



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 16, 2008

Ms. Lisa D. Hernandez
General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2008-17112

Dear Ms. Hernandez:

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# 329109.

The Texas Department of State Health Services (the "department") received a request for all complaints, investigations, or reports filed in connection with specified alleged misconduct by a named licensed chemical dependency counselor.¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, we must address the applicability of section 552.007 of the Government Code to the investigative report, which the department states it previously released to the requestor. Section 552.007 of the Government Code generally prohibits selective disclosure of information that a governmental body has voluntarily made available to any member of the public. *See Gov't Code* § 552.007. Section 552.007 provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See id.*; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision Nos. 490 (1988), 400 (1983) (governmental body may waive right to claim

¹The requestor excludes from his request social security numbers and the home address and telephone number of a specified client.

permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Section 552.103, which you claim for the submitted information, is a discretionary exception to disclosure that is designed to protect the governmental body's interests and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Although protection for information covered by the Act's permissive exceptions, such as section 552.103 can be waived, protection for information deemed confidential by law ordinarily is not waived through "selective disclosure." *See* ORD Nos. 490, 400. Thus, regardless of whether the department previously released any of the information at issue in this request, we must address whether the submitted information is made confidential by law and must now be withheld pursuant to section 552.101 of the Government Code.

Section 552.101 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 other statutes make confidential. You assert subsection 81.006(d) of the Civil Practice and Remedies Code in conjunction with section 552.101 protects the submitted information, which consists of a report of alleged sexual exploitation of a patient by a mental health services provider. Section 81.006 of the Civil Practice and Remedies Code provides in pertinent part as follows:

(a) If a mental health services provider or the employer of a mental health services provider has reasonable cause to suspect that a patient has been the victim of sexual exploitation by a mental health services provider during the course of treatment, or if a patient alleges sexual exploitation by a mental health services provider during the course of treatment, the mental health services provider or the employer shall report the alleged conduct not later than the 30th day after the date the person became aware of the conduct or the allegations to:

- (1) the prosecuting attorney in the county in which the alleged sexual exploitation occurred; and
- (2) any state licensing board that has responsibility for the mental health services provider's licensing.

...

(c) A report under this section need contain only the information needed to:

- (1) identify the reporter;

(2) identify the alleged victim, unless the alleged victim has requested anonymity; and

(3) express suspicion that sexual exploitation has occurred.

(d) Information in a report is privileged information and is for the exclusive use of the prosecuting attorney or state licensing board that receives the information. A person who receives privileged information 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. The identity of an alleged victim of sexual exploitation by a mental health services provider may not be disclosed by the reporter, or by a person who has received or has access to a report or record, unless the alleged victim has consented to the disclosure in writing.

(e) A person who intentionally violates Subsection (a) or (d) is subject to disciplinary action by that person's appropriate licensing board and also commits an offense. An offense under this subsection is a Class C misdemeanor.

Civ. Prac. & Rem. Code § 81.006. The submitted information consists of the mental health services provider's report of and investigation into the alleged sexual exploitation of a patient. Upon review, we agree the submitted letters from Mental Health Mental Retardation of Tarrant County ("MHMRTC") to the department are privileged and may not be disclosed. Accordingly, the department must withhold the submitted letters, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 81.006(d) of the Civil Practice and Remedies Code. However, we find the submitted investigative report is not subject to section 81.006(d) and may not be withheld from disclosure under section 81.006(d) of the Civil Practice and Remedies Code.

You also assert portions of the submitted investigative report are excepted under the doctrines of common-law and constitutional privacy. The doctrine of common-law right to privacy 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. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses,

operations, and physical handicaps). Accordingly, MHMRTC must withhold the information you have highlighted under section 552.101 in conjunction with common-law privacy.²

In summary, the department must withhold the submitted letters from MHMRTC to the department pursuant to section 552.101 of the Government Code in conjunction with section 81.006(d) of the Civil Practice and Remedies Code. The department must also withhold the information you have highlighted under section 552.101 in conjunction with common-law privacy. The remaining submitted 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 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).

²As our ruling for this information is dispositive, we need not address your remaining argument under constitutional privacy.

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,

A handwritten signature in black ink, appearing to read "Greg Henderson". The signature is fluid and cursive, with the first name "Greg" being more prominent than the last name "Henderson".

Greg Henderson
Assistant Attorney General
Open Records Division

GH/eeg

Ref: ID# 329109

Enc. Submitted documents

c: Requestor
(w/o enclosures)