



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 14, 2004

Mr. Lance Beversdorff
Staff Attorney
Texas Youth Commission
P.O. Box 4260
Austin, Texas 78765

OR2004-4815

Dear Mr. Beversdorff:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 203281.

The Texas Youth Commission (the "Commission") received a request from the legislative aide to a representative of the Texas House of Representatives for twelve items of information. You state that the Commission is releasing to the requestor the requested information with the exception of the information responsive to request item three, "videotapes and audiotapes as well as paper or electronic documents held in conjunction with investigations that involve abuse or neglect." You claim that the item three information is excepted from disclosure under section 552.101 of the Government Code. You also acknowledge that the requestor may have a right of access to the information under section 552.008 of the Government Code. We have considered the exception you claim and the applicability of section 552.008, and reviewed the submitted information, which you say is a representative sample of the information at issue.¹

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You raise section 261.201(a) of the Family Code, which provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

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. The commission is an agency authorized to conduct investigations under chapter 261. *See* Fam. Code § 261.401(b) (state agency that operates, licenses, certifies, or registers facility in which children are located shall make prompt, thorough investigation of report that child has been or may be abused, neglected, or exploited in facility). You indicate that the submitted information relates to an allegation of child abuse or neglect that was investigated under chapter 261 of the Family Code. Based on our review, we determine that one of the submitted files, Case No. 04-0089, consists of files, reports, records, communications, videotapes, and working papers used or developed in an investigation made under chapter 261 of the Family Code. We note that the commission has adopted rules concerning investigations of alleged abuse, neglect, or exploitation. *See* Fam. Code § 261.409 (commission by rule shall adopt standards for investigation under Fam. Code § 261.401); 37 T.A.C. § 93.33. You have not indicated that the requestor has a right to the information under the Commission's rules. We therefore determine that the submitted information for Case No. 04-0089 is made confidential under section 261.201 of the Family Code.

The other submitted file, Case No. 04-0493, is not subject to chapter 261, as the record indicates that the youth involved was eighteen years old at the time of the incident and consequently, was not a "child" for purposes of chapter 261 of the Family Code. *See* Fam. Code § 101.003(a) (child or minor means a 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). However, Case No. 04-0493 contains private information. The Office of the Attorney General will raise mandatory exceptions like sections 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.101 of the Government Code encompasses the doctrine of common-law 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. The names and other identifying information of youths appearing in the Case No. 04-0493 file are excepted from disclosure under section 552.101 in conjunction with common-law privacy. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 58.007. Thus, we have marked the types of information in the file that are subject to section 552.101 in conjunction with common-law privacy.

The submitted video associated with Case No. 04-0493 also contains the visages of youths in the custody of the commission. We thus determine that the commission must withhold the video in its entirety pursuant to section 552.101 in conjunction with common-law privacy.

Case No. 04-0493 includes a record subject to the Medical Practices Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(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 § 159.002b), (c). The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *Id.* §§ 159.004, .005. 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). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the record in Case No.04-0493 that is subject to the MPA. *See* Open Records Decision Nos. 598 (1991), 546 (1990) (because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records).

We turn to section 552.008. You state that the Commission assumes that the requestor here is not seeking the requested information pursuant to the legislative access allowed under section 552.008 of the Government Code. Section 552.008 of the Government Code, which

grants access to requested information, including confidential information, to individual members, agencies, or committees of the legislature, provides:

(a) This chapter does not grant authority to withhold information from individual members, agencies, or committees of the legislature to use for legislative purposes.

(b) A governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting member, agency, or committee for inspection or duplication in accordance with this chapter if the requesting member, agency or committee states that the public information is requested under this chapter for legislative purposes. A governmental body, by providing public information under this section that is confidential or otherwise excepted from required disclosure under law, does not waive or affect the confidentiality of the information for purposes of state or federal law or waive the right to assert exceptions to required disclosure of the information in the future. The governmental body may require the requesting individual member of the legislature, the requesting legislative agency or committee, or the members or employees of the requesting entity who will view or handle information that is received under this section and that is confidential under law to sign a confidentiality agreement that covers the information and requires that:

(1) the information not be disclosed outside the requesting entity, or within the requesting entity for purposes other than the purpose for which it was received;

(2) the information be labeled as confidential;

(3) the information be kept securely; or

(4) the number of copies made of the information or the notes taken from the information that implicate the confidential nature of the information be controlled, with all copies or notes that are not destroyed or returned to the governmental body remaining confidential and subject to the confidentiality agreement.

(c) This section does not affect:

(1) the right of an individual member, agency, or committee of the legislature to obtain information from a governmental body under other law, including under the rules of either house of the legislature;

(2) the procedures under which the information is obtained under other law; or

(3) the use that may be made of the information obtained under other law.

Gov't Code § 552.008. The requestor states, "We would like to make an open records request for the following information from the [Commission] for the past year. . . . Please redact any confidential information as this information may be released to other public officials. . . ." She does not state that the information is requested for legislative purposes. Furthermore, you state that the requestor "has not indicated that her request is indeed one to be considered invoking section 552.008." Thus, we find that release of the responsive information is not compelled by section 552.008 in response to this request. Accordingly, as we have determined that information in Case No. 04-0089 is deemed confidential under section 261.201 of the Family Code, and portions of the information in Case No. 04-0493 are confidential under the common-law right to privacy, and portions are confidential under the MPA, the Commission must withhold the confidential information from the requestor based on section 552.101 of the Government Code.

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,

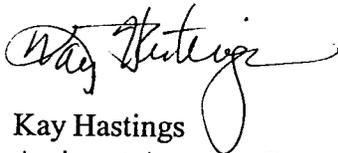
at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 Dep't of Pub. 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,



Kay Hastings
Assistant Attorney General
Open Records Division

KH/seg

Ref: ID# 203281

Enc: Submitted documents

c: Ms. Alison Brock
Office of Representative Sylvester Turner
State of Texas House of Representatives
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(w/o enclosures)