



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 6, 2013

Mr. Marc Allen Connelly
Deputy General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2013-19388

Dear Mr. Connelly:

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# 503357 (DSHS OR File: 22033/2013).

The Texas Department of State Health Services (the "department") received a request for a specified investigation. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions 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. This exception encompasses information other statutes make confidential, such as section 290dd-2 of title 42 of the United States Code. Section 290dd-2(a) provides as follows:

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, 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 also* 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), .12(b) (discussing when an alcohol abuse or drug abuse program is considered to be federally assisted). Thus, section 290dd-2 makes confidential the records of substance abuse patients that are 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). Upon review, however, we find the submitted documents do not constitute patient records, but rather consist of department records pertaining to the department's investigation and regulation of a narcotic treatment program facility. Thus, we find you have failed to establish any of the submitted information is confidential under section 290dd-2, and the department may not withhold any of the submitted information under section 552.101 on that basis. *See id.*

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 relevant part, as follows:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

- (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 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 contend the submitted information was used by the department in an investigation of the abuse or neglect of a disabled person under chapter 48. *See* §§ 48.002(a)(2), (4) (defining "abuse" and "neglect" for the purposes of chapter 48), .002(a)(8) (defining "disabled person" for the purposes of chapter 48). Upon review, we agree the submitted information was used or developed in an investigation made under chapter 48. Thus, this information must not be released to the public, except for a purpose consistent with chapter 48 and as provided by an investigating state agency rule or federal law. *See id.* § 48.101(b); *see also id.* § 48.101(c), (d), (d-1), (e), (e-1), (f) (permitting release of confidential information in certain circumstances); 25 T.A.C. § 1.207. Section 48.101(d) of the Human Resources Code provides that "[t]he executive commissioner shall adopt rules providing for the release . . . 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[.]" Hum. Res. Code § 48.101(d). Section 48.101(e) states "[t]he executive commissioner may adopt rules relating to the release of information . . . that is contained in the record of a deceased individual who was the subject of an investigation conducted by the [Department of Family and Protective Services] or investigating state agency[.]" *Id.* § 48.101(e).

We understand the department has adopted section 1.207 of title 25 of the Texas Administrative Code to govern the release of information pertaining to the abuse, neglect, or exploitation of an elderly or disabled person. Section 1.207 provides:

(h) The completed investigative report regarding abuse, neglect, or exploitation of an elderly or disabled person shall be released to the subject of a report of abuse, neglect, or exploitation or to that person's legal representative upon request. Any information relating to the reporter's identity or any other individual whose safety or welfare may be endangered by the disclosure shall be blacked out or deidentified.

25 T.A.C. § 1.207(h). The requestor is the wife of the deceased individual who is the subject of the report of abuse or neglect. As such, the requestor may be the legal representative of the deceased individual and, thus, she may have a right of access to the completed investigation report relating to the deceased individual. *See id.* If the requestor provides evidence demonstrating she is the legal representative of the deceased individual, then the department must release the submitted investigation report to her as provided in section 1.207. In such case, the remaining information must be withheld under

section 48.101 of the Human Resources Code.¹ If the requestor does not provide such evidence, the submitted information is confidential in its entirety and must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code.

In the instance the requestor provides evidence demonstrating she is the legal representative of the deceased individual, we will address your remaining arguments against disclosure of the investigation report. Section 552.101 of the Government Code also encompasses the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code. Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(b), (c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we conclude no portion of the investigation report consists of medical records that are subject to the MPA, and none of it may be withheld on that basis.

Section 552.101 of the Government Code also encompasses section 611.002, which is applicable to mental health records and provides in pertinent part:

(a) Communications 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.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining “patient” and “professional”). Upon review, we find no portion of the investigation report consists of

¹As we are able to make this determination, we need not address your remaining arguments against disclosure of this remaining information.

mental health records. Accordingly, the department may not withhold any portion of the investigation report pursuant to section 611.002(a) of the Health and Safety Code.

In summary, if the requestor provides evidence demonstrating she is the legal representative of the deceased individual at issue, then the department must release the submitted investigation report to her as provided in section 1.207 of title 25 of the Texas Administrative Code, but must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code. If the requestor does not provide such evidence, the department must withhold the submitted information in its entirety under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/bhf

Ref: ID# 503357

Enc. Submitted documents

c: Requestor
(w/o enclosures)