



July 10, 2002

Mr. George D. Cato  
Deputy General Counsel  
Texas Department of Health  
1100 West 49<sup>th</sup> Street  
Austin, Texas 78756-3199

OR2002-3725

Dear Mr. Cato:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164842.

The Texas Department of Health (the “department”) received a request for information regarding Timberlawn Mental Health System, a psychiatric hospital licensed by the department. You state that some of the requested information has been or will be released to the requestor. You claim, however, that portions of the requested information are excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by addressing your contention that a portion of the submitted information is excepted from disclosure under sections 611.002 and 611.004(d) of the Health and Safety Code. Section 611.002 of the Health and Safety Code provides that “[c]ommunications 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.” A “professional” is defined as:

- (A) a person authorized to practice medicine in any state or nation;
- (B) a person licensed or certified by this state to diagnose, evaluate, or treat any mental or emotional condition or disorder; or
- (C) a person the patient reasonably believes is authorized, licensed, or certified as provided by this subsection.

Section 611.004(a) provides specific instances in which a professional may disclose information that is confidential under section 611.002. Section 611.004(d) states that “[a] person who receives information from confidential communications or records may not

disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the person first obtained the information.” You indicate that the department received some mental health records pursuant to section 611.004(a). You further indicate that a portion of the submitted information consists of “copies of mental health records or communications and/or information from mental health records.” We have marked the submitted information that is confidential under section 611.002 of the Health and Safety Code. The department may release this information only if section 611.004(a) permits the department to do so.

You claim that the information subject to section 611.002 of the Health and Safety Code is also confidential under the Medical Practice Act (the “MPA”). Occ. Code §§ 151.001-165.160. We will address this argument with respect to such information that we did not mark as confidential under section 611.002. Section 159.002 of the MPA provides:

- (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.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that 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). Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Information subject to the MPA may be released only as provided under the MPA. *See* Open Records Decision No. 598 (1991). We find that the remaining information is not subject to the MPA.

You also claim that some of the submitted information is excepted under section 576.005 of the Health and Safety Code. Section 576.005 of the Health and Safety Code provides that “[r]ecords of a mental health facility that directly or indirectly identify a present, former, or

proposed patient are confidential unless disclosure is permitted by other state law.” Health & Safety Code § 576.005. We note that most of the information that you seek to withhold under section 576.005 is not a “record of a mental health facility.” Therefore, we conclude that this information may not be withheld under section 576.005 of the Health and Safety Code. *See* Open Records Decision No. 163 (1977) (construing predecessor statute). We have, however, marked a limited number of documents that are confidential under section 576.005 of the Health and Safety Code and must therefore be withheld under section 552.101 of the Government Code.

You also raise section 552.101 in conjunction with the common-law right to privacy and constitutional privacy. Section 552.101 encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual’s autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the “most intimate aspects of human affairs.” *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have marked the items of information that are protected by common-law privacy or constitutional privacy. The department must also withhold this information under section 552.101.

You claim that some of the submitted documents are confidential under section 552.101 in conjunction with section 261.201 of the Family Code. Section 261.201(a) of the Family Code provides in relevant part:

(a) The 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.

Fam. Code § 261.201(a). You indicate that the documents in question relate to the report and investigation by the department of a complaint of abuse or neglect of a child in a facility licensed by the department. *See* Fam. Code. § 261.103. You state that section 1.207 of title 25 of the Texas Administrative Code, which you indicate was adopted by the department under section 261.201(a), does not permit these documents to be released to this requestor. Based on your representations and our review of the documents in question, we conclude that some of these documents are confidential under section 261.201(a) of the Family Code. *See also* Open Records Decision No. 440 at 2 (1986) (discussing predecessor statute). Therefore, the department must withhold these documents, which we have marked, from the requestor under section 552.101 of the Government Code.

You also indicate that some of the submitted documents are confidential pursuant to chapter 48 of the Human Resources Code. Chapter 48 of the Human Resources Code governs investigations and protective services for elderly and disabled persons. Section 48.101 provides in relevant part:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

- (1) a report of abuse, neglect, or exploitation made under this chapter;
- (2) the identity of the person making the report; and
- (3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department or investigating state agency rule and applicable federal law.

