



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 30, 2010

Ms. Robin J. Chapman
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2010-13157

Dear Ms. Chapman:

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# 392123 (DSHS File #17590-2010).

The Texas Department of State Health Services (the "department") received a request for information related to Riverside General Hospital and Barbara Jordan Healthcare Center.¹ You indicate you withheld a W-2 form under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code pursuant to the previous determination issued by this office in Open Records Decision No. 684 (2009). *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). You also indicate that you have redacted social security numbers pursuant to section 552.147 of the Government Code.² You state that some of the responsive information has been released to the requestor, with some information "withheld pursuant to a previous determination or redacted as nonresponsive." You claim that the marked portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. We have

¹We note that the department sought and received clarification of the information requested. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010).

²Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

considered the exception you claim and reviewed the submitted representative sample of information.³

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 information protected by other statutes, such as chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) states that "[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. *Id.* § 611.001(b). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). You state that the information you have marked under section 611.002 constitutes confidential client and treatment related records of chemical dependency treatment facilities. Based on your representations and our review, we agree that most of the information you have marked constitutes mental health records, which are subject to chapter 611. Therefore, this information, which we have marked, may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.⁴ However, we find that the department has failed to demonstrate how the remaining information constitutes mental health records subject to chapter 611. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code on this basis.

You also raise section 552.101 of the Government Code in conjunction with section 290dd-2 of title 42 of the United States Code for portions of the remaining information. Section 290dd-2 of title 42 of the United States Code provides in part:

(a) Requirement

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or

³We 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.

⁴As our ruling under section 611.002(a) of the Health and Safety Code is dispositive for this information, we need not address your remaining arguments for that information.

indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

42 U.S.C. § 290dd-2(a); *see* 42 C.F.R. § 2.1 (records of identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with performance of drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of United States are generally confidential). You indicate the named facility operates a federally funded substance abuse treatment program. However, the documents at issue are not records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research from the named facility. Rather, the documents at issue constitute department records pertaining to the department's investigation of complaints against the facility. Accordingly, section 290dd of title 42 of the United States Code does not apply to any portion of the information at issue. Thus, the department may not withhold any of the remaining information under section 552.101 on that basis.

You also argue that some of the remaining information is excepted under section 576.005 of the Health and Safety Code. Section 552.101 also encompasses section 576.005, which provides that "[r]ecords of a mental health facility that directly or indirectly identify a present, former, or proposed patient are confidential unless disclosure is permitted by other state law." Health & Safety Code § 576.005. We note, however, that department records pertaining to the department's investigation of complaints against the facility are not records of a mental health facility as contemplated by section 576.005. As such, we conclude that none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with section 576.005 of the Health and Safety Code. *See* Open Records Decision No. 163 (1977) (construing predecessor statute).

Section 552.101 also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as

provided by chapter 411. *See generally id.* §§ 411.090-.127. Similarly, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Accordingly, the department must withhold the CHRI you have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.

You claim that some of the remaining information is confidential pursuant to section 241.051 of the Health and Safety Code. Section 552.101 of the Government Code also encompasses chapter 241 of the Health and Safety Code, which governs the licensing of hospitals. Section 241.051 authorizes the department to make any inspection, survey, or investigation that it considers necessary, and provides in pertinent part:

(d) All information and materials obtained or compiled by the [Texas Department of Health⁵] in connection with a complaint and investigation concerning a hospital are confidential and not subject to disclosure under Section 552.001 et seq., Government Code, and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the department or its employees or agents involved in the enforcement action except that this information may be disclosed to:

- (1) persons involved with the department in the enforcement action against the hospital;
- (2) the hospital that is the subject of the enforcement action, or the hospital's authorized representative;
- (3) appropriate state or federal agencies that are authorized to inspect, survey, or investigate hospital services;
- (4) law enforcement agencies; and
- (5) persons engaged in bona fide research, if all individual-identifying and hospital-identifying information has been deleted.

(e) The following information is subject to disclosure in accordance with Section 552.001 et seq., Government Code:

- (1) a notice of alleged violation against the hospital, which notice shall include the provisions of law which the hospital is alleged to

⁵We note that the Texas Department of Health became part of the Texas Department of State Health Services on September 1, 2004. *See* <http://www.tdh.state.tx.us>; *see also* Acts 2003, 78th Leg., R.S., ch. 198, eff. Sept. 1, 2003.

have violated, and a general statement of the nature of the alleged violation;

(2) the pleadings in the administrative proceeding; and

(3) a final decision or order by the department.

