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ATTORNEY GENERAL OF TEXAS

December 6, 2022

Ms. Susan E. Tennyson
Open Records Attorney
Texas Department of Family and Protective Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2022-37677

Dear Ms. Tennyson

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# 984373 [PIR R002699].

The Texas Department of Family and Protective Services (the "department") received multiple requests from the same requestor for the following: specified training materials and guidelines; specified contracts; records regarding specified types of surgeries performed upon children; e-mails to or from twenty-five named individuals and entities; communications in the possession of the commissioner pertaining to a specified directive, a specified letter, and six specified terms; and communications pertaining to the specified letter. You state you will withhold some information pursuant to Open Records Letter No. 2003-5590 (2003).¹ You also state the department will redact certain information subject to section 552.117 of the Government Code pursuant to section 552.024(c) of the Government Code, motor vehicle record information pursuant to section 552.130(c) of the Government Code, social security numbers pursuant to section 552.147(b) of the Government Code, and certain information pursuant to Open Records Decision No. 684

¹ Open Records Letter No. 2003-5590 is a previous determination authorizing the department to withhold, without the necessity of seeking a decision from this office, the records concerning an investigation of an allegation of abuse or neglect of a child and the records used or developed in providing services as a result of such an investigation under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code, unless the department's rules permit the department to release requested records to a particular requestor.

(2009).² You state the department will release some of the requested information. You claim some of the requested information is subject to previous rulings issued by our office. You also claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered your arguments and reviewed the submitted information.³

You state some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2021-31869 (2021) and 2022-14829 (2022). In Open Records Letter No. 2021-31869, we determined the following: (1) the department may withhold the information you marked under section 552.107(1) of the Government Code; (2) the department may withhold the information you marked under section 552.111 of the Government Code; and (3) the department must release the remaining information at issue. In Open Records Letter No. 2022-14829, we determined the following: (1) the department may continue to rely Open Records Letter No. 2021-31869 as a previous determination and withhold or release the requested information in accordance with that ruling; (2) the department must withhold certain information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; (3) the department may withhold the information you marked under section 552.103 of the Government Code; (4) the department may withhold the information you marked under section 552.107(1) of the Government Code; (5) the department may withhold the information you marked under section 552.111 of the Government Code; and (6) the department must release the remaining information at issue. We have no indication the law, facts, and circumstances on which the prior rulings were based have changed. Thus, the department must continue to rely Open Records Letter Nos. 2021-31869 and 2022-14829 as previous determinations and withhold or release the requested information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information

² Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117 of the Government Code without the necessity of requesting a decision under the Act if the individual to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). 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 id.* § 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). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information without the necessity of requesting an attorney general decision. *See* ORD 684.

³ We 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.

as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, some of the submitted information, which you marked, is not responsive to the instant requests for information. This ruling does not address the public availability of any information that is not responsive to the requests and the department is not required to release such information in response to this request.

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. This section encompasses information protected by chapter 411 of the Government Code, which makes confidential criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. *See id.* § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F, or subchapter E-1 of the Government Code. *See Gov’t Code* § 411.083(a). Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F, of the Government Code. We note section 411.083 does not apply to active warrant information or other information relating to one’s current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person’s current involvement in the criminal justice system). Further, CHRI does not include driving record information. *See id.* § 411.082(2)(B). Upon review, we find the department must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.

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). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was 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. *See 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

The department states multiple lawsuits were pending against the department when the department received the instant requests for information. The department also states the information at issue is related to the pending lawsuits. Based on your representations and our review, we find litigation was pending when the department received the requests for information, and the submitted information is related to the pending litigation for the purposes of section 552.103. Therefore, the department may withhold the information you indicated under section 552.103(a) of the Government Code

We note once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the department must continue to rely Open Records Letter Nos. 2021-31869 and 2022-14829 as previous determinations and withhold or release the requested information in accordance with those rulings. The department must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. The department may withhold the information you indicated under section 552.103(a) of the Government Code. The remaining responsive information must be released.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Paige Lay
Assistant Attorney General
Open Records Division

PL/pt

Ref: ID# 984373

c: Requestor