



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 22, 2011

Ms. J. Macklin Milligan
Assistant District Attorney
Office of the General Counsel
Harris County
1201 Franklin, Suite 600
Houston, Texas 77002-1901

OR2011-03905

Dear Ms. Milligan:

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# 411829.

The Harris County District Attorney's Office (the "district attorney") received a request for all records pertaining to the requestor's case. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.1325 of the Government Code and privileged under rule 509 of the Texas Rules of Evidence. We have considered your arguments and reviewed the submitted information.

Initially, we note the submitted information 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, or, or by a governmental body, except as provided by Section 552.108." Gov't Code § 552.022(a)(1). In this instance, the submitted information consists of a completed investigation made of, for, or by the district attorney. Accordingly, the information must be released under section 552.022(a)(1) of the Government Code, unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Because information subject to section 552.022(a)(1) may be withheld under sections 552.101, 552.108, and 552.1325 of the Government Code, we will address the applicability of these exceptions to the submitted information. Additionally, we note the Texas Rules of Evidence have been held to be "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53

S.W.3d 328, 336 (Tex. 2001). Accordingly, we will also determine whether rule 509 is applicable to any of the submitted information.

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information protected by other statutes, such as section 261.201 of the Family Code, which provides, in relevant part:

(a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this 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 this chapter 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 this chapter or in providing services as a result of an investigation.

...

(k) Notwithstanding Subsection (a), an investigating agency . . . on request, shall provide to the parent, managing conservator, or other legal representative of a child who is the subject of reported abuse or neglect, or to the child if the child is at least 18 years of age, information concerning the reported abuse or neglect that would otherwise be confidential under this section. The investigating agency shall withhold information under this subsection if the parent, managing conservator, or other legal representative of the child requesting the information is alleged to have committed the abuse or neglect.

Fam. Code § 261.201(a), (k). You state the submitted information was used or developed in an investigation of alleged child abuse. *See id.* §261.001(1)(E) (definition of child abuse includes sexual assault or aggravated sexual assault under Penal Code section 22.021); *see also* Penal Code § 22.011(c)(1) (defining "child" for purposes of Penal Code section 22.021 as a person younger than 17 years of age). Based on your assertions and our review, we agree the submitted information is within the scope of section 261.201(a). In this instance, although the requestor is a parent of the child victim at issue, the requestor is suspected of committing the alleged abuse. As such, the submitted information may not be provided to the requestor pursuant to section 261.201(k). *Id.* § 261.201(k) (stating child's parent may not obtain information subject to section 261.201(a) concerning reported abuse or neglect of child if parent is alleged to have committed abuse or neglect). Therefore, we conclude the

submitted information is generally confidential under section 261.201(a).¹ *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

The information, however, contains medical records of the requestor, which are governed by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-167.202. Section 159.002 of the MPA 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.

Id. § 159.002(a)-(c). 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). We have also found when a file is created as the result of a hospital stay, all of the documents in the file relating to diagnosis and treatment constitute either 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). Medical records must be released upon the patient's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) 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).

The submitted information also includes mental health records of the requestor that are governed by provisions of chapter 611 of the Health and Safety Code. Section 611.002 provides in part:

¹As our ruling for this information is dispositive, we do not address your remaining arguments against its release.

(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); *see also id.* § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to information that section 611.002 makes confidential only by certain individuals. *See id.* §§ 611.004, .0045; Open Records Decision No. 565 (1990). We have marked mental health records that are subject to section 611.002 that must be released if the requestor is authorized to obtain those records under sections 611.004 and 611.0045. *See* Health & Safety Code § 611.004(a)(4) (professional may disclose confidential information to person who has patient’s written consent).

Although the submitted information is generally confidential under section 261.201 of the Family Code, sections 159.004 and 159.005 of the MPA and sections 611.004 and 611.0045 of the Health and Safety Code may provide the requestor with a right of access to the marked medical records and mental health records. Therefore, there is a conflict between section 261.201 of the Family Code and the applicable provisions of the MPA and chapter 611 of the Health and Safety Code. Where general and specific statutes are in irreconcilable conflict, the specific provision typically prevails as an exception to the general provision unless the general provision was enacted later and there is clear evidence that the legislature intended the general provision to prevail. *See* Gov’t Code § 311.026(b); *City of Lake Dallas v. Lake Cities Mun. Util. Auth.*, 555 S.W.2d 163, 168 (Tex. Civ. App.—Fort Worth 1977, writ ref’d n.r.e.). In this instance, although section 261.201 generally makes records of alleged child abuse confidential, the applicable provisions of the MPA and chapter 611 of the Health and Safety Code specifically permit the release of medical records and mental health records under certain circumstances. Accordingly, the MPA and chapter 611 of the Health and Safety Code prevail over section 261.201 of the Family Code. Additionally, although you also claim the marked medical records and mental health records are excepted under section 552.108, the MPA and chapter 611 prevail over the general exceptions to disclosure found in the Act. *See* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). Therefore, we conclude the district attorney must generally release the marked medical records and mental health records to the requestor if it receives the required authorization for the release of those records under sections 159.004 and 159.005 of the MPA and sections 611.004 and 611.0045 of the Health and Safety Code, respectively.

We understand you to assert the marked medical records and mental health records are confidential pursuant to rule 509 of the Texas Rules of Evidence. Rule 509 addresses the physician-patient privilege and provides in relevant part:

(a) Definitions. As used in this rule:

...

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or those reasonably necessary for the transmission of the communication, or those who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family.

(b) Limited Privilege in Criminal Proceedings. There is no physician-patient privilege in criminal proceedings. However, a communication to any person involved in the treatment or examination of alcohol or drug abuse by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse is not admissible in a criminal proceeding.

...

(f) Consent.

...

(3) Any person who received information made privileged by this rule may disclose the information to others only to the extent consistent with the authorized purposes for which consent to release the information was obtained.

TEX. R. EVID. 509(a)(3), (b), (f)(3). Rule 509 provides consent for release of a confidential communication must be in writing and signed by the patient, provided the consent specifies (1) the information or medical records to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See id.* 509(f)(1). You generally state the marked medical records and mental health records are confidential under rule 509. However, you have not demonstrated how rule 509 is applicable to the information at issue. Consequently, we find the marked medical records and mental health records may not be withheld pursuant to rule 509 of the Texas Rules of Evidence.

You also raise section 552.101 of the Government Code in conjunction with chapter 241 of the Health & Safety Code. Chapter 241 is also known as the Texas Hospital Licensing Law. *See* Health & Safety Code § 241.001. We note sections 241.152 and 241.153 of the Health and Safety Code govern the disclosure of health care information *by a hospital or by an agent or an employee of a hospital*. *See id.* §§ 241.152 (written authorization for disclosure of health care information), .153 (disclosure without written authorization). You have not demonstrated, however, and it is not otherwise clear to this office, how or why any

information held by the district attorney would be subject to section 241.152, section 241.153, or any other provision of chapter 241 of the Health and Safety Code. We therefore conclude you may not withhold the information subject to the MPA and chapter 611 of the Health and Safety Code under section 552.101 on that basis.

In summary, the district attorney must release the marked medical records and mental health records to the requestor if it receives the required authorization for the release of those records under sections 159.004 and 159.005 of the MPA and sections 611.004 and 611.0045 of the Health and Safety Code, respectively. In that event, the remaining information must be withheld under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. If the district attorney does not receive the required authorization for release of the medical and mental health records, then the district attorney must withhold the submitted information in its entirety under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 411829

Enc. Submitted documents

c: Requestor
(w/o enclosures)