



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 19, 2008

Ms. Pamela Smith  
Assistant General Counsel  
Texas Department of Public Safety  
P.O. Box 4087  
Austin, Texas 78773-0001

OR2008-12944

Dear Ms. Smith:

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# 320838.

The Texas Department of Public Safety (the "department") received a request for information pertaining to a named police officer, including records of an investigation and prosecution for sexual assault of a child. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

The submitted information pertains to an investigation of sexual assault, and the department seeks to withhold the identifying information of the victims other than the requestor's client, which you have marked. The requestor, in correspondence to this office and the department, states that "to expedite the release of records, the requestor would agree to that proposal." *See* Gov't Code § 552.222; Open Records Decision No. 31 (1974). Accordingly, the department is not required to release the identifying information of the victims other than the requestor's client in response to this request.

We next note that the submitted information consists of a completed investigation that is subject to section 552.022 of the Government Code. Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or expressly confidential under other law. Although you assert this information is excepted under section 552.103 of the Government Code, this section is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022.

*See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, the department may not withhold the submitted information under section 552.103. However, section 552.101 of the Government Code does constitute other law for purposes of section 552.022; therefore, we will consider whether this section requires you to withhold any of the information at issue.

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. Section 261.201(a) of the Family Code provides as follows:

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.

Fam. Code § 261.201(a). The submitted information consists of files, reports, records, communications, or working papers used or developed in an investigation under chapter 261; therefore, this information is within the scope of section 261.201. However, you inform us that the department has adopted a rule governing the release of this type of information. *See id.* Section 1.60 of title 37 of the Texas Administrative Code, which pertains to the department, provides as follows:

A report concerning an investigation of alleged child abuse or neglect, as well as any notes, statements or other documentary evidence gathered during such an investigation that are otherwise confidential pursuant to Chapter 261, Family Code, may be released to the parent or guardian of an alleged victim of abuse or neglect if:

- (1) the investigation is complete and no criminal charges are anticipated;
- (2) the parent or guardian provides acceptable proof of his/her relationship to the child victim; and

- (3) the parent or guardian requesting the report is not the person alleged to have committed the abuse or neglect.

37 T.A.C. § 1.60. You state that the department is willing to release the remaining information to the requestor because the officer at issue has been convicted and no additional criminal charges are anticipated, the requestor represents the parents of one of the child victims, and the parents of that child are not accused in this case. Thus, we agree that the department may generally release the submitted information to this requestor pursuant to section 1.60. We note, however, that the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code and section 411.153 of the Government Code are applicable to some of the submitted documents; therefore, we must determine whether the department may release the information subject to these provisions.

The submitted information contains medical records of the requestor's client, access to which is governed by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

- (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). 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. *Id.* §§ 159.004, 159.005. 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). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the portion of the submitted information that constitutes medical records for purposes of the MPA.

The submitted information also contains DNA records obtained from the department's crime laboratory service. Section 552.101 of the Government Code encompasses section 411.153 of the Government Code, which provides as follows:

- (a) A DNA record stored in the DNA database is confidential and is not subject to disclosure under the public information law, Chapter 552.

(b) A person commits an offense if the person knowingly discloses to an unauthorized recipient information in a DNA record or information related to a DNA analysis of a sample collected under this subchapter.

(c) An offense under this section is a state jail felony.

(d) A violation under this section constitutes official misconduct.

Gov't Code § 411.153. A "DNA record" means the results of a forensic DNA analysis performed by a DNA laboratory. *See id.* § 411.141(6)-(7). "Forensic analysis" is defined as "a medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action." *See* Crim. Proc. Code art. 38.35(4); *see also* Gov't Code § 411.141(10) ("forensic analysis" has meaning assigned by Crim. Proc. Code art. 38.35). A "DNA database" means "one or more databases that contain forensic DNA records maintained by the director [of the department]." Gov't Code § 411.141(5); *see id.* § 411.001(3).

