



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 20, 2016

Mr. Christopher Garza
Assistant District Attorney
Brazoria County
111 East Locust, Suite 408 A
Angleton, Texas 77515

OR2016-21214

Dear Mr. Garza:

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# 627377.

The Brazoria County Sheriff's Office (the "sheriff's office") received a request for specified calls-for-service data.¹ The sheriff's office claims the requested information either does not exist, or is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

¹The sheriff's office sought clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified). We understand the requestor sent her clarification to the Brazoria County District Attorney's Office, which represents the sheriff's office in regard to the request for a ruling. Thus, the sheriff's office represents it, and not the district attorney's office, received the clarification pertaining to the initial request.

²We 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.

Initially, we note the sheriff's office states "[t]he records do not exist as requested." Nevertheless, the sheriff's office also states, "to comply with the Act's requirements that [this office] be sent responsive records so [that] it may determine whether the records must be disclosed, the [s]heriff's [o]ffice was forced to create a representative sample of responsive records, which is enclosed as Exhibit C." (Bold excluded). Further, the sheriff's office also asserts if it "is forced to create responsive records, it estimates there will be approximately 1,000 pages of records, which it would have to compile from approximately 200,000 calls" and, "[b]ased on [its] currently technology, this process would take countless hours and resources, which it would have to charge the requestor in order to defray these costs." In this regard, we note the Act does not require a governmental body to create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). Furthermore, while the sheriff's office does not maintain the records as requested, the sheriff's office must make a good faith effort to relate a request to information it holds. *See* Open Records Decision No. 561 at 8 (1990). Further, a governmental body may not decline to comply with the requirements of the Act on the ground of administrative inconvenience. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976). But a governmental body may require a deposit or bond for payment of anticipated costs from a requestor in certain instances if the governmental body provides the requestor with a written itemized statement. *See* Gov't Code §§ 552.263(a), .2615. Based on the representations of the sheriff's office and our review, we find the sheriff's office does possess information from which the requested information can be obtained, and it has made a good faith effort to submit such information in response to the request. Thus, we determine the sheriff's office must release the submitted information unless the information is excepted from disclosure under the Act. Accordingly, we will address the arguments of the sheriff's office to withhold the submitted information under the Act.

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 section 58.007 of the Family Code, which makes confidential juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997. *See* Fam. Code § 58.007(c). Section 58.007(c) provides the following:

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.

Id. For purposes of section 58.007(c), a “child” means person who is ten years of age or older and under seventeen years of age when the conduct occurred. *Id.* § 51.02(2). The sheriff’s office asserts some of the submitted information is confidential under section 58.007. *See id.* § 51.03(a), (b) (defining “delinquent conduct” and “conduct indicating a need for supervision”). However, the documents do not contain the ages of the offenders at issue and the sheriff’s office does not provide any additional information that establishes their ages. *See* Gov’t Code § 552.301(e)(1)(A) (providing that governmental body must provide sufficient arguments to establish applicability of claimed exceptions). Further, upon review, we find the submitted information does not identify a juvenile suspect or offender for purposes of section 58.007. Thus, the sheriff’s office has not established any of the submitted information is confidential under section 58.007(c), and the sheriff’s office may not withhold any of it under section 552.101 of the Government Code on that ground.

Section 552.101 of the Government Code also encompasses section 261.201(a) of the Family Code, which provides as follows:

[T]he following information is confidential, is not subject to public release under [the Act], 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.

