



ATTORNEY GENERAL OF TEXAS
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Mr. Thomas D. McClure
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P.O. Box 149347
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OR2012-10197

Dear Mr. McClure:

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# 458046 (DSHS File Nos. 20185/2012, 20246/2012).

The Texas Department of State Health Services (the "department") received two requests for information related to a specified investigation. The first requestor also asks a series of questions. We note the Act does not require a governmental body to answer factual questions, conduct legal research, or create responsive information. *See* Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). You state you have released or will release some information to the requestors. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. You also state you have notified the Texas Department of Criminal Justice ("TDCJ") of the request. We have received comments from TDCJ. *See* Gov't Code § 552.304 (interested third party may submit written comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the department's obligations under the Act. Section 552.301 of the Government Code describes the obligations placed on a governmental body that receives a written request for information it wishes to withhold. Section 552.301(e-1) of the Government Code requires a governmental body that submits written comments to the attorney general under section 552.301(e)(1)(A) to send a copy of those comments to the person who requested the information from the governmental body within fifteen business-days of receiving the request for information. *Id.* § 552.301(e-1). Section 552.301(e-1) authorizes a governmental body to redact information from those written comments that discloses or contains the substance of the information requested. *Id.*

In this instance, the department sent the requestors a copy of its briefs to this office requesting a decision and stating the exceptions that apply, but the briefs do not contain any written comments stating the reasons why the asserted exceptions apply. Therefore, we conclude the department failed to comply with the procedural requirements of section 552.301(e-1) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason 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 (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). You raise sections 552.103 and 552.107 as exceptions to disclosure. However, these sections are discretionary exceptions that protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, in failing to comply with section 552.301, the department has waived its claims under sections 552.103 and 552.107 of the Government Code. However, you also raise section 552.101 as an exception to disclosure. Further, we note some of the submitted information is subject to sections 552.117, 552.130, and 552.137.¹ Finally, TDCJ raises section 552.134 as an exception to disclosure. Because sections 552.101, 552.117, 552.130, 552.134, and 552.137 can provide compelling reasons for non-disclosure under section 552.302, we will consider the applicability of these exceptions to the submitted information.

Next, we address TDCJ's argument under section 552.134 for a portion of the submitted information. Section 552.134 of the Government Code encompasses information relating to TDCJ inmates and states, in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the [TDCJ] is excepted from the requirements of Section 552.021 if it is information about an inmate who is confined in a facility operated by or under a contract with [TDCJ].

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Gov't Code § 552.134(a). TDCJ states the documents pertain to a former inmate of a TDCJ facility. Section 552.134 applies to TDCJ and the inmate records it maintains. Here, the department received the request for documents it maintains. Both the department and TDCJ maintain the documents at issue. Section 552.134 does not apply to the department's copy of the records that it received and maintains as part of its official duties. Therefore, no portion of the submitted information may be withheld on the basis of section 552.134 of the Government Code.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. You raise section 552.101 in conjunction with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-9. 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* 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. 45 C.F.R. § 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* 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 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 the submitted information under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both

prongs of this test must be satisfied. *Id.* at 681-82. The types of information considered intimate and 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. *See id.* at 683. Upon review, we find the information we have marked is highly intimate or embarrassing information that is of no legitimate public concern. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find you have failed to demonstrate any portion of the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the department may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with constitutional privacy.

Section 552.101 of the Government Code also encompasses section 48.101 of the Human Resources Code, which pertains to the disclosure of reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities. Section 48.101 provides in pertinent part as follows:

(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 department or investigating state agency rule and applicable federal law.

...

(d) The executive commissioner [of the Texas Health and Human Services Commission] shall adopt rules providing for the release, on request, to a person who is the subject of a report of abuse, neglect, or exploitation or to that person's legal representative of otherwise confidential information relating to that report. The department or investigating state agency shall edit the information before release to protect the confidentiality of information relating to the reporter's identity and to protect any other individual whose safety or welfare may be endangered by disclosure.