The director of the department is required to establish certain procedures for DNA laboratories. *See id.* §§ 411.144(a), 411.142(h) (requiring director to establish standards for DNA analysis). Section 411.144 of the Government Code provides that a DNA laboratory conducting a forensic DNA analysis under subchapter G of chapter 411 shall comply with subchapter G and the rules adopted under subchapter G. *See id.* § 411.144(d); 37 T.A.C. § 28.82(a). The director of the department has adopted rules that govern the regulation of forensic DNA laboratories in this state. *See* 37 T.A.C. §§ 28.81, 28.82 (describing minimum standards by which a forensic DNA laboratory must abide); *see also* Gov't Code § 411.147(b). The director of the department may release a DNA record in certain instances, including to a criminal justice agency for criminal justice or law enforcement purposes. *See* Gov't Code § 411.147(c).

Some of the submitted documents are DNA records relating to DNA analyses of samples collected under subchapter G of chapter 411 of the Government Code. This information is contained in the department's file related to a criminal case. The documents appear to be the result of forensic DNA analyses performed by a department DNA laboratory in accordance with department regulations. Thus, the DNA records that we have marked are confidential under section 411.153 of the Government Code.

We therefore find the MPA and section 411.153 prohibit the release of the medical and DNA records, respectively, unless release is in accordance with these provisions. *See* Occ. Code § 159.002(b) (medical records are "confidential"); Gov't Code § 411.153(a) ("DNA record stored in the DNA database is confidential"). Conversely, section 261.201(a) provides that a governmental body may release information subject to section 261.201 under rules adopted by an investigating agency, such as section 1.60 of title 37 of the Texas Administrative Code. *See* Fam. Code § 261.201(a) (information subject to section 261.201 "may be disclosed"). Pursuant to the Code Construction Act, the term "may" signifies the creation

of discretionary authority or the granting of permission or a power; thus, the department's authority to release the submitted information pursuant to section 1.60 in this instance is discretionary. *See* Gov't Code § 311.016(1) (construing "may" under the Code Construction Act). Because the MPA and section 411.153 require that records falling under the reach of those statutes be withheld, while section 261.201(a) in conjunction with section 1.60 permits, but does not require, the department to release information, we find that these provisions are not in conflict. *See Dallas Merchant's and Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489 (Tex. 1993) (where possible, courts are to construe language used in statutes so as to harmonize all relevant laws, not create conflict); *see also* Attorney General Opinion JM-290 at 2 (1984) (rules of statutory construction followed in Texas eliminate any "conflict" with a mandatory provision, for where a permissive provision of a statute is confronted by a mandatory provision, the permissive provision yields, avoiding conflict). Accordingly, notwithstanding the provisions of section 1.60, the department must only release the marked medical records in accordance with the MPA, and it must withhold the information that is confidential under section 411.153 of the Government Code pursuant to section 552.101 of the Government Code. However, the department may release the remaining information at issue pursuant to section 1.60.

To conclude, the identifying information of the victims other than the requestor's client are not responsive and the department is not required to release this information in response to this request. The remaining information is confidential under section 261.201 of the Family Code, but the department may release the remaining information pursuant to section 1.60 of title 37 of the Texas Administrative Code, with the following exceptions: the marked medical records may only be released in accordance with the MPA; and the DNA records that we have marked must be withheld under section 552.101 of the Government Code in conjunction with section 411.153 of the Government Code.<sup>1</sup>

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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).

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<sup>1</sup>If the department elects to release any of the submitted information to the requestor pursuant to section 1.60, the department must again seek a decision from this office if it receives a request for this information from a different requestor.

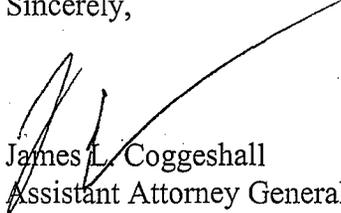
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 challenge 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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/jh

Ref: ID# 320838

Enc. Submitted documents

c: Mr. Scott Ozmun  
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(w/o enclosures)