



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 15, 2019

Ms. Andrea D. Russell
Counsel for the Town of Flower Mound
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6000 Western Place, Suite 200
Fort Worth, Texas 76107

OR2019-04416

Dear Ms. Russell:

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# 750795.

The Town of Flower Mound (the "town"), which you represent, received a request for information pertaining to a named individual, including a specified incident. You state you will redact information under sections 552.130(c) and 552.147(b) of the Government Code.¹ You also state you will redact information pursuant to Open Records Decision No. 684 (2009).² You claim the submitted information is excepted from disclosure under section

¹We note section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). 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. *See id.* § 552.147(b).

²Open Records Decision No. 684 is a previous determination authorizing all governmental bodies to withhold certain categories of information, including e-mail addresses of members of the public subject to section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

552.101 of the Government Code.³ We have considered the exception you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses 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. This office has found a compilation of an individual’s criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual’s privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one’s criminal history). Furthermore, we find a compilation of a private citizen’s criminal history is generally not of legitimate concern to the public.

The present request, in part, requires the town to compile unspecified law enforcement records concerning the named individual. We find this part of the request implicates the named individual’s right to privacy. Thus, to the extent the town maintains unspecified law enforcement records depicting the named individual as a suspect, arrestee, or criminal defendant, the town must generally withhold such information under section 552.101 of the Government Code in conjunction with common-law privacy. However, information that refers to an individual solely as a victim, witness, or involved person is not part of a compilation of the individual’s criminal history and may not be withheld under section 552.101 on that basis. We note the town has submitted information that does not list the named individual as a suspect, arrestee, or criminal defendant. Further, the town has submitted information pertaining to the specified incident. This information does not consist of a compilation of the named individual’s criminal history, and it may not be withheld under section 552.101 of the Government Code on that basis. Accordingly, we will address your remaining arguments for this information.

³We note, and you acknowledge, the town failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting a decision from this office. *See* Gov’t Code § 552.301(b), (e). Nonetheless, section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness caused by failure to comply with section 552.301. *See id.* §§ 552.007, .302. Thus, we will address the applicability of this exception to the submitted information, notwithstanding the town’s violation of section 552.301 in requesting this decision.

However, in this instance, the requestor is an investigator with the Texas Education Agency (the "TEA"), which has assumed the duties of the State Board for Educator Certification ("SBEC").⁴ The requestor states the information at issue is related to a TEA investigation of an individual who has applied for or currently holds educator credentials.⁵ Section 22.082 of the Education Code provides that the TEA "may obtain from any law enforcement or criminal justice agency all criminal history record information ["CHRI"] and all records contained in any closed criminal investigation file that relate to a specific applicant for or holder of a certificate issued under Subchapter B, Chapter 21 [of the Education Code]." Educ. Code § 22.082. We understand the information at issue pertains to a closed investigation; therefore, the requestor has a statutory right of access to the entirety of information at issue pursuant to section 22.082. We note statutory access provisions prevail over the common-law. *See Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.— Fort Worth 2009, no pet.) (statutory provision controls and preempts common law only when it directly conflicts with common-law principle); *see also Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000) (statute depriving person of common-law right will not be extended beyond its plain meaning or applied to cases not clearly within its purview). Thus, the right of access afforded to the TEA investigator under section 22.082 prevails over section 552.101 in conjunction with common-law privacy and the information we have marked must be released to this requestor.

Section 552.101 of the Government Code also encompasses information protected by other statutes. Section 261.201 of the Family Code provides, in part, as follows:

(a) [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:

- (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.

⁴The 79th Texas legislature passed House Bill 1116, which required the transfer of SBEC's administrative functions and services to the TEA, effective September 1, 2005.

⁵The requestor also claims a right to the information at issue under sections 261.308 and 261.406 of the Family Code. However, these statutes apply to information held by the Texas Department of Family and Protective Services and not the town. *See* Fam. Code §§ 261.308, .406.

Fam. Code § 261.201(a). Upon review, we find the information pertaining to the specified incident relates to an investigation of alleged or suspected child abuse or neglect under chapter 261. *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). Accordingly, we find this information is subject to chapter 261 of the Family Code. You do not indicate the town’s police department has adopted a rule that governs the release of this type of information. Therefore, we assume no such regulation exists. Given that assumption, we conclude the information we have marked is confidential pursuant to section 261.201(a) of the Family Code and must generally be withheld under section 552.101 of the Government Code on that basis. *See id.* § 261.201(a). However, we find you have failed to demonstrate any portion of the remaining information was used or developed in an investigation of alleged or suspected child abuse or neglect under section 261.201(a)(2). Furthermore, you have not established the remaining information is a report of alleged or suspected abuse or neglect made under section 261.201(a)(1). Therefore, the town may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

However, section 261.201 provides information encompassed by subsection (a) may be disclosed “for purposes consistent with [the Family Code] and applicable federal or state law.” *Id.* § 261.201(a). Section 22.082 of the Education Code constitutes “applicable state law.” As noted above, section 22.082 provides the TEA “may obtain from any law enforcement or criminal justice agency all [CHRI] and all records contained in any closed criminal investigation file that relate to a specific applicant for or holder of a certificate issued under Subchapter B, Chapter 21 [of the Education Code].” Educ. Code § 22.082. CHRI consists of “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2); *see also id.* §§ 411.0901 (TEA is entitled to obtain CHRI from Texas Department of Public Safety (“DPS”) relating to certain employees of schools), .090 (SBEC is entitled to obtain CHRI from DPS about a person who has applied to SBEC for certificate under subchapter B, chapter 21, Education Code), .087(a)(2) (agency entitled to obtain CHRI from DPS also authorized to “obtain from any other criminal justice agency in this state criminal history record information maintained by that [agency]”); *cf. Brookshire v. Houston Indep. Sch. Dist.*, 508 S.W.2d 675, 678-79 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) (when legislature defines term in one statute and uses same term in relation to same subject matter in later statute, later use of term is same as previously defined).