Health & Safety Code § 241.051(d), (e). You state that the information at issue "reflects the complaint history" for a hospital. You also state that the records at issue do not contain any information that falls within the exceptions to confidentiality outlined in sections 241.051(d) and (e). Based on your representations and our review, we conclude that the information you have marked under section 241.051(d) of the Health and Safety Code is confidential and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

(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(a)-(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). Information taken directly from medical records and contained in other documents can be withheld in accordance with the MPA. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). We also have concluded that 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). After reviewing the information at issue, we find that you have failed to demonstrate that the information you have marked

under the MPA is a medical record or information obtained directly from a medical record. Therefore, we find that none of the submitted information is subject to the MPA.

You next claim that portions of the submitted information, which relate to investigations by the department of alleged abuse or neglect in a facility licensed by the department, are confidential under section 261.201(a) of the Family Code and section 48.101 of the Human Resources Code. Section 261.201(a) provides as follows:

(a) [T]he following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with [the Family Code] and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under [chapter 261 of the Family Code] and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under [chapter 261.201 of the Family Code] or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Chapter 48 of the Human Resources Code 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 Services⁶] 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.

Hum. Res. Code § 48.101(a), (b), (d).

You state that the department "cannot determine in every case . . . the specific facility address the complaint relates to[,] whether it relates to an adult or adolescent, or whether it relates to the facility's residential or outpatient treatment." You explain that because you cannot determine "whether the alleged victim is an adult or adolescent" or which of the two statutes is applicable, you have referenced both. You state that records of abuse or neglect "that involve a child or [those you cannot determine] involve an adult, rather than a child, have been marked for withholding under [section] 261.201(a)[, while records] of abuse, neglect and exploitation against substance abuse/chemical dependency treatment clients . . . that cannot be determined to involve a child have been marked for withholding under [section] 48.101(a)[.]"

To the extent the marked information at issue was used or developed by the department in conducting an investigation under chapter 261 or in providing services as a result of such an investigation, this information is confidential under section 261.201 of the Family Code and may be disclosed only for purposes consistent with the Family Code and applicable federal or state law or under rules adopted by the department. *See id.* § 261.103(a)(3) (requiring that report of suspected abuse or neglect be made to state agency that operates, licenses, certifies, or registers facility in which alleged abuse or neglect occurred). To the extent the information you have marked consists of records regarding an investigation conducted pursuant to chapter 48 of the Human Resources Code, the information at issue is confidential under section 48.101 and must not be released to the public, except for a purpose consistent with chapter 48 or as provided by the Texas Department of Family and Protective Services or investigating state agency rule or federal law. *See id.* § 48.101(a), (b). You further state the requestor does not have a right of access to this information. Accordingly, we conclude

⁶In 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.

the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code and section 48.101(a) of the Human Resources Code.⁷

You raise common-law and constitutional rights of privacy for some of the remaining information. Section 552.101 also encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82.

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. *Id.* at 683. 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). This office has also found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Upon review, we find that some of the remaining information is intimate or embarrassing and of no legitimate public interest. Accordingly, the department must withhold the information we have marked in the remaining records under section 552.101 of the Government Code in conjunction with common-law privacy.⁸ The remaining highlighted information, however, is not protected by common-law privacy, and may not be withheld under section 552.101 on that basis.

Constitutional privacy under section 552.101 protects two kinds of interests: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of a personal matter. *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 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters.

⁷As our ruling is dispositive, we need not address your remaining arguments against disclosure as they pertain to this information.

⁸As our ruling is dispositive for the information we have marked under common-law privacy, we need not address your remaining arguments for that information.

See Ramie v. City of Hedwig Village, Tex., 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

After review of the remaining information, we find you have not demonstrated how any portion of the information at issue falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Accordingly, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with constitutional privacy.

In summary, we have marked the mental health records that may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. The department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with (1) section 411.083 of the Government Code; (2) section 241.051(d) of the Health and Safety Code; (3) section 261.201(a) of the Family Code; and (4) section 48.101(a) of the Human Resources Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining submitted information must be released 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 392123

Enc. Submitted documents

c: Requestor
(w/o enclosures)