ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 12, 2010

Ms. Donna L. Clarke
Assistant Criminal District Attorney
Lubbock County
P.O. Box 10536
Lubbock, Texas 79408-3536

OR2010-03596

Dear Ms. Clarke:

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# 372761.

The Lubbock County Sheriff's Office (the "sheriff") received a request for documentation related to the reporting of a specified incident, a specified grievance and any responses to the grievance, and information on whether a specified area contains cameras and if the area was being videotaped. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor, Advocacy, Incorporated ("Advocacy"). *See* Gov't Code § 552.304 (providing that any person may submit comments stating why information should or should not be released).

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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type 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. 540 S.W.2d at 683.

In this case, the submitted information pertains to an investigation of an alleged sexual assault. Generally, only information that either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy. However, a governmental body is required to withhold an entire report when identifying information is inextricably intertwined with other releasable information or when the requestor knows the identity of the alleged victim. *See* Open Records Decisions Nos. 393 (1983), 339 (1982); *see also* Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld); *cf. Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have legitimate interest in such information). You claim the submitted information must be withheld in its entirety under common-law privacy because the request shows the requestor knows the identity of the alleged sexual assault victim listed in the submitted information. However, the request also states, and provides documentation showing, the requestor is the representative of the individual whose privacy interest is at issue. Section 552.023 of the Government Code provides a governmental body may not deny access to a person or a person's representative to whom the information relates on the grounds the information is considered confidential under privacy principles. Gov't Code § 552.023(b). Thus, the submitted information may not be withheld from the requestor on the basis of common-law privacy.

The sheriff also claims section 552.108 of the Government Code for the submitted information. Section 552.108 provides in pertinent part:

> (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:
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> . . .
>
> (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;
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> (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:
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> . . .

> (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Id. § 552.108(a)(2), (b)(2). A governmental body claiming subsection 552.108(a)(2) or subsection 552.108(b)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). Section 552.108 is generally not applicable to information relating to an administrative investigation that did not result in a criminal investigation or prosecution. *See Ellen*, 840 S.W.2d at 525-26 (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982). We note the submitted documents reflect they were generated as part of an internal administrative investigation. You do not provide any arguments explaining how the internal investigation was a part of or resulted in a criminal investigation or prosecution. Therefore, you have not demonstrated the information at issue relates to a closed criminal investigation that did not result in conviction or deferred adjudication. Accordingly, the sheriff may not withhold any of the submitted information under subsection 552.108(a)(2) or subsection 552.108(b)(2) of the Government Code.

We note the submitted information includes information obtained from a polygraph examination. Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code, which provides as follows:

> (a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:
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> (1) the examinee or any other person specifically designated in writing by the examinee;
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> (2) the person that requested the examination;
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> (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
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> (4) another polygraph examiner in private consultation; or
>
> (5) any other person required by due process of law.

> (b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.
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> (c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. The requestor does not fall within any of the enumerated categories; therefore, the sheriff must generally withhold the polygraph information under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure regardless of whether the officer requested confidentiality under section 552.024 or 552.1175 of the Government Code.[1] Gov't Code § 552.117(a)(2). Upon review, we note that a portion of the information may be subject to section 552.117(a)(2). We are unable to determine from the information provided whether the information at issue relates to a currently licensed peace officer. Thus, we must rule conditionally. Accordingly, if the individual at issue is a currently licensed peace officer as defined by article 2.12, then the sheriff must generally withhold the personal information in the submitted information under section 552.117(a)(2). If the individual at issue is not a currently licensed peace officer, section 552.117(a)(1) may apply to this information.

Section 552.117(a)(1) of the Government Code 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 this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). The sheriff may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The submitted information does not reflect whether the individual at issue elected to keep his information confidential pursuant to section 552.024 of the Government Code prior to the sheriff receiving the request at issue. If the individual made a timely election under section 552.024, the sheriff must generally withhold the personal information at issue under section 552.117(a)(1). If the individual did not make a timely election under section 552.024, the personal information may not be withheld under that exception.

