



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 27, 2009

Mr. William E. Parham
District Attorney
Twenty-First Judicial District of Texas
Burlison and Washington Counties
100 East Main, Box 303
Brenham, Texas 77833

OR2009-04018

Dear Mr. Parham:

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# 338451.

The District Attorney for the Twenty-First Judicial District (the "district attorney") received a request for copies of a criminal offense report, a psychological exam/report/evaluation, and a video interview of a criminal defendant.¹ You assert that the district attorney is not required to respond to the request for the offense report and the video interview. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you argue that the district attorney is the incorrect agency to respond to the request for the offense report and video interview pursuant to section 552.002.² Section 552.002(a) of the Government Code defines "public information" as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Gov't Code § 552.002(a). You contend that the governmental body by or for which the information is

¹As you have not submitted a copy of the written request for information, we take our description from your brief.

²Although you cite to section 552.102 of the Government Code; we understand you to argue section 552.002, as that is the appropriate exception for the substance of your argument.

collected, assembled, or maintained pursuant to section 552.002(a) "retains ultimate responsibility for disclosing or withholding information in response to a request . . . even though another governmental body has physical custody of it." Virtually all of the information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Upon review, we find the district attorney either has physical custody or a right of access to the information at issue and this information is maintained by the district attorney in connection with the transaction of official district attorney business. Therefore, we find that the information at issue in the hands of the district attorney is subject to the Act, and the district attorney is required to respond to the request for information.

Next, we must address the district attorney's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e). In this instance, the district attorney did not submit a copy of the written request for information. Furthermore, the district attorney did not submit the requested video interview, as you state it has not been located. Thus, the district attorney has failed to comply with section 552.301.

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 requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. Gov't Code §§ 552.301(e), .302. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information. *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 section 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). You raise section 552.108, however, section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Record Decision Nos. 665 at 2 n. 5 (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). In failing to comply with section 552.301, the district attorney has waived its claim under section 552.108. Therefore, no information may be withheld on this basis. Accordingly, to the extent the requested video interview existed on the date the district attorney received the current request, it must be released to the requestor.

However, you also raise section 552.101 for a portion of the submitted information. Because section 552.101 of the Government Code can provide a compelling reason for non-disclosure, we will address the applicability of section 552.101 to the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8 for the psychological evaluation in Exhibit B. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. See Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); see also Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. See 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. See 45 C.F.R. § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. See 45 C.F.R. § 164.512(a)(1). We further noted that the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." See ORD 681 at 8; see also Gov't Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. See *Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; see also Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the district attorney may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

Section 552.101 encompasses information protected under section 611.002(a) of the Health and Safety Code, which reads as follows:

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. 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. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *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. You inform us that you have not received written consent from the patient allowing for the disclosure of the psychological evaluation. Accordingly, the district attorney must withhold the psychological evaluation in Exhibit B under section 611.002 of the Health and Safety Code.³

Section 552.101 also encompasses section 58.007 of the Family Code.⁴ Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. For purposes of section 58.007, “child” means a person who is ten years of age or older and under seventeen years of age. *See Fam. Code § 51.02(2)*. The relevant language of section 58.007 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, D, and E.

Id. §58.007(c). We have reviewed the criminal offense reports you have submitted in Exhibit A and we find that Offense Report No. 20080075 involves allegations of delinquent juvenile conduct that occurred after September 1, 1997. It does not appear that any of the

³As our ruling is dispositive, we need not address your other argument against disclosure of this information.

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

exceptions in section 58.007 apply. Thus, Offense Report No. 20080075, which we have marked, is confidential and the district attorney must withhold it in its entirety under section 552.101.

In summary, the district attorney must withhold the psychological evaluation under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code. The district attorney must withhold Offense Report No. 20080075, which we have marked, under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code. The remaining information must be released to the requestor.⁵

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/dls

Ref: ID# 338451

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note Offense Report No. 20080016 contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.