



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 3, 2012

Mr. Thomas D. McClure
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2012-01807

Dear Mr. McClure:

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# 444393 (DSHS File: 19612/ 2012).

The Texas Department of State Health Services ("DSHS") received a request for all records pertaining to disciplinary actions taken against the requestor's client. You state DSHS has released some of the requested information, but claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have also received correspondence from the requestor, the Austin Police Department (the "police department"), and the Texas Medical Board (the "board"). *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

Initially, we must address DSHS's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant

¹We 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.

to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. 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.

DSHS states it received the request for information on November 14, 2011, and has submitted a copy of this request in its request for a ruling (the "November 14 request"). Thus, DSHS's fifteen-business-day deadline under section 552.301(e) for the November 14 request was December 7, 2011. However, DSHS did not submit some of the information responsive to this request until December 28, 2011. Thus, we conclude DSHS failed to comply with section 552.301 related to the information submitted by DSHS on December 28, 2011. *See id.* § 552.301(b).

In addition, the requestor asserts he made a previous request for the information at issue on October 27, 2011 (the "October 27 request") and has submitted a copy of this request in his comments. The October 27 request asks for policies and procedures related to disciplinary actions taken against the requestor's client, as well as "a list of all witnesses and a copy of all documents reviewed or considered in the review process or in any way used in arriving at a determination to place [the requestor's client] on leave." We note the documents submitted by DSHS include a copy of the October 27 request. DSHS's copy of the October 27 request has a facsimile receipt date stamp of October 27, 2011. We also note the October 27 request is addressed to the same DSHS assistant general counsel who received the November 14, 2011 request. *See id.* § 552.301(c) (for purposes of section 552.301, written request includes request made in writing that is sent to the officer for public information, or the person designated by that officer, by electronic mail or facsimile transmission); *cf. id.* § 552.301(e)(1)(C) (within fifteen business days of receiving request, governmental body must submit signed statement as to date on which written request for information was received or evidence sufficient to establish that date). Thus, we conclude DSHS received the October 27 request on that date. Accordingly, for the information responsive to the October 27 request that DSHS seeks to withhold, DSHS's ten-business-day deadline under section 552.301(b) to ask for a decision from this office and state the exceptions that apply was November 10, 2011, and its fifteen-business-day deadline under section 552.301(e) to submit general written comments stating the reasons why the stated exceptions apply, a copy of the written request for information, and a copy of the requested information at issue was November 18, 2011. *See id.* § 552.301(b), (e). However, DSHS did not request a ruling from this office until November 29, 2011, or submit general written comments stating the reasons why the stated exceptions apply, a copy of the written request for information, or a copy of the requested information at issue until December 6

and 28, 2011. Thus, we conclude DSHS also failed to comply with section 552.301 with regard to the information that is responsive to the October 27 request.²

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. *See id.* § 552.302; *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 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). 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). Sections 552.107 and 552.111 of the Government Code are discretionary exceptions to disclosure that protect a governmental body's interests. *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work-product privilege under section 552.111 or Texas Rule of Civil Procedure 192.5 is not compelling reason to withhold information under section 552.302), 676 at 12 (2002) (attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 constitutes compelling reason to withhold information under section 552.302 only if information's release would harm third party). Thus, DSHS's claims under sections 552.107 and 552.111 are not compelling reasons to overcome the presumption of openness. Therefore, DSHS may not withhold any of the information responsive to the October 27 request under section 552.107 or 552.111. However, section 552.101 of the Government Code can provide a compelling reason to overcome this presumption. In addition, the need of another governmental body to withhold information under section 552.108 of the Government Code can provide a compelling reason under section 552.302. *See* Open Records Decision No. 586 at 2-3 (1991). The police department raises section 552.108. Therefore, we will consider the submitted arguments under section 552.101 and the police department's arguments under section 552.108, as well as the arguments to withhold the remaining 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." Gov't Code § 552.101. This exception encompasses information other statutes make confidential, including section 261.201 of the Family Code. Section 261.201(a) provides as follows:

[T]he 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:

²We note some of the submitted information is not responsive to the October 27 request because it was created after October 27, 2011.

(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.

Fam. Code § 261.201(a); *see id.* §§ 101.003(a) (defining “child” for purposes of section 261.201), 261.001(1) (defining “abuse” for purposes of section 261.201). The police department informs us it has been provided copies of the requested disciplinary information and a Texas Department of Family and Protective Services (“DFPS”) investigative report. The police department states this information is contained in the police department’s investigation file concerning allegations of indecency with a child. The police department asserts the requested disciplinary information and DFPS investigative report consist of records of the investigation of child abuse the police department is currently conducting pursuant to chapter 261 of the Family Code and, thus, are confidential under section 261.201(a). Upon review, we agree the submitted information is confidential under section 261.201(a). *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

The requestor asserts his client has a right of access to a DFPS investigation report in the submitted documents pursuant to section 417.512(d) of title 25 of the Texas Administrative Code, which provides in relevant part the following:

When disciplinary action is taken against an employee based on confirmed abuse or neglect, the head of a facility notifies the employee in writing of the disciplinary action taken and any right to a grievance hearing the employee may have under [DSHS]’s internal policies and procedures relating to employee grievances. If the employee files a grievance in response to disciplinary action resulting from confirmed abuse or neglect, the head of the facility, upon the employee’s written request, provides the employee with a copy of or access to the investigative report. Before receiving or inspecting the report, the employee is required to complete a document acknowledging that the report’s content must be kept confidential.

25 T.A.C. § 417.512(d). However, DSHS informs us, and the requestor acknowledges, that the requestor and his client, the disciplined employee at issue, had not yet provided DSHS with a document acknowledging the DFPS investigation report must be kept confidential when the requestor made his requests for information. *See id.* Thus, without addressing the applicability of section 417.512 to the requested information, we conclude the requestor has not established he or his client had a right of access to the investigative report at issue

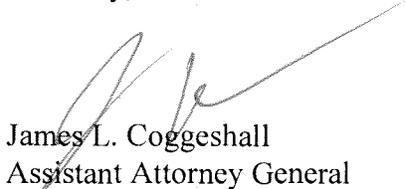
pursuant to section 417.512 when the requestor made his requests for information, and DSHS may not release it to him on that ground. *See id.*

The requestor also asserts his client has a right of access to some of the requested information pursuant to section 164.003 of the Occupations Code and section 187.16 of title 22 of the Texas Administrative Code. Chapter 164 of the Occupations Code pertains to disciplinary actions and procedures the board takes against license holders under the Medical Practice Act, subtitle B of title 3 of the Occupations Code. Pursuant to section 164.003, the board must adopt rules related to informal dispositions and proceedings of disciplinary actions under chapter 164. *See Occ. Code § 164.003(a).* Section 187.16 requires the board to provide to a licensee subject to an informal show compliance proceeding (“ISC”) under chapter 164 “a copy of the information the board intends to use at the ISC.” 22 T.A.C. § 187.16(a)(3). However, upon review, we find section 187.16 is not applicable to DSHS. Therefore, DSHS may not release any of the information at issue to the requestor on that ground. Instead, DSHS must withhold the submitted information in its entirety under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/ag

³As our ruling is dispositive, we do not address the other arguments to withhold this information.

Ref: ID# 444393

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)