



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 13, 2012

Ms. Donna L. Johnson
For Memorial Villages
Olson & Olson, L.L.P.
2727 Allen Parkway, Suite 600
Houston, Texas 77019

OR2012-05312

Dear Ms. Johnson:

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# 450678 (M.V. Reference No. MVPD-HEF).

The Memorial Villages Police Department (the "department"), which you represent, received a request for all 9-1-1 recordings, incident reports, and photographs related to seven specified incidents at the requestor's home and the names of the responding officers. You have redacted information pursuant to section 552.130 of the Government Code.¹ You claim the remaining 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.

You claim the submitted information is protected under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8. At the direction of

¹Section 552.130(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the motor vehicle record information described in subsections 552.130(a)(1) and (a)(3). *See* Gov't Code § 552.130(c); *see also id.* § 552.130(d)-(e) (requestor may appeal governmental body's decision to withhold information under section 552.130(c) to attorney general and governmental body withholding information pursuant to section 552.130(c) must provide certain notice to requestor). We note you have marked the driver's license number of the requestor, to which he has a right of access under section 552.023 of the Government Code. *See id.* § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on grounds that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987). Therefore, the department may not withhold the driver's license number of the requestor under section 552.130. However, the department must withhold the driver's license numbers of other individuals, which you have redacted, under section 552.130 of the Government Code.

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* Health Insurance Portability and Accountability Act of 1996, 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, except as provided by parts 160 and 164 of the Code of Federal Regulations. *Id.* § 164.502(a).

This office addressed the interplay of the Privacy Rule and the Act in Open Records Decision No. 681 (2004). In that decision, we noted section 164.512 of title 45 of the Code of Federal Regulations provides that 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 id.* § 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 that 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 information that is subject to disclosure under the Act confidential, the department may not withhold any portion of the submitted information on this basis.

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 information protected by other statutes, including section 261.201 of the Family Code, which provides in relevant part:

[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.

Fam. Code § 261.201(a). Upon review, we find Incident Report #12A036 and audio recording 11-09-46p consist of a report of alleged child abuse. *See id.* § 261.001(1)(A) (defining “abuse” for purposes of chapter 261 of the Family Code); *see also id.* § 101.003(a) (defining “child” for purposes of chapter 261). Therefore, Incident Report #12A036 and audio recording 11-09-46p are confidential under section 261.201(a) of the Family Code and must be withheld under section 552.101 of the Government Code.²

Section 552.101 of the Government Code also encompasses chapter 772 of the Health and Safety Code which authorizes the development of local emergency communication districts. Sections 772.118, 772.218, and 772.318 of the Health and Safety Code are applicable to emergency 911 districts established in accordance with chapter 772. *See Open Records Decision No. 649 (1996)*. These sections make the originating telephone numbers and addresses of 9-1-1 callers furnished by a service supplier confidential. *Id.* at 2. Section 772.118 applies to an emergency communication district for a county with a population of more than two million. Section 772.218 applies to an emergency communication district for a county with a population of more than 860,000. Section 772.318 applies to an emergency communication district for a county with a population of more than 20,000.

You indicate the submitted information includes the originating telephone numbers and address of 9-1-1 callers that were furnished by a service supplier. We note chapter 772 of the Health and Safety Code only applies to the originating telephone numbers and addresses of 9-1-1 callers provided by a service supplier. The telephone numbers and address contained in the submitted audio recordings were provided by the callers and not a service supplier. Accordingly, chapter 772 of the Health and Safety Code is not applicable to the telephone numbers and address in the audio recordings, and this information may not be withheld under section 552.101 of the Government Code on that basis. *See Open Records Decision Nos. 658 at 4 (1998)* (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), *649 at 3 (1996)* (language of confidentiality provision controls scope of its protection). Further, you do not inform us whether the department is part of an emergency communication district established under section 772.118, section 772.218, or section 772.318 of the Health and Safety Code. Nevertheless, if the department is part of an emergency communication district established under section 772.118, section 772.218, or section 772.318, then, to the extent the telephone numbers and addresses of the 9-1-1 callers in the submitted reports were supplied by a 9-1-1 service supplier, the department must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with section 772.118,

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

section 772.218, or section 772.318 of the Health and Safety Code. If the department is not subject to section 772.118, section 772.218, or section 772.318, or if the telephone numbers and addresses were not supplied by a 9-1-1 service supplier, then the department may not withhold this information under section 552.101 on the basis of section 772.118, section 772.218, or section 772.318.

Section 552.101 of the Government Code also encompasses section 773.091 of the Health and Safety Code. This section 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.

Health & Safety Code § 773.091(b). Section 773.091 applies to records of the provision of emergency medical services (“EMS”). *See* Open Records Decision No. 632 (1995). You seek to withhold some or all of the remaining information under section 773.091. However, upon review, we find the department has not established how any of the submitted information constitutes records that were created by EMS personnel or a physician or are records maintained by an EMS provider. *See* Health & Safety Code § 773.091(b); *see also* ORD 649 at 3 (language of confidentiality provision controls scope of its protection). We therefore conclude the department may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code.

Section 552.101 of the Government Code 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 type of information considered highly 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. Upon review, we find the information we have marked in the submitted reports and indicated in the submitted audio recordings is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

You state the department lacks the technical capability to redact information from the submitted audio recordings. However, because the department had the capability to copy the

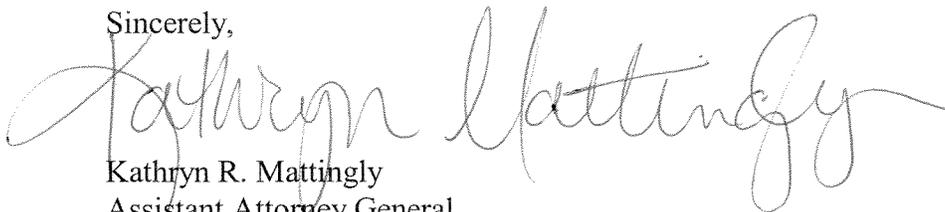
audio recordings at issue in order to submit the requested information for our review, we believe the department has the capacity to produce copies of only the non-confidential portions of the submitted audio recordings. Therefore, in regards to the submitted audio recordings, we find the department must only withhold the information we have indicated.

In summary, the department must withhold Incident Report #12A036 and audio recording 11-09-46p in their entirety under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. The department must withhold the information we have marked in the submitted reports under section 552.101 of the Government Code in conjunction with chapter 772 of the Health and Safety Code, if the department is part of an emergency communication district established under section 772.118, section 772.218, or section 772.318, and the telephone numbers and addresses of the 9-1-1 callers were supplied by a 9-1-1 service supplier. The department must withhold the information we have marked in the submitted reports and indicated in the submitted audio recordings under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information must be released.³

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,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/dls

³We note the submitted information contains information to which the requestor has a right of access. See Gov't Code § 552.023. Because such information may be confidential with respect to the general public, if the department receives another request for this information from a different requestor, the department must again seek a ruling from this office.

Ref: ID# 450678

Enc. Submitted documents

c: Requestor
(w/o enclosures)