



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 14, 2012

Ms. Janet I. Monteros
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2012-18377

Dear Ms. Monteros:

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# 470945.

The El Paso County's Purchasing Department (the "county") received a request for documents relating to El Paso Guardianship services provided by LULAC Project Amistad ("LULAC"). You state the county has released some of the requested information but claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, you acknowledge, and we agree, the county failed to comply with the procedural requirements of section 552.301 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 Gov't Code § 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); see also Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can generally be overcome by demonstrating the information is confidential by law or third-party interests are at stake. See Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Sections 552.101 and 552.136 of the Government Code can provide compelling reasons to overcome this presumption. Therefore, we will consider whether these sections require the county to withhold the submitted information.

¹Pursuant to subsections (b) and (c) of section 552.303 of the Government Code, we asked the county to provide a detailed explanation of its arguments.

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. You generally raise sections 48.101 and 161.111 of the Human Resources Code and section 10.401 of title 40 of the Texas Administrative Code.² Section 48.101 of the Human Resources Code provides in relevant part the following:

(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 [the Texas Department of Family and Protective Services (the “DFPS”)] or investigating state agency rule and applicable federal law.

Hum. Res. Code § 48.101(a)-(b). The only entities authorized to conduct an investigation under chapter 48 of the Human Resources Code are DFPS and certain other state agencies, depending on the circumstances surrounding the incident. *See id.* §§ 48.151, .152, .252, .301. You inform us the information at issue consists of a list of LULAC wards that LULAC provided to the county pursuant to its successful bid to provide indigent guardianship services for the county. You do not assert the submitted information pertains to an investigation conducted by an entity authorized to conduct such an investigation under chapter 48. Consequently, the county may not withhold the information under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code.

Section 161.111(a) of the Human Resources Code provides the following:

All files, reports, records, communications, or working papers used or developed by the [Texas Department of Aging and Disability Services (“DADS”)] in the performance of duties relating to the assessment for or the

²Although you raised section 48.10 of the Human Resources Code and section 10.04 of title 40 of the Texas Administrative Code, we note there are no such sections in the Human Resources Code or title 40. However, from your arguments we understand you intended to raise section 48.101 of the Human Resources Code and section 10.401 of title 40 of the Texas Administrative Code instead.

provision of guardianship services to an individual referred for guardianship services under this subchapter are confidential and not subject to disclosure under [the Act].

Id. § 161.111(a). You do not assert, nor do the documents reveal, the submitted information was used or developed by DADS in the performance of duties relating to the assessment for or the provision of guardianship services to an individual referred for guardianship services. *Id.* § 161.111(a). Consequently, the county may not withhold the information under section 552.101 of the Government Code in conjunction with section 161.111 of the Human Resources Code.

Section 10.401 of title 40 of the Texas Administrative Code provides in relevant part the following:

(a) A contractor must not disclose information from the case record on a ward served under the contract with the DADS Guardianship Program in a manner that identifies the ward unless the disclosure is necessary to carry out the duties of the contractor, as described in subsection (b) of this section. Texas Human Resources Code, § 161.111 makes information about a DADS guardianship case confidential, and this extends to the case record of DADS wards served through contracts with DADS. All records, reports, or working papers related to the case are confidential and are exempt from public disclosure under the [Act]. DFPS' Adult Protective Services Division records are also confidential under Texas Human Resources Code, § 48.101.

(b) Examples of situations that might require pertinent case information to be disclosed include:

- (1) arranging for the provision of services;
- (2) facilitating involuntary mental health or mental retardation commitment;
- (3) cooperating with law enforcement during the criminal investigation of abuse, neglect, or exploitation; and
- (4) responding to a court order for disclosure.

(c) If a contractor shares information about a ward, the contractor must advise the recipient of the information that the information is confidential and must not be further shared without permission.

40 T.A.C. § 10.401(a)-(c). For purposes of section 10.401, a contractor is defined as “[a]n agency that operates a guardianship program as defined by Texas Probate Code, § 601 with which DADS has a contract to provide guardianship services for a fee.” *Id.* § 10.103(b)(4).

Section 10.401(a) prohibits a contractor from releasing information from a case record in a manner that identifies a ward. You represent the county is not a contractor for purposes of section 10.401(a) of title 40 of the Texas Administrative Code. *See id.* Thus, you have not established section 10.401 makes any of the submitted information confidential on the grounds that the county possesses it as a contractor with DADS. *See id.* § 10.401(a). Although you also suggest the possibility that the wards listed in the submitted information may be under the jurisdiction of DADS by virtue of a contract between DADS and LULAC, you do not affirmatively state this to be the case. Further, we note section 10.401(c) states, “[i]f a contractor shares information about a ward, the contractor must advise the recipient of the information that the information is confidential and must not be further shared without permission.” However, you do not inform us LULAC made such a representation to the county pursuant to section 10.401(c). Thus, you have not established section 10.401(a) is applicable to the submitted information. Accordingly, the county may not withhold the information under section 552.101 of the Government Code in conjunction with section 10.401 of title 40 of the Texas Administrative Code.

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 the doctrine of common-law privacy, which protects information that (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). 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 some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *E.g.* 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 names of the living wards in the submitted information, which we have marked, are highly intimate or embarrassing and are not of legitimate concern to the public. *See generally Moore v. Charles B. Pierce Film Enters.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref’d n.r.e.); Attorney General Opinions JM-229 (1984) “the right of privacy lapses upon death”), H-917 (1976) (“We are of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). Therefore, the county must withhold the names of the living wards we have marked in the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.136(b) of the Government Code provides that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that

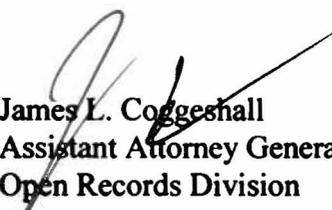
is collected, assembled, or maintained by or for a governmental body is confidential.”³ This office has determined an insurance policy number is an access device number for purposes of section 552.136. Open Records Decision No. 684 at 9 (2009). Thus, the county must withhold the insurance policy numbers you have marked under section 552.136.

To conclude, the county must withhold the names of the living wards we have marked in the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy. The county must withhold the insurance policy numbers you have marked under section 552.136. The county must release the remaining information.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 470945

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. See Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); see, e.g., Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).