



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 29, 2012

Ms. Robin J. Chapman  
Assistant General Counsel  
Texas Department of State Health Services  
P.O. Box 149347  
Austin, Texas 78714-9347

OR2012-17265

Dear Ms. Chapman:

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# 469255 (DSHS File No. 20751-2012).

The Texas Department of State Health Services (the "department") received a request for information pertaining to a specified case. You state some of the information has been released with redactions pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> 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. Section 552.101 encompasses section 290dd-2 of title 42 of the United States Code, which provides in part:

(a) Requirement. Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated,

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<sup>1</sup>Open Records Decision No. 684 serves as a previous determination to all governmental bodies permitting them to withhold certain categories of information without requesting a decision from this office.

or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

42 U.S.C. § 290dd-2(a); *see* 42 C.F.R. §§ 2.1 (records of identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with performance of drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of United States are generally confidential), 2.12(b) (discussing when an alcohol abuse or drug program is considered to be federally assisted). Section 290dd-2 makes confidential the records of substance abuse patients created and maintained as part of their participation and treatment in a federally assisted substance abuse program. *See* 42 U.S.C. § 290dd-2(a). An exception to the prohibition against disclosure of protected information exists in section 2.12(c)(4) of title 42 of the Code of Federal Regulations for a qualified service organization that has entered into an agreement with the treatment center. *See* 42 C.F.R. § 2.12(c)(4) (providing restrictions on disclosure do not apply to communications between a program and a qualified service organization of information needed by the organization to provide services to the program). A qualified service organization is an organization that provides services, such as data processing, to a program; acknowledges it is bound by part 2 of title 42 of the Code of Federal Regulations; and will resist any effort to obtain access to patient records except as permitted by part 2 of title 42 of the Code of Federal Regulations. *See id.* § 2.11. You state the department has no information that shows the substance abuse program at issue is federally assisted. Furthermore, we find most of the submitted documents do not constitute patient records, but rather consist of records created by the department as part of its investigation and regulation of the program at issue. Thus, we find the department has failed to demonstrate the submitted information concerns a program that is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States. According, we find the submitted information is not made confidential by section 290dd-2(a) and may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code, which provides “[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, are confidential.” Health & Safety Code § 611.002(a). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient’s behalf, or a person who has the written consent of the patient. *See* Health & Safety Code §§ 611.004–.0045. Upon review, we find the

information we have marked consists of information obtained from mental health records. This information is confidential under section 611.002 of the Health and Safety Code. Therefore, the marked information may be released only in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. The remaining information you have marked does not consist of confidential mental health records or information obtained from mental health records, and the department may not withhold it under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy 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 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. We note, however, the names, addresses, telephone numbers, and dates of birth of members of the public are not excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 551 at 3 (1990) (disclosure of person's name, address, or telephone number not an invasion of privacy), 455 at 7 (1987) (home addresses and telephone numbers and dates of birth not protected under privacy).

Constitutional privacy consists of two inter-related 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. 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 by constitutional privacy 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 the information we have marked is highly intimate and embarrassing and of no legitimate public interest. The department must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.<sup>2</sup>

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<sup>2</sup>As our ruling is dispositive, we do not address your argument under chapter 411 of the Government Code.

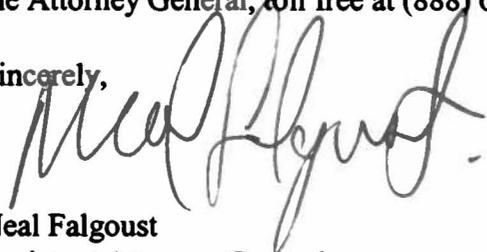
However, the remaining information is not highly intimate or embarrassing. Additionally, the remaining information does not fall within the zones of privacy or otherwise implicate an individual's privacy interest for purposes of constitutional privacy. Accordingly, the department may not withhold the remaining information under section 552.101 of the Government Code on the basis of common-law or constitutional privacy.

In summary, the department may release the information we have marked only 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 552.101 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](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,



Neal Falgoust  
Assistant Attorney General  
Open Records Division

NF/ag

Ref: ID# 469255

Enc. Submitted documents

c: Requestor  
(w/o enclosures)