



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 18, 2010

Mr. C. Patrick Phillips
Assistant City Attorney
Office of the City Attorney
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2010-07133

Dear Mr. Phillips:

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#379637 (Fort Worth PIR No. 2586-10).

The Fort Worth Police Department (the "department") received a request for the following: 1) all investigative reports, supporting information, and all department records pertaining to a named individual, including arrest reports, accident reports, 911 calls, and medical records; 2) the names and credentials of all officers in the department who are certified as special officers for mental health assignments; 3) all documents indicating an agreement between the department and any third party regarding the handling of calls involving individuals with mental illness, mental illness crisis, jail diversion, or the provision of emergency mental health services. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 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).

We note that a portion of the responsive information consists of a completed investigation labeled CPI Investigative File, which is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as

provided by Section 552.108.” Gov’t Code § 552.022(a)(1). Although you raise section 552.103 of the Government Code, section 552.103 is a discretionary exception to disclosure that protects the governmental body’s interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold the completed investigation under section 552.103 of the Government Code. However, we note that some of the information at issue is subject to sections 552.101 and 552.130 of the Government Code, which are other law for the purpose of section 552.022 of the Government Code. Accordingly, we will address these exceptions.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses the Medical Practice Act (the “MPA”), chapter 159 of the Occupations Code, which governs access to medical records.¹ Section 159.002 of the Occupations Code provides in pertinent part:

(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). This office has concluded that 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). We have also found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990). Further, information that is subject to the MPA also includes information that was obtained from medical records. *See* Occ. Code. § 159.002(a)-(c); *see also* Open Records Decision No. 598 (1991). The medical records of a deceased patient may only be

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

released on the signed written consent of the decedent's personal representative. *See* Gov't Code § 159.005(a)(5). Upon review, we find that Section 12 of the CPI Investigative File contains a confidential medical record. Accordingly, unless the department receives written consent for release of the record that complies with sections 159.004 and 159.005 of the MPA, the department must withhold the medical record found in Section 12 of the CPI Investigative File pursuant to section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 also encompasses section 611.002(a) of the Health and Safety Code, which provides "[c]ommunications 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." Health & Safety Code § 611.002(a). 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). These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. *See* Health & Safety Code §§ 611.004, .0045. Upon review, we find that portions of Sections 12 and 15 of the CPI Investigative File consist of mental health records. Accordingly, the department must withhold these mental health records pursuant to section 552.101 of the Government Code in conjunction with section 611.002(a) of the Health and Safety Code. *See id.* § 611.004(a)(5) (professional may disclose confidential information to patient's personal representative if patient is deceased).

Section 552.130 of the Government Code excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130(a). Upon review, we find that Sections 4, 5, and 18 of the CPI Investigative File contain Texas motor vehicle record information of living persons. The department must, therefore, withhold the motor vehicle record information of these individuals pursuant to section 552.130 of the Government Code.²

Next, we address the submitted personnel file, which is not subject to section 552.022 of the Government Code. Section 552.101 also encompasses section 143.089 of the Local Government Code. You state the City of Fort Worth is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of

²We 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 Texas driver's license numbers, under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

personnel files: a police officer's civil service file that the civil service director is required to maintain, and an internal file that the police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a).³ *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or in possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records are subject to release under the Act. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You inform us the information in the file labeled IA File for Officer Phillips consists of the department's internal investigation of a complaint that did not result in disciplinary action against the named officer. You state this information is maintained in the department's internal file concerning the named officer. Based on your representations and our review of the documents at issue, we agree the information in the file labeled IA File for Officer Phillips is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code.

We must now address the requestor's argument that, as a representative of Advocacy, she has a right of access to the submitted information under federal law. Advocacy has been designated in Texas as the state protection and advocacy system ("P&A system") for the 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 Act"), 42 U.S.C. §§ 15041-15045. *See* Tex. Gov. Exec. Order No. DB-33, 2 Tex. Reg. 3713 (1977); Attorney General Opinion JC-0461 (2002); *see also* 42 C.F.R. §§ 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

³Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov't Code §§ 143.051-143.055.

(A) investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the [P&A 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 Advocacy shall

(4) in accordance with section 10806 of this title, have access to all records of –

...