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[1]The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Next, we note some of the remaining information is subject to section 552.130 of the Government Code. Section 552.130 provides that information relating to a motor vehicle operator's license or driver's license issued by a Texas agency is excepted from public release. *Id.* § 552.130(a)(1). The sheriff must generally withhold the Texas driver's license number under section 552.130 of the Government Code.[2]

Finally, we address the arguments of the requestor, Advocacy, that it has a special right of access to all of the requested information pursuant to its authority under federal law to conduct investigations of abuse or neglect of people with disabilities. Federal law provides allotments for the support of a protection and advocacy system ("P&A system") in each state to protect the legal and human rights of individuals with developmental disabilities. *See* 42 U.S.C. § 15041. Advocacy has been designated in Texas as the P&A system for purposes of the federal Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI"), sections 10801 through 10851 of title 42 of the United States Code and the Developmental Disabilities Assistance and Bill of Rights Act ("DDA"), sections 15041 through 15045 of title 42 of the United States Code. *See* Tex. Gov. Exec. Order No. DB-33, 2 Tex. Reg. 3713 (1977); Attorney General Opinion JC-0461 (2002); *see also* 42 CFR §§ 1386.19, .20 (defining "designated official" and requiring official to designate agency to be accountable for funds and conduct of P&A agency).

The PAIMI provides, in relevant part, that Advocacy, as the state's P&A system, shall

> (1) have the authority to–
>
> > (A) investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred[.]

42 U.S.C. § 10805(a)(1)(A). Further, the PAIMI provides that Advocacy shall

> (4) . . . have access to all records of–
>
> > (A) any individual who is a client of the system if such individual, or the legal guardian, conservator, or other legal representative of such individual, has authorized the system to have such access[.]

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[2]We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

Id. § 10805(a)(4)(A). The term "records" as used in the above-quoted section 10805(a)(4)(A) includes "reports prepared by any staff of a facility rendering care and treatment [to the individual] . . . that describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents[.]" *Id.* § 10806(b)(3)(A); *see also* 42 C.F.R. § 51.41(c) (addressing scope of right of access under PAIMI). Further, the PAIMI defines the term "facilities" and states that the term "may include, but need not be limited to, hospitals, nursing homes, community facilities for individuals with mental illness, board and care homes, homeless shelters, and jails and prisons." 42 U.S.C. § 10802(3).

In this instance, the records at issue consist of an internal affairs investigation related to abuse in a facility as defined by the PAIMI. Advocacy states that it represents an individual being treated for a mental illness. Further, Advocacy states the Lubbock County Detention Center records indicate the individual at issue was being treated for a mental illness on or about the time of the alleged abuse. Advocacy explains that it intends to use the requested information to investigate the alleged abuse of an individual with a mental illness as governed by the PAIMI. Additionally, Advocacy explains, and provides documentation showing, the individual at issue has provided Advocacy with consent to obtain the requested information. 42 U.S.C. § 10805(a)(4)(A).

Finally, Advocacy asserts that, pursuant to federal law, any state confidentiality laws shall not restrict Advocacy's right of access to the requested records. In this regard, we note a state statute is preempted by federal law to the extent it conflicts with that federal law. *See, e.g.*, *Equal Employment Opportunity Comm'n v. City of Orange*, 905 F. Supp 381, 382 (E.D. Tex.1995). Further, federal regulations provide that state law must not diminish the required authority of a P&A system. *See* 45 C.F.R. § 1386.21(f); *see also Iowa Prot. and Advocacy Services, Inc. v. Gerard*, 274 F. Supp. 2d 1063 (N.D. Iowa 2003) (broad right of access under section 15043 of title 42 of United States Code applies despite existence of any state or local laws or regulations which attempt to restrict access; although state law may expand authority of P&A system, state law cannot diminish authority set forth in federal statutes); *Iowa Protection and Advocacy Services, Inc. v. Rasmussen*, 206 F.R.D. 630, 639 (S.D. Iowa 2001). Similarly, Texas law states, "[n]otwithstanding other state law, [a P&A system] . . . is entitled to access to records relating to persons with mental illness to the extent authorized by federal law." Health & Safety Code § 615.002(a). Thus, in this instance, although we note some of the submitted information is subject to sections 552.101, 552.117, and 552.130 of the Government Code, these exceptions to disclosure are preempted by the PAIMI. Accordingly, based on Advocacy's representations, we determine that Advocacy has a right of access to the submitted information pursuant to subsections (a)(1)(A) and (a)(4)(A) of section 10805 of title 42 the United States Code, and the sheriff must release this information to the requestor.

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,

Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/eeg

Ref: ID# 372761

Enc. Submitted documents

c: Requestor
(w/o enclosures)