As noted above, the requestor is an investigator with the TEA. Accordingly, the requestor may have a right of access under section 22.082 of the Education Code to CHRI regarding the individual or all records contained in a closed criminal investigation file relating to the individual. However, as noted above, section 261.201(a) states any release must be “for

purposes consistent with the Family Code.” *See* Fam. Code § 261.201(a). This office is unable to determine whether release of the information at issue is consistent with the Family Code. Moreover, the town does not inform us, and the information at issue does not otherwise reflect, whether the criminal investigation to which the information pertains is closed. Accordingly, we must rule in the alternative.

If the town determines the release of the information at issue is not consistent with the Family Code, then it must withhold the information we have marked in its entirety under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. *See* Attorney General Opinions DM-353 at 4 n.6 (1995) (finding interagency transfer of information prohibited where confidentiality statute enumerates specific entities to which release of information is authorized and where potential receiving governmental body is not among statute’s enumerated entities), JM-590 at 4-5 (1986); *see also* Fam. Code § 261.201(b)-(g), (k) (listing entities authorized to receive Fam. Code § 261.201 information). If the town determines release of the information at issue is consistent with the Family Code and the criminal investigation to which the information pertains is closed, then the town must generally release the information we have marked in its entirety pursuant to section 22.082 of the Education Code. *See* Open Records Decision No. 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under statutory predecessor to Act). Finally, if the town determines release of the information at issue is consistent with the Family Code and the criminal investigation at issue is not closed, then the town must release the CHRI from the information at issue, but must withhold the remaining information we have marked under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.

In the event the town determines release of the information at issue is consistent with the Family Code and the criminal investigation to which the information pertains is closed, we must nevertheless consider whether the information we have marked under section 261.201 is otherwise excepted from disclosure. You state the information at issue includes medical records subject to the Medical Practice Act (“MPA”). Section 552.101 of the Government Code also encompasses information made confidential by the MPA, subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant part:

(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.

Occ. Code § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). 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 (1987), 370 (1983), 343 (1982). Upon review, we find the information we have marked constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician. Accordingly, the town must generally withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA.

In addition, we note some of the information at issue is subject to section 611.002 of the Health and Safety Code. Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code, which pertains to mental health records. Section 611.002 of the Health and Safety Code provides, in part, as follows:

(a) 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.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see also id.* § 611.001 (defining "patient" and "professional"). Upon review, we find some of the information at issue consists of mental health records. Thus, the town must generally withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.

Because the requestor may have a statutory right of access to the information we have marked under section 261.201(a) of the Family Code pursuant to section 22.082 of the Education Code, we must address the conflict between the right of access provided under section 22.082 and the confidentiality provided under the MPA and section 611.002 of the Health and Safety Code. A statutory right of access generally prevails over the Act's general exceptions to disclosure. *See* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 at 4 (1986). Where general and specific provisions are in irreconcilable conflict, the specific provision typically

prevails as an exception to the general provision unless the general provision was enacted later and there is clear evidence that the legislature intended the general provision to prevail. *See* Gov't Code § 311.026(b); *City of Lake Dallas v. Lake Cities Mun. Util. Auth.*, 555 S.W.2d 163, 168 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.). Although section 22.082 of the Education Code generally allows a TEA investigator access to files of a closed criminal investigation, the MPA specifically protects medical records and section 611.002 of the Health and Safety Code specifically protects mental health records. Thus, we find the confidentiality provisions of the MPA and section 611.002 are more specific than the general right of access provided by section 22.082 of the Government Code. Additionally, as noted above, although some of the information at issue is subject to common-law privacy, we note a specific statutory right of access generally prevails over the common law. *See Collins*, 297 S.W.3d at 415; *see also CenterPoint Energy Houston Elec. LLC*, 436 F.3d at 544. Therefore, to the extent the requestor has a right of access to the information at issue under section 22.082 of the Government Code, we conclude the town must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA and section 611.002 of the Health and Safety Code, but must release the remaining information at issue pursuant to section 22.082.

As noted above, section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. The Third Court of Appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *See Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). Thus, the town must withhold the public citizens' dates of birth we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the town must release the information we have marked pursuant to section 22.082 of the Education Code. If the town determines the release of the information we have marked under section 261.201(a) of the Family Code is not consistent with the Family Code, then the town must withhold the information we have marked in its entirety under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. If the town determines release of the information we have marked under section 261.201(a) of the Family Code is consistent with the Family Code and the criminal investigation at issue is not closed, then the town must release the CHRI from the information at issue, but must withhold the remaining information we have marked under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. If the town determines release of the information we have marked under section 261.201(a) of the Family Code is consistent with the Family Code and the criminal investigation to which the information pertains is closed, then, with the exception of the information we have marked under section 552.101 of the Government Code in conjunction with the MPA and section 552.101 of the Government Code in conjunction with section 611.002 of the Health and

Safety Code, the town must release the information we have marked under section 261.201(a) of the Family Code pursuant to section 22.082 of the Education Code. The town must withhold the public citizens' dates of birth we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The town 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,



Sidney M. Pounds
Assistant Attorney General
Open Records Division

SMP/mo

Ref: ID# 750795

Enc. Submitted documents

c: Requestor
(w/o enclosures)