Hum. Res. Code § 48.101(a), (b), (d). You state, and the submitted information indicates, some of the remaining information was used or developed in an investigation conducted under chapter 48 of the Human Resources Code. *See id.* § 48.252(a)(1); 40 T.A.C. § 711.1. Such information must not be released to the public, except for a purpose consistent with chapter 48 or as provided by a department or investigating state agency rule or federal law. *See* Hum. Res. Code § 48.101(b)-(g) (permitting release of confidential information only in certain circumstances). You do not indicate, nor does it appear, an exception to confidentiality applies in this instance. Accordingly, we conclude the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code.

Section 552.101 also encompasses section 611.002 of the Health and Safety Code. Section 611.002 of the Health and Safety Code applies to “[c]ommunications 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.” Health & Safety Code § 611.002; *see also id.* § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See id.* §§ 611.004, .0045; Open Records Decision No. 565 (1990). We have marked mental health records within the remaining information. The mental health records we have marked are confidential under section 611.002 of the Health and Safety Code and may only be released if the requestors are authorized to obtain the mental health records under sections 611.004 and 611.0045 of the Health and Safety Code. We find no portion of the remaining information constitutes a communication between a patient and a professional or a record of the identity, diagnosis, evaluation, or treatment of a patient created or maintained by a professional. Accordingly, the department may not withhold any portion of the remaining information on that basis.

Section 552.101 of the Government Code also encompasses section 576.005 of the Health and Safety Code, which provides, “[r]ecords of a mental health facility that directly or indirectly identify a present, former, or proposed patient are confidential unless disclosure

is permitted by other state law.” Health & Safety Code § 576.005. You indicate the North Texas State Hospital is a mental health facility as defined by chapter 571. *See id.* § 571.003(12). You state the submitted information directly or indirectly identifies a person as a patient of the North Texas State Hospital. Upon review, we find you have failed to demonstrate any of the remaining information directly or indirectly identifies a patient of a mental health facility under section 576.005. Accordingly, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with section 576.005 of the Health and Safety Code.

We note a portion of the remaining information is subject to section 552.117 of the Government Code. Section 552.117 of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department may only withhold information under section 552.117 on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which request for this information was made. The remaining information contains information subject to section 552.117 of the Government Code, which we have marked. To the extent the employee to whom the information relates timely elected to keep such information confidential, the department must withhold the information we have marked under section 552.117(a)(1) of the Government Code.

We note a portion of the remaining information is subject to section 552.130 of the Government Code. Section 552.130 provides that information related to a motor vehicle title or registration issued by a Texas agency, or an agency of another state or country, is excepted from public release. Gov’t Code § 552.130(a)(2). The department must withhold the information we have marked under section 552.130(a)(2) of the Government Code.

The remaining information contains e-mail addresses of members of the public. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c). *See id.* § 552.137(a)-(c). The remaining information contains e-mail addresses of members of the public, which we have marked, that do not appear to be a type specifically excluded by section 552.137(c). Accordingly, the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses consent to their release.

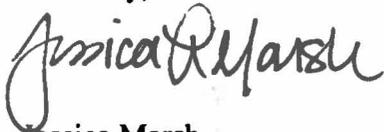
In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with: (1) common-law privacy and (2) section 48.101 of the Human Resources Code. The department may only release the mental health records we have marked in accordance with sections 611.004 and 611.0045

of the Health and Safety Code. The department must withhold the information we have marked under section 552.117(a)(1) of the Government Code if the employee to whom the information relates timely elected to keep such information confidential. The department must withhold the information we have marked under sections 552.130 and 552.137 of the Government Code. 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,



Jessica Marsh
Assistant Attorney General
Open Records Division

JM/bs

Ref: ID# 458046

Enc. Submitted documents

c: Requestors
(w/o enclosures)

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