



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 18, 2009

Ms. Luz E. Sandoval-Walker
Assistant City Attorney
City of El Paso
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901

OR2009-17991

Dear Ms. Sandoval-Walker:

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# 365184.

The El Paso Police Department (the "department") received multiple requests for ten specified incident reports and two requests for information regarding a previous request by a named individual, all from the same requestor.¹ You state you have released some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note, and you acknowledge, that for a portion of the submitted information, the department failed to meet its ten-day deadline prescribed by section 552.301 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 City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling

¹We note that the requestor, in part, has asked the department to answer questions. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). We assume the department has made a good faith effort to do so.

demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). We note that you raise section 552.101 of the Government Code for the untimely submitted information. Because this exception can provide a compelling reason to withhold information under the Act, we will address your arguments under this exception for the untimely submitted information. We will also address your arguments for the timely 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. Section 552.101 encompasses information protected by other statutes, such as section 261.201 of the Family Code. Section 261.201 provides in relevant part:

(a) Except as provided by Section 261.203, 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, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

...

(k) Notwithstanding Subsection (a), an investigating agency, other than the department or the Texas Youth Commission, on request, shall provide to the parent, managing conservator, or other legal representative of a child who is the subject of reported abuse or neglect, or to the child if the child is at least 18 years of age, information concerning the reported abuse or neglect that would otherwise be confidential under this section. The investigating agency shall withhold information under this subsection if the parent, managing conservator, or other legal representative of the child requesting the information is alleged to have committed the abuse or neglect.

(l) Before a child or a parent, managing conservator, or other legal representative of a child may inspect or copy a record or file concerning the child under Subsection (k), the custodian of the record or file must redact:

(1) any personally identifiable information about a victim or witness under 18 years of age unless that victim or witness is:

(A) the child who is the subject of the report; or

(B) another child of the parent, managing conservator, or other legal representative requesting the information;

(2) any information that is excepted from required disclosure under [the Act], or other law; and

(3) the identity of the person who made the report.

Fam. Code § 261.201(a), (k), (l). You state that incident report numbers 09-032149, 05-202342, 05-165277, and 07-206335 were used or developed in investigations of alleged or suspected child abuse or neglect. *See id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of chapter 261 of the Family Code); *see also id.* § 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). Based on your representations and our review, we find that these incident reports fall within the scope of section 261.201(a). The requestor is not the parent of the child victim in report number 09-032149. Thus, the requestor does not have a right of access to this report. *See id.* § 261.201(k). While the requestor is the parent of the child victims listed in incident report numbers 05-202342 and 05-165277, the requestor is alleged to have committed the suspected abuse or neglect in these reports. Thus, the requestor does not have a right of access to incident reports numbers 05-202342 and 05-165277 under section 261.201(k). *See id.* As you do not indicate that the department has adopted a rule that governs this type of information, we assume that no such rule exists. Given that assumption, we conclude that the department must withhold incident report numbers 09-032149, 05-202342, and 05-165277 in their entirety under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (addressing predecessor statute).

However, we note the requestor is a parent of one of the child victims listed in report number 07-206335, and the requestor is not alleged to have committed the suspected abuse or neglect. Therefore, the department may not use section 261.201(a) to withhold this report from this requestor. *See* Fam. Code § 261.201(k). Section 261.201(l)(1), however, states any personally identifiable information about a child victim or witness must be withheld, unless that child victim or witness is the subject of the report or is another child of the person requesting the information. *Id.* § 261.201(l)(1). Furthermore, section 261.201(l)(3) states the identity of the reporting party must be withheld. *Id.* § 261.201(l)(3). The submitted report contains information regarding a child witness and child victims who are not the subject of the report and are not the children of the requestor. Thus, the department must withhold the identifying information of the child witness and victims, which we have marked, in report number 07-206335 under section 552.101 of the Government Code in

conjunction with section 261.201(1)(1) of the Family Code. The department must also withhold the identifying information of the reporting parties we have marked in report number 07-206335 under section 552.101 of the Government Code in conjunction with section 261.201(1)(3) of the Family Code.

Section 552.101 of the Government Code also encompasses section 58.007 of the Family Code. The relevant language of section 58.007 reads:

(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 Subchapters B, D, and E.

Fam. Code § 58.007(c). Under section 58.007, juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential. *See id.* § 51.03(a), (b) (defining “delinquent conduct” and “conduct indicating a need for supervision”). For purposes of section 58.007, a “child” is a person who is ten years of age or older and under seventeen years of age. *See id.* § 51.02(2). Incident report number 06-233282 involves juvenile delinquent conduct that occurred after September 1, 1997. You do not indicate, nor does it appear, that any of the exceptions in section 58.007 apply to this information. Therefore, report number 06-233282 is confidential under section 58.007(c) of the Family Code and must be withheld in its entirety under section 552.101 of the Government Code.

Now we address your arguments for the timely submitted information submitted in Exhibit D. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins.*

Exch., 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state Exhibit D consists of communications by an attorney for the City of El Paso to the department that were made for the purpose of facilitating the rendition of professional legal services. You indicate these communications were intended to be and have remained confidential. Based upon your representations and our review of the information at issue, we conclude the department may withhold Exhibit D under section 552.107(1) of the Government Code.²

In summary, the department must withhold incident report numbers 09-032149, 05-202342, and 05-165277 in their entirety under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. From incident report number 07-206335, the department must withhold the marked child witness’ and victims’ identifying information under section 552.101 of the Government Code in conjunction with section 261.201(1)(1) of the Family Code and the marked reporting parties’ identifying information under section 552.101 of the Government Code in conjunction with section 261.201(1)(3) of the Family Code. The department must withhold incident report number 06-233282 under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code. The department may withhold Exhibit D under

²As our ruling is dispositive for this information, we need not address your remaining argument against disclosure.

section 552.107(1) of the Government Code. The remaining information must be released to this requestor.³

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, toll free, at (888) 672-6787.

Sincerely,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/jb

Ref: ID# 365184

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³Because the requestor has a right of access to certain information in report number 07-206335 that otherwise would be excepted from release under the Act, the department must again seek a decision from this office if it receives a request for this information from a different requestor.