The submitted documents include files, reports, records, communications, and working papers used or developed in an investigation made under chapter 48 of the Human Resources Code or in providing services as a result of an investigation. Such information must not be released to the public, except for a purpose consistent with chapter 48 of the Human Resources Code or as provided by a department or investigating state agency rule or federal law. *See id.* § 48.101(b). *But see id.* § 48.101(c), (d), (e), (f) (permitting release of confidential information in certain circumstances); 25 T.A.C. § 1.207. We have marked the information that is confidential under section 48.101.

You claim that some of the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 577.013(d) of the Health and Safety Code. Section 577.013(d) provides:

(d) All information and materials obtained or compiled by the department in connection with a complaint and investigation concerning a mental hospital licensed under this chapter are confidential and not subject to disclosure, discovery, subpoena or other means of legal compulsion for their release to anyone other than the department or its employees or agents involved in the enforcement action except that this information may be disclosed to:

- (1) persons involved with the department in the enforcement action against the licensed mental hospital;
- (2) the licensed mental hospital that is the subject of the enforcement action, or the licensed mental hospital's authorized representative;
- (3) appropriate state or federal agencies that are authorized to inspect, survey, or investigate licensed mental hospital services;
- (4) law enforcement agencies; and
- (5) persons engaged in bona fide research, if all individual-identifying information and information identifying the licensed mental hospital has been deleted.

Health & Safety Code § 577.013(d). However, subsection (e) of section 577.013 provides that notice of the alleged violation against the licensed mental hospital, pleadings in the administrative hearing, and the final decision or order by the department are subject to disclosure under the Public Information Act. You indicate that some of the submitted information was obtained or compiled by the department as a result of a complaint and

investigation concerning a mental hospital. Furthermore, you state that none of the exceptions listed in subsections (d)(1) through (d)(5) and (e) applies in this instance. Based on our review of your representations and the information, we agree some of the submitted information is confidential under section 577.013(d) of the Health and Safety Code and, thus, must be withheld from disclosure pursuant to section 552.101 of the Government Code.<sup>1</sup> We have marked the information that is confidential under section 577.013.

You also contend that one of the submitted documents, a Report of Contact, is confidential under section 1306(e) of title 42 of the United States Code and section 401.133(a)(2) of title 42 of the Code of Federal Regulations. Section 1306 of title 42 of the United States Code requires state agencies operating programs under the relevant subchapter to release certain reports and evaluations, but only after the entity whose performance is being evaluated has had a reasonable opportunity, not exceeding sixty days, to review the report and offer comments. 42 U.S.C. 1306(e), (f). Section 401.133(a)(2) of title 42 of the Code of Federal Regulations provides that a statement of deficiencies or report must be made available to the public "within 90 days following the completion of the survey by the State agency, but not to exceed 30 days following the receipt of the report by [the Health Care Finance Administration]." You indicate that the submitted Report of Contact is subject to sections 1306(e)(3) and (f) of title 42 of the United States Code and section 401.133(a)(2) of title 42 of the Code of Federal Regulations. Therefore, the department must release this Report of Contact, which we have marked, as required by those provisions. *See* 42 U.S.C. § 1306(e), (f); 42 C.F.R. § 401.133(a)(2).

Finally, we note that the submitted documents contain a social security number that may be confidential under federal law. A social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the responsive records are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

To summarize: (1) we have marked the submitted information that is confidential under section 611.002 of the Health and Safety Code, which may only be released in accordance

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<sup>1</sup>As we are able to make this determination, we need not address your argument under section 552.107 of the Government Code.

with section 611.004 of the Health and Safety Code; (2) we have marked the submitted documents that are confidential under section 576.005 of the Health and Safety Code and must therefore be withheld under section 552.101 of the Government Code; (3) we have marked the information that must be withheld under section 552.101 in conjunction with common-law or constitutional privacy; (4) we have marked the information that is confidential under section 261.201 of the Family Code and must therefore be withheld under section 552.101; (5) we have marked the information that is confidential under section 48.101 of the Human Resources Code and must therefore be withheld under section 552.101; (6) we have marked the information that is confidential under section 577.013 of the Health and Safety Code and must therefore be withheld under section 552.101; (7) the department must release the submitted Report of Contact, which we have marked, as required by section 1306(e)(3) and (f) of title 42 of the United States Code and section 401.133(a)(2) of title 42 of the Code of Federal Regulations; and (8) prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990. The remaining information must be released.

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 Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Karen A. Eckerle  
Assistant Attorney General  
Open Records Division

KAE/sdk

Ref: ID# 164842

Enc: Submitted documents

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