ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 3, 2008

Mr. Cary E. Smith
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2008-12056

Dear Mr. Smith:

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# 321149.

The Texas Health and Human Services Commission (the "commission") received a request for information pertaining to grievances made by three former commission employees. You state that some of the requested information is being released, but claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed 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. Chapter 48 of the Human Resources Code regulates the investigation of abuse, neglect, or exploitation of an elderly or disabled person. Section 48.101 makes the following information confidential:

> (1) a report of abuse, neglect, or exploitation made under [chapter 48];
>
> (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.

Human Res. Code § 48.101(a). You state that Exhibit B consists of Adult Protective Service records of investigations of abuse of disabled persons, which we understand were conducted pursuant to chapter 48 of the Human Resources Code. We note that such information must not be released to the public, except for a purpose consistent with chapter 48 or as provided by a department or investigating state agency rule or federal law. *See id.* § 48.101(b). Based on your representations, we agree that Exhibit B is confidential under section 48.101. *See id.*; Attorney General Opinion JM-851 (1988) (confidentiality of adult protective services records continues after client's death). You further state the requestor does not have a right of access to this information. *See* Human Res. Code § 48.101(c); 25 T.A.C. § 1.207. Accordingly, we conclude that the commission must withhold Exhibit B, as well as the information we have marked in Exhibit D, under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

> (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 § 159.002(b), (c). 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, 159.005. 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). Exhibit C consists of medical records and you state that the release provisions of the MPA are inapplicable to the requestor. *See* Occ. Code §§ 159.004, 159.005. Thus, the commission must withhold Exhibit C under section 552.101 in conjunction with the MPA.

Section 552.101 also encompasses section 595.001 of the Health and Safety Code, which provides that "[r]ecords of the identity, diagnosis, evaluation, or treatment of a person that

are maintained in connection with the performance of a program or activity relating to mental retardation are confidential and may be disclosed only for the purposes and under the circumstances authorized under Sections 595.003 and 595.004." You assert that the remaining information in Exhibit D contains information coming within the scope of section 595.001 and that sections 595.003 and section 595.004 of the Health and Safety Code are inapplicable here. Having considered your representations and reviewed the submitted records, we agree that the information pertaining to restraint evaluations in Exhibit D is confidential under section 595.001; therefore, the commission must withhold this information, which we have marked, under section 552.101 of the Government Code. However, the remaining documents in Exhibit D, including the grievance appeal documents of the former employees at issue, do not consist of the records of the identity, diagnosis, evaluation, or treatment of a person pursuant to section 595.001 of the Health and Safety Code. Accordingly, the commission may not withhold the remaining documents in Exhibit D on this basis.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.,* 540 S.W.2d 668, 685 (Tex. 1976). The types 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. However, the common-law right to privacy is a personal right that lapses at death, and therefore it does not encompass information that relates to a deceased individual. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.–Texarkana 1979, writ ref'd n.r.e.); Open Records Decision No. 272 at 1 (1981). We find that the identities of the commission's living clients are intimate and embarrassing information of no legitimate public interest; therefore, the commission must withhold the information we have marked in Exhibit D under section 552.101 in conjunction with common-law privacy.

We note that section 552.117 of the Government Code may be applicable to some of the remaining information. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. But an individual's personal post office box number is not a "home address" for purposes of section 552.117, and therefore may not be withheld under section 552.117. *See* Open Records Decision No. 622 at 4 (1994) (purpose of section 552.117 is to protect public employees from being harassed at home); *see also* Open Records Decision No. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Pursuant to

section 552.117(a)(1), the commission must withhold this personal information that pertains to the former employees of the commission who elected, prior to the commission's receipt of the request for information, to keep such information confidential. Such information may not be withheld for individuals who did not make a timely election. We have marked information that must be withheld if section 552.117 applies.

To conclude, the commission must withhold the following: Exhibit B and the information we have marked in Exhibit D under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code; Exhibit C under section 552.101 in conjunction with the MPA; the information we have marked in Exhibit D under section 552.101 in conjunction with section 595.001 of the Health and Safety Code and common-law privacy; and the information we have marked under section 552.117 of the Government Code if the former employees at issue timely elected to withhold that information. The commission must release the remaining information.

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). If the governmental body does not file suit over 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,

James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/ma

Ref: ID# 321149

Enc. Submitted documents

c: Ms. Cindy Culp
Waco Tribune-Herald
900 Franklin Avenue
Waco, Texas 76701
(w/o enclosures)