



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 19, 2009

Mr. Brett Norbraten
Open Records Attorney
Texas Department of Aging and Disability Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2009-14739

Dear Mr. Norbraten:

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# 358627 (DADS internal tracking number 2009SOLEG0149).

The Texas Department of Aging and Disability Services (the "department") received a request for information pertaining to the Lubbock State School/Lubbock State Supported Living Center, including information about employees who were fired following an abuse or neglect investigation since 2005, inspection reports, documents pertaining to incidents involving prone manual restraint of residents by staff since 2005, and three categories of information about a specified incident. You indicate that you will release some of the requested information. You 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.¹

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.

Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses statutory confidentiality provisions. You contend that Exhibit A is confidential under section 48.101 of the Human Resources Code, which pertains to the disclosure of reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities. Section 48.101 provides in pertinent part as follows:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

- (1) a report of abuse, neglect, or exploitation made under this chapter;
- (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.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department or investigating state agency rule and applicable federal law.

Hum. Res. Code § 48.101(a), (b). You indicate that the Texas Department of Family and Protective Services investigative report in Exhibit A relates to an investigation made under chapter 48 of the Human Resources Code. *See id.* § 48.252(a)(1), 40 T.A.C. § 711.1. Based upon your representations and our review, we find that Exhibit A consists of files, reports, records, communications, and working papers used or developed in an investigation made under chapter 48. 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* Hum. Res. Code § 48.101(b). *But see id.* § 48.101(c)-(g) (permitting release of confidential information in certain circumstances). You do not indicate, nor does it appear, that an exception to confidentiality applies in this instance. Accordingly, we conclude that the department must withhold Exhibit A in its entirety pursuant to section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code.

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.” Health & Safety Code § 595.001. You state that Exhibit B and portions of Exhibit C pertain to the identity, diagnosis, evaluation, or treatment of a state school client and that “the state school system itself is a ‘program or activity relating to mental retardation.’” You also assert that the release provisions set forth in sections 595.003 and 595.004 of the Health and Safety Code are inapplicable here. Having considered your representations and reviewed the submitted records, we agree that a portion of Exhibit B and the information you have marked in Exhibit C are confidential under section 595.001; therefore, the department must withhold this information under section 552.101 of the Government Code.² However, upon review of the remaining information in Exhibit B, we find that it is not the type of information that is confidential under section 595.001 of the Health and Safety Code. Therefore, none of the remaining information is confidential under section 595.001 of the Health and Safety Code and the department may not withhold it under section 552.101 on that ground.

You also argue that the remaining information in Exhibit B is subject to the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 552.101 of the Government Code also encompasses section 159.002 of the of the MPA, which provides in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (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). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded 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). Upon review, we find you have failed to demonstrate how any of the remaining

²As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this portion of Exhibit B.

information at issue constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician for the purposes of the MPA. Accordingly, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 also encompasses section 611.002 of the Health and Safety Code. Section 611.002 provides in part:

- (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.

Health & Safety Code § 611.002(a)-(b). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See Open Records Decision No. 565 (1990)*. After reviewing the information at issue, we find that no portion of the remaining information in Exhibit B is subject to chapter 611 of the Health and Safety Code. Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.

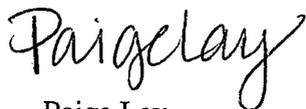
In summary, the department must withhold Exhibit A under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code. The department must also withhold the information we have marked in Exhibit B and the information you have marked in Exhibit C under section 552.101 of the Government Code in conjunction with section 595.001 of the Health and Safety Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script that reads "Paigelay".

Paige Lay
Assistant Attorney General
Open Records Division

PL/rl

Ref: ID# 358627

Enc. Submitted documents

cc: Requestor
(w/o enclosures)