because this information would be excepted from disclosure to the general public, the district attorney must request another ruling from our office if it receives a future request for this information from an individual other than an authorized representative of the requestor's client.

<sup>4</sup>We note section 552.137 is other law for purposes of section 552.022(a)(17) of the Government Code.

Procedure. The marked mental health records must be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. We have marked the information that must be withheld under section 552.101 in conjunction with the doctrine of constitutional privacy. The marked e-mail addresses must be withheld pursuant to section 552.137 of the Government Code unless the district attorney receives consent for their release. The remaining submitted 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,

A handwritten signature in black ink that reads "Ramsey Abarca". The signature is written in a cursive, flowing style.

Ramsey A. Abarca  
Assistant Attorney General  
Open Records Division

RAA/er

Ref: ID# 240718

Enc. Submitted documents

c: Mr. Gary Cohen  
Attorney at Law  
1307 West Avenue  
Austin, Texas 78701  
(w/o enclosures)