



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 29, 2010

Mr. Marc Allen Connelly
Deputy General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714

OR2010-04364

Dear Mr. Connelly:

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# 374047.

The Department of State Health Services (the "department") received a request for information pertaining to a named individual and a specified incident. You state the department has made or will make some of the requested information available to the requestor. You claim portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, you acknowledge, and we agree, the department failed to request a ruling or submit the responsive information within the statutory time periods prescribed by subsections 552.301(b) and 552.301(e) of the Government Code. *See Gov't Code* § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). A compelling reason

exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). Because section 552.101 can provide a compelling reason to withhold information, we will consider whether or not the submitted information is excepted under the Act.

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 information made confidential by other statutes, including the Medical Practices Act (the "MPA"). Occ. Code §§ 151.001-165.160. Section 159.002 of the Occupations Code provides in relevant 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.

Id. § 159.002(a), (b), (c). This office has concluded that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; ORD 598. 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). This office has also determined when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). Medical records must be released on receipt of the patient's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .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). You indicate that the

information you have marked under section 159.002 of the Occupations Code is from patient medical records. Thus, the department must withhold this information under section 159.002 of the Occupations Code, unless it receives the required written consent for release of the information under sections 159.004 and 159.005 of the Occupations Code.

Section 552.101 also encompasses Chapter 48 of the Human Resources Code which regulates the investigation of abuse, neglect, or exploitation of an elderly or disabled person. Section 48.101 states in relevant part:

(a) The following information is confidential and not subject to disclosure under [the Act]:

(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.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by [the Texas Department of Family and Protective Services¹] or investigating state agency rule and applicable federal law.

...

(d) The executive commissioner shall adopt rules providing for the release, on request, to a person who is the subject of a report of abuse, neglect, or exploitation or to that person's legal representative of otherwise confidential information relating to that report. [The Texas Department of Family and Protective Services] or investigating state agency shall edit the information before release to protect the confidentiality of information relating to the reporter's identity and to protect any other individual whose safety or welfare may be endangered by disclosure.

¹In 2005, the Department of Protective and Regulatory Services was renamed the Department of Family and Protective Services. See Act of May 29, 2005, 79th Leg., R.S., ch. 268, §§ 1.74, 1.75, 2005 Tex. Gen. Laws 621, 661.

Hum. Res. Code § 48.101(a), (b), (d). You contend that the information you have marked was used by the department in an investigation of abuse of an elderly and disabled person under chapter 48. *See id.* §§ 48.002(a)(2) (defining “abuse” for the purposes of chapter 48), .002(a)(1), (8) (defining “elderly” and “disabled person” for the purposes of chapter 48). 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. Based on your representations and our review, we agree the information you have marked relating to the reporter’s identity is confidential under section 48.101. You further state the requestor does not have a right of access to this marked information. *See id.* § 48.101(c), (d), (e), (f) (permitting release of confidential information in certain circumstances); 25 T.A.C. § 1.207. Accordingly, we conclude the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code.²

You contend portions of the remaining information are confidential on the basis of common-law and constitutional privacy. 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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. 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.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7. The first type protects an individual’s autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for “the most

²We note that the requestor in this instance is the legal representative of the subject of the investigation at issue and as such has a right of access to information being released. *See* 25 T.A.C. § 1.207(h). Accordingly, if the department receives another request for the submitted information from a person who would not have a right of access under section 1.207(h), the department should resubmit the information and request another decision. *See* Gov’t Code §§ 552.301(a), .302; Open Records Decision No. 673 (2001).

intimate aspects of human affairs.” *Id.* at 5 (quoting *Ramie v. City of Hedwig Village*, Tex., 765 F.2d 490 (5th Cir. 1985)).

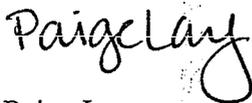
In this instance, we note the requestor represents the individual whose privacy interests are at issue. As such, the requestor has a special right of access to any information that would be protected from public disclosure for the purpose of protecting her client’s privacy interests. *See* Gov’t Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when an individual or authorized representative asks governmental body to provide information concerning that individual). Accordingly, we find that no information may be withheld from this requestor on the basis of common-law or constitutional privacy.

In summary, the department must withhold the information you have marked under section 159.002 of the Occupations Code, unless it receives the required written consent for release of the information under sections 159.004 and 159.005 of the Occupations Code. The department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code. The remaining information must be released.³

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,



Paige Lay
Assistant Attorney General
Open Records Division

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³We note that the requestor has a special right of access to some of the information being released. Because such information is confidential with respect to the general public, if the department receives another request for this information from a different requestor, the department must again seek a ruling from this office.

Ref: ID# 374047

Enc. Submitted documents

cc: Requestor
(w/o enclosures)