(B) any individual (including an individual who has died or whose whereabouts are unknown) –

(i) who by reason of the mental or physical condition of such individual is unable to authorize the [P&A system] to have such access;

(ii) who does not have a legal guardian, conservator, or other legal representative, or for whom the legal guardian is the State; and

(iii) with respect to whom a complaint has been received by the [P&A system] or with respect to whom as a result of monitoring or other activities (either of which result from a complaint or other evidence) there is probable cause to believe that such individual has been subject to abuse or neglect[.]

Id. § 10805(a)(4)(B). The DDA Act provides, in relevant part, that a P&A system shall

(B) have the authority to investigate incidents of abuse and neglect of individuals with developmental disabilities if the incidents are reported to the [P&A system] or if there is probable cause to believe that the incidents occurred;

...

(H) have access at reasonable times to any individual with a developmental disability in a location in which services, supports, and other assistance are provided to such an individual, in order to carry out the purpose of this part;

(I) have access to all records of –

...

(ii) any individual with a developmental disability, in a situation in which—

(I) the individual by reason of such individual's mental or physical condition, is unable to authorize the [P&A system] to have such access;

(II) the individual does not have a legal guardian, conservator, or other legal representative, or the legal guardian of the individual is the State; and

(III) a complaint has been received by the [P&A system] about the individual with regard to the status or treatment of the individual or, as a result of monitoring or other activities, there is probable cause to believe that such an individual has been subject to abuse or neglect;

...

(J)(i) have access to the records of individuals described in subparagraphs (B) and (I), and other records that are relevant to conducting an investigation, under the circumstances described in those subparagraphs, not later than 3 business days after the [P&A system] makes a written request for the records involved[.]

42 U.S.C § 15043(a)(2)(B), (H), (I)(ii), (J)(i). The DDA Act states that the term "record" includes

(1) a report prepared or received by any staff at any location at which services, supports, or other assistance is provided to individuals with developmental disabilities;

(2) a report prepared by an agency or staff person charged with investigating reports of incidents of abuse or neglect, injury, or death occurring at such location, that describes such incidents and the steps taken to investigate such incidents; and

(3) a discharge planning record.

Id. § 15043(c). In this case, the information reflects the named individual suffered from mental illness and that Advocacy received information that the named individual died during

an arrest made at his home. Advocacy explains that it intends to investigate this death for possible incidents of abuse or neglect of an individual with a mental illness as governed by PAIMI. Further, Advocacy asserts the individual at issue is deceased and does not have a legal guardian, conservator, or other legal representative acting on his behalf with regard to the investigation of possible abuse and neglect and his death. However, the department has provided documentation showing that the parents of the deceased individual have filed suit in *Michael Patrick Jacobs, Sr., and Charlotte Jacobs, individually, as the Representatives of the Estate of Michael Patrick Jacobs, Jr., Deceased, and as Next Friends of J.K. and Z.J., Minors v. City of Fort Worth; and Stephanie A. Phillips*, Case No. 4-09-CV-513-Y, in the United States District Court for the Northern District of Texas, Fort Worth Division, alleging their son's death was proximately caused by the gross neglect of Fort Worth in failing to properly train and supervise its officers. Thus, we conclude that the individual at issue does have a legal representative acting on his behalf with regard to the investigation of possible abuse and neglect. Accordingly, we find that Advocacy does not have a right of access to the submitted information under either the PAIMI Act or the DDA Act.

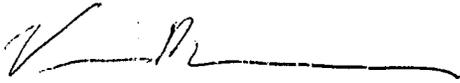
We note that portions of the information contained in the CPI Investigative Report may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Thus, any copyrighted information may only be released in accordance with copyright law.

In summary; 1) the department must withhold the medical record in Section 12 of the CPI Investigative File pursuant to section 552.101 of the Government Code in conjunction with the MPA; 2) the department must withhold the mental health records in Sections 12 and 15 of the CPI Investigative File pursuant to section 552.101 of the Government Code in conjunction with section 611.002(a) of the Health and Safety Code; 3) the department must withhold the Texas motor vehicle record information of the living individuals in Sections 4, 5, and 18 of the CPI Investigative File pursuant to section 552.130 of the Government Code; 4) the department must withhold the file labeled IA File for Officer Phillips under section 552.101 in conjunction with section 143.089(g) of the Government Code. The remaining information must be released. However, the copyrighted portions of the information at issue may only be released in accordance with copyright law.

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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/jb

Ref: ID#379637

Enc. Submitted documents

c: Requestor
(w/o enclosures)