



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 18, 2008

Mr. Charles K. Eldred
Public Information Coordinator
Texas Youth Commission
P.O. Box 4260
Austin, Texas 78765

OR2008-05226

Dear Mr. Eldred:

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# 307850.

The Texas Youth Commission (the "commission") received a request for copies of a specified investigation report regarding the alleged abuse and mistreatment of a named youth. You claim that the submitted 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.¹

Initially, we note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 of the Government Code provides that:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

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.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108.

Gov't Code § 552.022(a)(1). In this instance, the submitted information constitutes completed investigations made for or by the commission. The commission must release the completed investigation under section 552.022(a)(1) of the Government Code unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly confidential under other law. You claim that submitted information is excepted from disclosure under section 552.103 of the Government Code. We note, however, that section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103 of the Government Code); Open Records Decision No. 542 at 4 (1990) (litigation exception may be waived). As such, section 552.103 of the Government Code is not other law that makes information confidential for the purposes of section 552.022 of the Government Code. Therefore, the commission may not withhold the submitted information subject to section 552.022 under section 552.103 of the Government Code. However, because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will address the applicability of section 552.101 to the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. Medical records are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See Occ. Code § 151.001*. Section 159.002 of the MPA provides in part:

(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.

Id. § 159.002(b)-(c). 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).*

When medical records pertain to a minor, such records may only be released upon the parent's or legal guardian'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, 159.005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We note that the submitted information includes nurse's notes. To the extent these nurse's notes were created under the supervision of a physician, they constitute medical records within the scope of the MPA. However, if these notes were not created under the supervision of a physician, they are not subject to the MPA. We have marked the medical records in the submitted information that are confidential under the MPA, if the notes were created under the supervision of a physician. The commission may only release records subject to the MPA in accordance with the statute. *See* Open Records Decision No. 598 (1991). If the notes were not created under the supervision of a physician, they are subject to our conclusion under section 261.201 of the Family Code, which we will explain.

Section 261.201 of the Family Code provides in 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). We note that the commission is authorized to conduct an investigation under chapter 261 of the Family Code. *See id.* § 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). According to the submitted documents, the alleged victim in the incident to which the information pertains was 14 years of age at the time of the incident and thus was a child for purposes of chapter 261. *See id.* § 101.003(a) (defining "child" for purposes of Fam. Code § 261.201 as person under 18 years of age who is not and has not been married or who has not had disabilities of minority removed for general purposes). Moreover, we have reviewed the submitted information and find that it consists of files, reports, records, communications, videotapes and working papers used or developed in an

investigation made under chapter 261 of the Family Code. Therefore, the submitted information falls within the scope of section 261.201 of the Family Code.²

We note, however, that sections 261.201(i) and (j) state:

(i) [n]otwithstanding subsection (a), the [commission] shall release a report of alleged or suspected abuse or neglect made under this chapter if:

(1) the report relates to a report of abuse or neglect involving a child committed to the commission during the period that the child is committed to the commission; and

(2) the commission is not prohibited by Chapter 552, Government Code, or other law from disclosing the report.

(j) The [commission] shall edit any report disclosed under Subsection (I) to protect the identity of:

(1) a child who is the subject of the report of alleged or suspected abuse or neglect;

(2) the person who made the report; and

(3) any other person whose life or safety may be endangered by the disclosure.

Fam. Code § 261.201(i), (j). We additionally 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). Section 93.33(l) of title 37 of the Texas Administrative Code provides in part that:

(5) [a] report will be provided to a parent, managing conservator or other legal representative of a youth upon request. The information contained in the report will be redacted to protect the identity of the person making the report, *other youth*, and any other person who may be harmed by the disclosure.

²We note the commission raised section 552.101 in conjunction with section 61.073 of the Human Resources Code. In this instance, however, the information is subject to section 261.201 of the Family Code, which is the more specific statute. See *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000) (the "more specific statute controls over the more general").

37 T.A.C. § 93.33(1)(5) (emphasis added). In this instance, the child at issue was committed to the commission at the time the alleged abuse occurred. Further, the requestor states that he is an attorney representing the youth's mother, and that the request letter is being written on behalf of the named youth. Therefore, under section 261.201(i) of the Family Code, and subsection 93.33(1)(5) of title 37 of the Texas Administrative Code, the commission must provide the requestor with a copy of the report and its attachments, after redacting this information to protect the identity of the person making the report and any other person who may be harmed by the disclosure of the report. *See* Fam. Code § 261.201(j)(2), (3); 37 T.A.C. § 93.33(1)(5). The commission must also redact the identifying information of other youths in commission custody identified in the submitted information. *See* 37 T.A.C. § 93.33(1)(5).

We note that section 261.201(j)(1) of the Family Code provides that a report will be released only after redactions are made to protect the identity of the child who is the subject of the investigation. However, as noted, section 93.33(1)(5) allows access by the parent, managing conservator or other legal representative of a youth without such redactions. We find that section 261.409 of the Family Code, which provides the commission such authority to adopt standards for the investigation of abuse in commission facilities, authorizes the commission to provide for release of child abuse investigation information to the child's parent or legal representative without redactions made to protect the identity of the child. Accordingly, the commission need not redact identifying information of the child who is the subject of the investigation before releasing the report to the requestor. *See* Fam. Code § 261.201(a) (providing for release of confidential information for purposes consistent with rules adopted by an investigating agency). The commission must withhold the marked documents that are not part of the report based on section 552.101 in conjunction with section 261.201(a).

In summary, the marked nurse's notes may only be released in accordance with the MPA if the notes were created under a physician's supervision. Otherwise, the notes, which are attached to the reports, are subject to section 261.201(i) of the Family Code. Pursuant to section 261.201(i) of the Family Code, the commission must provide the requestor with a copy of the reports and their attachments, after redacting information identifying the person making the report, any other person who may be harmed by the disclosure of the reports, and any other youths identified in the submitted information. The commission must withhold the remaining information based on section 552.101 in conjunction with section 261.201 of the Family 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 file suit in

Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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. 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,



Jessica J. Maloney
Assistant Attorney General
Open Records Division

JJM/jh

Ref: ID# 307850

Enc. Submitted documents

c: Mr. David L. Jones
Watts Law Firm
Tower II Building, 14th Floor
555 North Carancahua Street
Corpus Christi, Texas 78478
(w/o enclosures)