



September 14, 2000

Ms. Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
9001 North IH-35, Suite 105
Austin Texas 78753-5233

OR2000-3547

Dear Ms. Pettigrew:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 138653.

The Texas Commission on Alcohol and Drug Abuse (the "commission") received a request for information concerning a named individual or any other person involved in incidents arising from the conduct of named individuals and entities during a specified time period. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You argue that the submitted information is excepted from public disclosure pursuant to Government Code section 552.101 in conjunction with section 464.010 of the Health and Safety Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Subchapter A of chapter 464 of the Health and Safety Code governs the regulation of chemical dependency treatment facilities. Section 464.010 provides as follows:

(a) A person, including treatment facility personnel, who believes that a client's physical or mental health or welfare has been, is, or will be adversely affected by abuse or neglect caused by any person shall report the facts underlying that belief to the commission. . . .

(e) All records made by the commission during its investigation of alleged abuse or neglect are confidential and may not be released except that the release may be made:

(1) on court order;

(2) on written request and consent of the person under investigation or that person's authorized attorney; or

(3) as provided by Section 464.011.

Health & Safety Code § 464.010(a), (e). It does not appear that any of the exceptions to subsection 464.010(e) are applicable here.

You explain that the submitted documents pertain to an investigation of alleged abuse or neglect of a client by a licensed chemical dependency counselor.¹ You contend that the records of that investigation are made confidential by section 464.010(e). You argue that, although section 464.010 relates to licensed facilities and investigations thereof, the section is not limited to facilities and applies to counselors as well.

Subchapter A of chapter 464 does not apply to "an individual who personally provides counseling or support services to a chemically dependent person but does not offer or purport to offer a chemical dependency treatment program[.]" Health & Safety Code § 464.003(6); *see also* Health & Safety Code § 462.001(10) (term "treatment facility" does not include "the individual office of a private, licensed health care practitioner who personally renders private individual or group services within the scope of the practitioner's license and in the practitioner's office"). From your brief, we are unable to discern if the counselor at issue offered or purported to offer a chemical dependency treatment program. You state that the investigated individual is licensed as a chemical dependency counselor. However, you do not further explain the scope of the counselor's practice or elaborate on his association with Action Recovery Centers ("ACR"), the facility where he practiced. From the submitted information we find that ACR is not a licensed chemical dependency treatment facility under chapter 464 of the Health and Safety Code and that the counselor provided education and counseling services as a private practitioner. Because ACR was not licensed to offer a chemical dependency treatment program, and because you do not explain if the counselor offered or purported to offer a chemical dependency treatment program, we conclude that the submitted information is not subject to subchapter A of chapter 464. Thus, the commission may not withhold the submitted information pursuant to subsection 464.010(e).

¹An individual identified to the public as a chemical dependency counselor must be licensed. *See* Occ. Code § 504.151; 40 T.A.C. § 150.5.

We next address your section 552.103 claim for the "notes" binder. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The commission must meet both prongs of this test for the information to be excepted under section 552.103(a).

You explain that the commission has received complaints regarding the counselor, that the complaints were investigated, and allegations of abuse were substantiated.² You state that the commission is pursuing disciplinary action against the counselor and that the matter is currently pending before the State Office of Administrative Hearings ("SOAH").³

The commission may initiate an investigation or disciplinary action against a licensee if it receives information that a violation has or may have occurred. *See* 40 T.A.C. § 142.21(b). Chemical dependency counselor disciplinary hearings are administrative hearings conducted by an administrative law judge employed by SOAH. *See* 40 T.A.C. § 142.31(e). The hearings must comply with the requirements of the Government Code, chapter 2001, subchapter C, and SOAH's Rules of Procedure. *Id.* Contested cases conducted under the Administrative Procedure Act, Chapter 2001 of the Government Code, are considered litigation under section 552.103. *See* Open Records Decision No. 588 at 7 (1991). After reviewing your arguments and the submitted information, we conclude that litigation is pending. We also find that some of the submitted information relates to the pending litigation. Thus, the notes binder may be withheld under section 552.103.

