ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 22, 2012

Ms. Dana Colbert
Records Coordinator
Office of the General Counsel
Texas Juvenile Justice Department
P.O. Box 12757
Austin, Texas 78711

OR2012-07730

Dear Ms. Colbert:

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# 454382 (ORR No. 18593).

The Texas Juvenile Justice Department (the "department") received a request for information regarding youth medical complaints, medical mistreatment investigations, the number of department youth on psychotropic medications, the cost of all department prescription drugs, and a list of all doctors and nurses employed by the department for the past five years.[1] You state you have released most of the requested information You claim that 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 representative sample of information.[2]

Initially, we must address the department's procedural obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that

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[1]You state the department received clarification from the requestor regarding a portion of the request. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request).

[2]We assume 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 those records contain substantially different types of information than that submitted to this office.

receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). In this instance, you state the department received the initial request for information on January 31, 2012. You state the department responded to portions of the request on March 2, 2012, which you inform us was after the requestor had clarified a portion of the request. Subsequently, you submitted a request for a decision to our office for the remaining portion of the request. You do not inform us when the department received the clarification; however, the submitted information reflects that the clarified request was received on or before March 2, 1012. Accordingly, the department was required to request a decision from this office by March 16, 2012.[3] However, the envelope in which you submitted your request for a decision bears a postmark date of March 19, 2012. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the department failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because your arguments under section 552.101 can provide a compelling reason to withhold information, we will address the applicability of this exception to 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. This section encompasses information that other statutes make confidential, such as section 244.003 of the Human Resources Code. Section 244.003 provides as follows:

> (a) The department shall keep written records of all examinations and conclusions based on them and of all orders concerning the disposition or treatment of each child subject to its control.

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[3] *See City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or overbroad request, ten-day period to request attorney general ruling is measured from date is clarified).

> (b) Except as provided by Section 243.051(c), these records and all other information concerning a child, including personally identifiable information, are not public and are available only according to the provisions of Section 58.005, Family Code, Section 244.051, and Chapter 61, Code of Criminal Procedure.

Hum. Res. Code § 244.003. Section 201.001 of the Human Resources Code, which became effective on September 1, 2011, currently defines "child" for purposes of chapter 244 as a person "10 years of age or older and younger than 19 years of age who is committed to the department under Title 3, Family Code." *Id.* § 201.001(a)(2)(b). Additionally, the former section 61.001 of the Human Resources Code defined "child" as "a person 10 years old or older and under 21 years old who is committed to the [Texas Youth Commission (the "commission")] under Title 3, Family Code."[4] Act of May 29, 1987, 70th Leg., R.S., ch. 1099, § 1, 1987 Tex. Gen. Laws 3734, 3734 *repealed by* Act of May 9, 2011, 82nd Leg., R.S., ch. 85, § 4.001(a), 2011 Tex. Gen. Laws 366, 441. Although the upper age limit of the definition of "child" has since been lowered to eighteen, in enacting the change in that limit, the Texas Legislature expressly provided that "[t]he disposition of an individual 10 years of age or older and under 21 years of age who was committed to the commission under Title 3, Family Code, before June 8, 2007 is not affected by" the change in the definition. Act of May 9, 2011, 82nd Leg., R.S., ch. 85, § 4.006(d), 2011 Tex. Gen. Laws 366, 442; *see also id.* § 4.001(a), 2011 Tex. Gen. Laws 366, 441 (repealing chapter 61 of the Human Resources Code). Because the disposition of such individuals who were committed to the department's custody before June 8, 2007, is not affected by the change, we believe the Legislature intended the records of such individuals in the department's custody to continue to be confidential even when the records concern individuals over eighteen years of age, but under 21 years of age.

You assert the submitted information contains personally identifiable information relating to children in the custody of the department, and thus, is within the scope of section 244.003. You state the requestor does not have a right of access to the information at issue under section 243.051(c) of the Human Resources Code, section 244.051 of the Human Resources Code, or chapter 61 of the Code of Criminal Procedure. Based on your representations and our review, we find section 244.003 is generally applicable to the submitted information. We note, however, the submitted information does not reflect the ages of the juveniles involved.

Because we are unable to determine the ages of the individuals involved in the submitted information, we must rule conditionally. To the extent the submitted information pertains to children who are ten years of age or older and under nineteen years of age that were committed to the department's custody on or after June 8, 2007, it is confidential pursuant to section 244.003 of the Human Resources Code and must be withheld in its entirety under section 552.101 of the Government Code. To the extent the submitted information pertains

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[4]Effective December 1, 2011, the Texas Youth Commission became known as the Texas Juvenile Justice Department. *See* Hum. Res. Code § 201.001(b).

to children who are ten years of age or older and under twenty-one years of age who were committed to the department's custody before June 8, 2007, such records are also confidential pursuant to section 244.003 of the Human Resources Code and must also be withheld in their entirety under section 552.101 of the Government Code.[5] However, to the extent the information at issue pertains to children committed to the department's custody on or after June 8, 2007, who are not ten years of age or older and under nineteen years of age, or if committed to the department's custody before June 8, 2007, are not ten years of age or older and under twenty-one years of age, the department may not withhold the information relating to such children under section 244.003. In that event, we will determine whether the information may otherwise be confidential under section 552.101.

Section 552.101 of the Government Code also encompasses the common-law right to 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 met. *Id.* at 681-82. Common-law privacy protects the types of information held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). Additionally, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *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 the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Therefore, the department must withhold the marked information under section 552.101 in conjunction with common-law privacy.

In summary, to the extent the submitted information pertains to children who are ten years of age or older and under nineteen years of age that were committed to the department's custody on or after June 8, 2007, it is confidential pursuant to section 244.003 of the Human Resources Code and must be withheld in its entirety under section 552.101 of the Government Code. To the extent the submitted information pertains to children who are ten years of age or older and under twenty-one years of age who were committed to the department's custody before June 8, 2007, such records are also confidential pursuant to section 244.003 of the Human Resources Code and must also be withheld in their entirety under section 552.101 of the Government Code. To the extent the submitted information is not confidential under section 244.003 of the Human Resources Code in conjunction with section 552.101 of the Government Code, the department must withhold the marked

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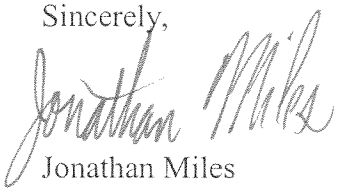
[5]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information, except to note that a "child" for purposes of sections 58.005 and 58.007 of the Family Code is defined as a person ten years of age or older and under seventeen years of age. *See* Fam. Code § 51.02(2)(A).

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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 454382

Enc. Submitted documents

c: Requestor
(w/o enclosures)