Fam. Code § 261.201(a). The sheriff’s office asserts some of the remaining information was used or developed in investigations under chapter 261. *See id.* §§ 101.003(a) (defining “child” for purposes of section 261.201), 261.001(1), (4) (defining “abuse” and “neglect” for purposes of section 261.201). Upon review, we find some of the remaining information, which we have marked, is within the scope of section 261.201 of the Family Code. The sheriff’s office does not indicate it has adopted a rule that governs the release of this type of

information. Therefore, we assume no such rule exists. Given that assumption, the sheriff's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). However, the sheriff's office has not established any of the remaining information was used or developed in an investigation of alleged or suspected child abuse or neglect under chapter 261 of the Family Code. *See id.* §§ 101.003(a), 261.001(1), (4). Therefore, the remaining information is not confidential under section 261.201(a) of the Family Code and the sheriff's office may not withhold it under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides in relevant part the following:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 at 3-4 (1988), 370 at 2 (1983), 343 at 1 (1982). Upon review, we find the sheriff's office has not established any of the remaining information consists of records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. Thus, the remaining information is not confidential under the MPA, and the sheriff's office may not withhold it under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses section 773.091 of the Health and Safety Code, which provides, in relevant part, the following:

(a) A communication between certified emergency medical services personnel or a physician providing medical supervision and a patient that is made in the course of providing emergency medical services to the patient is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

Health & Safety Code § 773.091(a)-(b). The remaining information does not contain a communication between certified emergency medical services personnel or a physician providing medical supervision and a patient that is made in the course of providing emergency medical services to the patient. *See id.* § 773.091(a). It also does not contain a record of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that was created by the emergency medical services personnel or physician or maintained by an emergency medical services provider. *See id.* § 773.091(b). Accordingly, none of the information is confidential under section 773.091, and the sheriff's office may not withhold it under section 552.101 of the Government Code on that ground.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). We note the remaining documents do not contain the identifying information of any individual, other than the names of the investigating officers. Upon review, we find the sheriff's office has failed to establish any of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the remaining information is not confidential under common-law privacy, and the sheriff's office may not withhold it under section 552.101 on that ground.

Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the

state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show section 552.103 is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

The sheriff's office explains some of the remaining information may relate to pending criminal prosecutions. However, the sheriff's office is not a party to that criminal litigation. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information withheld from disclosure under section 552.103. We understand the Brazoria County District Attorney's Office (the "district attorney's office") to object to the release of some of the requested information under section 552.103 because it pertains to pending prosecutions. However, neither the sheriff's office nor the district attorney's office has identified which of the submitted events at issue is related to a pending prosecution. By not identifying the information that pertains to the pending prosecutions, the sheriff's office and the district attorney's office have failed to demonstrate any of the remaining information pertains to pending litigation. *See* Gov't Code § 552.301(e)(1)(D) (governmental body must submit copy of specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents). Therefore, the sheriff's office may not withhold any of the remaining information under section 552.103.

Section 552.108(a) of the Government Code provides in part the following:

Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

- (1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]
- (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Id. § 552.108(a)(1)-(2). Section 552.108(a)(1) protects information that pertains to a pending criminal investigation or prosecution, while section 552.108(a)(2) protects information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication. The sheriff's office asserts some of the remaining information is excepted under section 552.108(a)(2) because it pertains to investigations that "are still open/pending investigations that did not result in a final action, such as a conviction or deferred adjudication." Because the sheriff's office has provided this office with conflicting arguments regarding section 552.108(a)(2), we find the sheriff's office has not demonstrated the applicability of that section to the remaining information. Therefore, the sheriff's office may not withhold any of the remaining information under section 552.108(a)(2) of the Government Code.

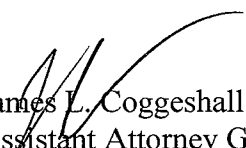
The sheriff's office also asserts some of the remaining information is excepted under section 552.108(a)(1) because it pertains to criminal investigations or prosecutions that are pending. However, neither the sheriff's office nor the district attorney's office has identified which of the submitted events at issue is related to a pending criminal investigation or prosecution. By not identifying the information that pertains to the pending investigations or prosecutions, the sheriff's office and the district attorney's office have failed to establish release of any of the remaining information would interfere with the detection, investigation, or prosecution of crime. *See id.* § 552.301(e)(1)(D). Therefore, the sheriff's office may not withhold any of the remaining information under section 552.108(a)(1).

To conclude, the sheriff's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. The sheriff's office must release the remaining information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/bw

Ref: ID# 627377

Enc. Submitted documents

c: Requestor
(w/o enclosures)