



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 6, 2011

Ms. Leila Feldman
General Counsel
Fort Bend Independent School District
16431 Lexington Boulevard
Sugar Land, Texas 77479

OR2011-04727

Dear Ms. Feldman:

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# 413914.

The Fort Bend Independent School District (the "district") received a request for information pertaining to two specified incidents. You claim 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.

Initially, we note you have not submitted information pertaining to one of the specified incidents. To the extent any information responsive to this portion of the request existed on the date the district received the request, we assume the district has released it. If the district has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

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. This section encompasses common-law privacy and excepts from disclosure private facts about an individual. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). Information is excepted from required public disclosure by a common-law right of privacy if the information (1) 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. *Id.* at 685.

The submitted information pertains to a report of alleged sexual assault. In Open Records Decision No. 393 (1983), this office concluded 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. ORD 393 at 2; *see also* Open Records Decision Nos. 440 (1986), 339 (1982); *see also 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 a legitimate interest in such information). However, a governmental body is required to withhold an entire report when the requestor knows the identity of the alleged victim. In this instance, the requestor knows the identity of the alleged sexual assault victim. However, the requestor is a parent of the individual whose privacy interests are at issue, and may be this individual's authorized representative. *See* Gov't Code § 552.023(a) ("person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and that is protected from public disclosure by laws intended to protect that person's privacy interests"); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Because we are unable to determine whether the requestor is the authorized representative of the individual whose privacy interests are at issue, we must rule conditionally. If the requestor is not the authorized representative of the individual, then the submitted report must be withheld in its entirety under section 552.101 in conjunction with common-law privacy. If the requestor is the authorized representative of the individual, she has a right of access to information pertaining to the individual that would otherwise be confidential under common-law privacy, and the submitted information may not be withheld under section 552.101 on that basis. In that instance, we will consider your arguments against disclosure of the submitted information.

Section 552.101 of the Government Code also encompasses information protected by other statutes, such as section 48.101 of the Human Resources Code, which provides 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 this chapter;

(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 Services (the "DFPS")] or investigating state agency rule and applicable federal law.

Hum. Res. Code § 48.101(a)-(b). The only entities authorized to conduct an investigation under chapter 48 of the Human Resources Code are the DFPS and certain other state agencies, depending on the circumstances surrounding the incident. *See id.* §§ 42.151, .152, .252, .301. Thus, records of a school district police department's investigation are not subject to section 48.101. The submitted information reflects it was created by the district's police department pursuant to its own investigation. Thus, we conclude no portion of the submitted information was used or developed in an investigation under chapter 48 of the Human Resources Code. Consequently, the submitted information may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses information made confidential by the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See Occ. Code* §§ 151.001-165.160. Section 159.002 of the MPA 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)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* 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 further found when a file is created as a result of a hospital stay, all the documents in the file referring 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).

Upon review, we find portions of the submitted information, which we have marked, constitute records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician. Medical records must be released on receipt of 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). If the requestor provides proper consent in accordance with the MPA, the district must release the marked medical records because a statutory right of access prevails over a claim under section 552.108 of the Government Code. *See* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 at 4 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). If the requestor does not provide proper consent, the district must withhold the marked medical records under section 552.101 of the Government Code in conjunction with the MPA.

You claim the remaining information is excepted from disclosure under section 552.108(a)(2) of the Government Code, which excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(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)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). Although you claim the information at issue is excepted from disclosure under section 552.108(a)(2), you state "the specific case is not closed, but it is inactive, as it *has not* resulted in a conviction or deferred adjudication" (emphasis added). We note section 552.108(a)(2) is applicable only if the information at issue is related to a *concluded* criminal case "that did not result in conviction or deferred adjudication." *Id.* § 552.108(a)(2). Upon review, we find you have failed to demonstrate the information at issue relates to a closed criminal investigation that did not result in conviction or deferred adjudication. Thus, we find you have not demonstrated the applicability of section 552.108(a)(2) to the remaining information. *See id.* § 552.301(e)(1)(A). Accordingly, the district may not withhold any of the remaining information under subsection 552.108(a)(2) of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. *Id.* § 552.130(a)(1), (2). Accordingly, the district

must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.¹

In summary, if the requestor is not the authorized representative of the individual whose privacy interests are at issue, then the submitted report must be withheld in its entirety under section 552.101 in conjunction with common-law privacy. If the requestor is the authorized representative of her child, then (1) the district must release or withhold the marked medical records in accordance with the MPA, (2) the district must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code, and (3) the district must release the remaining information.

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/tf

Ref: ID# 416914

Enc. Submitted documents

c: Requestor
(w/o enclosures)

¹We note Open Records Decision No. 684 (2009) is 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.