



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 18, 2011

Ms. Martha T. Williams
Olson & Olson, L.L.P.
Wortham Tower, Suite 600
2727 Allen Parkway
Houston, Texas 77019

OR2011-05330

Dear Ms. Williams:

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# 416878.

The City of Cleveland (the "city"), which you represent, received a request for all calls and complaints made by a named individual. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

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. You raise section 552.101 in conjunction with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") for the submitted information. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information,

excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. Open Records Decision No. 681 (2004). In that decision, we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. See 45 C.F.R. § 164.512(a)(1). We further noted the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." See ORD 681 at 8; see also Gov't Code §§ 552.002, .003, .021. We, therefore, held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. See *Abbott v Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; see also Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the city may not withhold any portion of the submitted information on that basis.

Section 552.101 of the Government Code also encompasses section 261.201 of the Family Code, which provides:

(a) [T]he 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.

...

(h) This section does not apply to an investigation of child abuse or neglect in a home or facility regulated under Chapter 42, Human Resources Code.

Fam. Code § 261.201(a), (h). You assert the submitted information is confidential under section 261.201 of the Family Code because that information relates to a report of suspected

child abuse or neglect. *See id.* § 261.001(1),(4) (defining “abuse” and “neglect” for purposes of Fam. Code ch. 261); *see also id.* § 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). However, section 261.201 does not apply to an investigation of child abuse or neglect in a home or facility regulated under chapter 42 of the Human Resources Code. *Id.* § 261.201(h). The information pertaining to case number 09-0662 indicates an alleged offense occurred at a child care facility, but does not reveal whether that facility was regulated under chapter 42. Because we are unable to determine whether the facility was regulated under chapter 42, we must rule conditionally. If the facility at which the alleged abuse occurred was not regulated by chapter 42 of the Human Resources Code, we conclude the information pertaining to case number 09-0662, which we have marked, is subject to section 261.201(a) of the Family Code and must be withheld in its entirety under section 552.101 of the Government Code. However, if the facility at which the alleged abuse or neglect occurred was regulated by chapter 42 of the Human Resources Code, section 261.201 of the Family Code is not applicable to this report and the city may not withhold it under section 552.101 on that basis. Under either scenario, we find none of the remaining submitted information is confidential under section 261.201, and the city may not withhold it under section 552.101 of the Government Code on that ground.

If the facility at issue was regulated by chapter 42 of the Human Resources Code, we address your assertion that the information pertaining to case number 09-0662, as well as the remaining information, is confidential on the basis of common-law privacy. Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (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. *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 established. *Id.* at 681-82. The types of information considered intimate or 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 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). Upon review, we find portions of the information pertaining to case number 09-0662, as well as some of the remaining information, is highly intimate or embarrassing information not of legitimate public interest. Accordingly, the city must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy. We find none of the remaining information is highly intimate or embarrassing and not a matter of legitimate public interest. Therefore, the rest

of the submitted information may not be withheld under section 552.101 in conjunction with common-law privacy.

You also claim section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code, which provides in part:

(b) Records of the identity, evaluation or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

(c) Any person who receives information from confidential communications or records as described by this chapter, other than a person listed in Section 773.092 who is acting on the survivor's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was obtained.

Health & Safety Code § 773.091(b)-(c). Section 773.091 is applicable to records of the provision of emergency medical services ("EMS"). *See* Open Records Decision No. 632 (1995). Although you contend the remaining information is confidential under section 773.091, you have not demonstrated that the information at issue was created by EMS personnel or a physician providing medical supervision or that the information is maintained by an EMS provider. *See* Health & Safety Code § 773.091(b); *see also* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). We, therefore, conclude the city may not withhold the any of the remaining information under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code.

In summary, if the child care facility at issue was not regulated under chapter 42 of the Human Resources Code, the marked information pertaining to case number 09-0662 must be withheld in its entirety under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. If the child care facility was regulated under chapter 42 of the Human Resources Code, then the city must withhold the marked portions of the information pertaining to case number 09-0662 under section 552.101 of the Government Code in conjunction with common-law privacy. Under either scenario, the city must withhold the information we have marked within the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information must be released.

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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/tf

Ref: ID# 416878

Enc. Submitted documents

c: Requestor
(w/o enclosures)