



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 8, 2005

Mr. Michael P. Mondville
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2005-08188

Dear Mr. Mondville:

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# 227873.

The Texas Department of Criminal Justice (the "department") received a request for information pertaining to a former inmate from a representative of the inmate. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the department's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e)(1)(D). The department states that it received the request for information on June 7, 2005, but it did not request a decision from this office by fax until June 22, 2005. In addition, the department

did not submit most of the information at issue until July 1, 2005. The department therefore failed to comply with the procedural requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Sections 552.101 and 552.134 of the Government Code can provide compelling reasons to overcome this presumption; therefore, we will consider whether these sections require you to withhold the submitted information.

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. You argue that the submitted information includes records pertaining to substance abuse treatment that are confidential pursuant to federal law.¹ Section 290dd-2 of title 42 of the United States Code provides in relevant part the following:

(a) Requirement. Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

42 U.S.C. § 290dd-2(a); *see also* 42 C.F.R. § 2.1 (records of identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with performance of drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of United States are generally confidential). You inform us that the documents at issue are from a department program funded in part by federal funds.

¹Although you assert that the submitted substance abuse treatment records are confidential under section 290ee-3 of title 42 of the United States Code, we note that this section has been omitted. The confidentiality of substance abuse and mental health records is currently governed by part D of subchapter III-A of chapter 6-A of title 42 of the United States Code (42 U.S.C. §§ 290dd-290dd-3). Pub. L. 102-321, Title I, § 131, July 10, 1992, 106 Stat. 366.

The requestor has submitted a consent form signed by the former inmate authorizing the department to release to the requestor records pertaining to the former inmate, including medical records. In this regard, we note that section 290dd-2 of title 42 of the United States Code further provides:

(b) Permitted disclosure

(1) Consent. The content of any record referred to in subsection (a) of this section may be disclosed in accordance with the prior written consent of the patient with respect to whom such record is maintained, but only to such extent, under such circumstances, and for such purposes as may be allowed under regulations prescribed pursuant to subsection (g) of this section.

42 U.S.C. § 290dd-2(a), (b)(1). Section 2.33 of title 42 of the Code of Federal Regulations also provides as follows:

If a patient consents to a disclosure of his or her records under Sec. 2.31, a program may disclose those records in accordance with that consent to any individual or organization named in the consent, except that disclosures to central registries and in connection with criminal justice referrals must meet the requirements of Sec. 2.34 and 2.35, respectively.

42 C.F.R. § 2.33; *see id.* § 2.31 (listing required information in written consent). We further note that section 2.20 of title 42 of the Code of Federal Regulations (“Relationship to State Law”) provides the following:

The statutes authorizing these [federal] regulations . . . do not preempt the field of law which they cover to the exclusion of all State laws in that field. If a disclosure permitted under these regulations is prohibited under State law, neither these regulations nor the authorizing statutes may be construed to authorize any violation of that State law. However, no State law may either authorize or compel any disclosure prohibited by these regulations.

42 C.F.R. § 2.20. Thus, section 290dd-2 and implementing regulations do not preempt state law if the state law provides greater protection against disclosure of substance abuse treatment records. *See id.*; *see also In re W.H.*, 602 N.Y.S.2d 70 (1993) (“federal regulations expressly provide that if a state’s law is more protective of patient records than the federal regulations, the state law is not preempted and governs”); *Jane H. v. Rothe*, 488 N.W.2d 879, 882 (N.D. 1992) (section 2.20 “declares that state law may offer more, but not less, disclosure protection than the federal law”); *Aetna Cas. & Sur. Co. v. Ridgeview Institute, Inc.*, 194 Ga. App. 805, 806, 392 S.E.2d 286, 287 (1990) (“federal regulations make it clear that even if disclosure is allowed under federal law, if state law prohibits disclosure, federal

law may not be construed to allow disclosure contrary to the state law”). Therefore, we must determine the extent to which Texas law applies to the submitted information and whether Texas law is more protective than federal law of substance abuse treatment records.

Chapter 611 of the Texas Health and Safety Code governs the release of substance abuse treatment information. *See* Health and Safety Code § 611.011(1) (definition of patient includes person who consults or is interviewed by a professional for diagnosis, evaluation, or treatment of alcoholism or drug addiction). Section 611.002 provides the following:

- (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.
- (c) This section applies regardless of when the patient received services from a professional.

Health and Safety Code § 611.002.

Upon review, we find that a portion of the submitted information consists of patient records subject to section 611.002. Under chapter 611, a patient is generally entitled to have access to the contents of a confidential record made about the patient. *Id.* §§ 662.0045(a); *see id.* § 611.004(a)(4) (professional may disclose confidential information to person who has the written consent of patient). However, section 611.0045(b) provides that “[t]he professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient’s physical, mental, or emotional health.” In addition, the Texas Supreme Court has determined that “[b]ecause subsection (b) [of section 662.0045] may limit a patient’s rights to his or her own records, subsection (b) can also limit a parent’s or third party’s right to a patient’s records when the third party or parent stands in the patient’s stead.” *Abrams v. Jones*, 35 S.W.3d 620, 626 (Tex. 2000).

Consequently, because section 611.0045(b) of the Health and Safety Code provides that a professional may deny a patient or his representative access to treatment records under certain circumstances, and federal law has no such restriction, disclosure under federal law could in certain circumstances violate Texas law. Therefore, we conclude that, in this instance, the release of information consisting of alcoholism and drug addiction treatment records that fall under chapter 611 is governed by Texas law, not federal law. *See* 42 C.F.R. § 2.20. We have marked the information that is subject to chapter 611, and that may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

The remaining information contains records maintained in connection with the performance of a substance abuse treatment program that do not fall under chapter 611, but which are subject to section 290dd-2 of chapter 42 of the United States Code. Although you assert that the relevant federal regulations “allow for disclosure only for medical emergencies, research or audit activities, and upon order of the court,” we note that federal law allows for the release of a patient’s substance abuse records upon proper written consent of the patient “to any individual or organization named in the consent.” 42 C.F.R. § 2.33; *see* 42 U.S.C. § 290dd-2(a)(1). Accordingly, these substance abuse records, which we have marked, may be released only as provided under section 290dd-2 of title 42 of the United States Code and sections 2.31 and 2.33 of title 42 of the Code of Federal Regulations.

The department asserts that the remaining information is excepted under section 552.134 of the Government Code. Section 552.134(a) relates to inmates of the department and provides in relevant part the following:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov’t Code § 552.134(a). Upon review of your arguments and the submitted information, we conclude that section 552.134 is applicable to the remaining information. We also find that the exceptions in section 552.029 are not applicable. Therefore, the department must withhold the remaining information under section 552.134 of the Government Code.

To conclude, the information marked under chapter 611 may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. The remaining substance abuse records we have marked may only be released in accordance with section 290dd-2 of title 42 of the United States Code and sections 2.31 and 2.33 of title 42 of the Code of Federal Regulations. The department must withhold the remaining information under section 552.134 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).

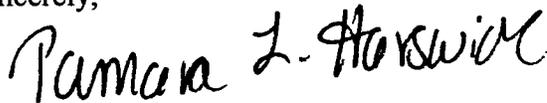
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,



Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/JLC/seg

Ref: ID# 227873

Enc. Submitted documents

c: Ms. Rebecca Garcia
Confidential Communications International, LTD.
2525 North Loop West, Suite 260
Houston, Texas 77008
(w/o enclosures)