We note, however, that 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 and such information must be disclosed. *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 anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. In addition, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). We note that the submitted information indicates a proposed SOAH hearing date of July 2000, a date which precedes

²The requestor indicates he is the attorney for a complainant.

³SOAH docket No. 517-99-24000, in the Matter of the License No. 3528 of James Rick Collins.

the date of this letter ruling. Thus, if litigation has concluded in this matter the commission may not withhold the information pursuant to section 552.103.

The submitted information contains a copy of a driver's license. Subsection 552.130(a)(1) of the Government Code exempts from public disclosure information relating to a driver's license issued by an agency of this state. Therefore, you must withhold the copy of the driver's license under section 552.130.

The submitted information contains medical records of the counselor and the complainants. Confidential medical records may only be released in accordance with the Medical Practice Act (the "MPA"). *See* Open Records Decision No. 598 (1991). The MPA, Title 3, Subtitle B of the Occupations Code, section 159.002(b) provides the following:

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.

Thus, you must withhold the counselor's and complainants' medical records except as provided below.

The submitted information contains medical records of the requestor's client. Section 159.005 provides consent requirements by which medical records are to be released. In pertinent part, section 159.005 provides as follows:

(a) Consent for the release of confidential information must be in writing and signed by:

(1) the patient[.]

.....

(b) The written consent must specify:

(1) the information or medical records to be covered by the release;

(2) the reasons or purposes for the release; and

(3) the person to whom the information is to be released.

Section 159.004 of the MPA provides certain exceptions to confidentiality. As applicable to the instant request, that section provides as follows:

An exception to the privilege of confidentiality in a situation other than a court or administrative proceeding, allowing disclosure of confidential information by a physician, exists only with respect to the following:

...
(5) A person who has the written consent of the patient . . . for the release of confidential information, *as provided by Section 159.005*[.]

(Emphasis added). Thus, section 159.004(5) allows the release of medical records if the commission has obtained a written consent for release of the information as provided by section 159.005 from the patient or the patient's authorized representative. *See* Occ. Code §§ 159.004(5), 159.005.

The submitted information also contains mental health records. Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

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.

Health & Safety Code § 611.002(a). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals, including the patient. *See* Open Records Decision No. 565 (1990). Thus, you must withhold the mental health records.

The submitted information includes the mental health records of the requestor's client. Section 611.004(a)(4) of the Health and Safety Code provides an exception to the confidentiality of mental health records when a person has the written consent of the patient. Therefore, if the commission receives proper written consent to release the mental health records to the requestor, the records must be released.

The submitted documents include information that is confidential under section 552.101 of the Government Code and common law privacy. Under common law privacy, private facts about an individual are excepted from disclosure. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure.

Id. at 685; Open Records Decision No. 611 at 1 (1992). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Additionally, this office has found that information regarding some kinds of medical information or information indicating disabilities or specific illnesses is also excepted from required public disclosure under common law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

We conclude that any identifying information of chemical or alcohol dependent patients must be redacted from the remaining documents pursuant to common law privacy in conjunction with section 552.101 of the Government Code.

In summary, the notes binder may be withheld from public disclosure pursuant to Government Code section 552.103. The copy of the driver's license included in the records must be withheld under Government Code section 552.130. The medical and mental health records must be withheld. We have marked the relevant documents with the corresponding applicable exceptions. The remaining documents must be released to the requestor. Any identifying information of chemical or alcohol dependent clients contained within documents not excepted from disclosure must be redacted prior to release of the documents.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be

provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Julie Reagan Watson
Assistant Attorney General
Open Records Division

JRW/pr

Ref: ID# 138653

Encl. Submitted documents

cc: Mr. J. D. Lambright
Conroe Tower
300 West Davis, Suite 450
Conroe, Texas 77301
(w/o enclosures)