



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 20, 2007

Ms. Karol H. Davidson
Staff Attorney
Texas Youth Commission
P.O. Box 4260
Austin, Texas 78765

OR2007-07828

Dear Ms. Davidson:

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# 281440.

The Texas Youth Commission (the "commission") received a request for the investigation report of an injury sustained by a named youth, a complete copy of all statements made by the named youth and any witnesses to the injury, a complete copy of the videotape of the incident, and a complete copy of all medical records relating to the named youth. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that a portion of the submitted information, Attachments C and D, is subject to section 552.022 of the Government Code. Section 552.022 of the Government Code provides that:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108.

Gov't Code § 552.022(a)(1). In this instance, Attachments C and D constitute a completed investigation made for or by the commission. The commission must release the completed investigation under section 552.022(a)(1) of the Government Code unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly confidential under other law. You claim that submitted information is excepted from disclosure under section 552.103 of the Government Code. We note, however, that section 552.103 of the Government Code is a discretionary exception to disclosure that protects the 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 of the Government Code); Open Records Decision No. 542 at 4 (1990) (litigation exception may be waived). As such, section 552.103 of the Government Code is not other law that makes information confidential for the purposes of section 552.022 of the Government Code. Therefore, the commission may not withhold the information subject to section 552.022, Attachments C and D, under section 552.103 of the Government Code. However, because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will address the applicability of section 552.101 to the information subject to section 552.022.

Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. Section 261.201 of the Family Code provides in part:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). We note that the commission is authorized to conduct an investigation under chapter 261 of the Family Code. *See id.* § 261.401(b) (state agency that operates, licenses, certifies, or registers facility in which children are located shall make prompt, thorough investigation of report that child has been or may be abused, neglected, or exploited in facility). According to the submitted documents, the alleged victim in the incident to which the information pertains was 12 years of age at the time of the incident and

thus was a child for purposes of chapter 261. *See id.* § 101.003(a) (defining “child” for purposes of Fam. Code § 261.201 as person under 18 years of age who is not and has not been married or who has not had disabilities of minority removed for general purposes). Moreover, we have reviewed Attachments C and D and find that they consist of files, reports, records, communications, videotapes and working papers used or developed in an investigation made under chapter 261 of the Family Code. Therefore, Attachments C and D fall within the scope of section 261.201 of the Family Code.¹

We note, however, that the 80th Texas Legislature recently added subsections (i) and (j) to section 261.201, which relate to release by the commission of certain child abuse investigation information held by the commission. Section 261.201(i) and (j) state:

(i) [n]otwithstanding subsection (a), the [commission] shall release a report of alleged or suspected abuse or neglect made under this chapter if :

(1) the report relates to a report of abuse or neglect involving a child committed to the commission during the period that the child is committed to the commission ; and

(2) the commission is not prohibited by Chapter 552, Government Code, or other law from disclosing the report.

(j) The [commission] shall edit any report disclosed under Subsection (i) to protect the identity of:

(1) a child who is the subject of the report of alleged or suspected abuse or neglect;

(2) the person who made the report; and

(3) any other person whose life or safety may be endangered by the disclosure.

Act of May 28, 2007, 80th Leg., R.S., S.B. 103, § 12 (to be codified at Fam. Code § 261.201(i), (j)). We additionally note that the commission has adopted rules concerning

¹We note that for Attachments C and D, the commission also raises section 552.101 in conjunction with section 61.073 of the Human Resources Code. In this instance, however, this information is subject to section 261.201 of the Family Code, which is the more specific statute. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000) (the “more specific statute controls over the more general”); *cf. Open Records Decision No. 598* (1991) (in governing access to specific subset of information, statutory predecessor to Medical Practice Act prevailed over more general provisions of predecessor to Public Information Act).

investigations of alleged abuse, neglect, or exploitation. *See* Fam. Code § 261.409 (commission by rule shall adopt standards for investigation under Fam. Code § 261.401). Section 93.33(1) of title 37 of the Texas Administrative Code provides in part that

(5) [a] report will be provided to a parent, managing conservator or other legal representative of a youth upon request. The information contained in the report will be redacted to protect the identity of the person making the report, *other youth*, and any other person who may be harmed by the disclosure.

37 T.A.C. § 93.33(1)(5) (*emphasis added*). In this instance, the child at issue was committed to the commission at the time the alleged abuse occurred. Further, the requestor states that he is an attorney representing the youth's mother, and that the request letter is being written on behalf of the named youth. Therefore, under section 261.201(i) of the Family Code, and subsection 93.33(1)(5) of title 37 of the Texas Administrative Code, the commission must provide the requestor with a copy of the report and its attachments submitted as Attachment C, after redacting this information to protect the identity of the person making the report and any other person who may be harmed by the disclosure of the report. *See* Act of May 28, 2007, 80th Leg., R.S., S.B. 103, § 12 (to be codified at Fam. Code § 261.201(j)(2), (3)); 37 T.A.C. § 93.33(1)(5). The commission must also redact the identifying information of other youths in commission custody identified in Attachment C, and must withhold the videotape of the incident submitted as Attachment D in its entirety as it contains images of other youths.² *See* 37 T.A.C. § 93.33(1)(5).

We note that section 261.201(j)(1) of the Family Code provides that a report will be released only after redactions are made to protect the identity of the child who is the subject of the investigation. However, as noted, section 93.33(1)(5) allows access by the parent, managing conservator or other legal representative of a youth without such redactions. We find that section 261.409 of the Family Code, which provides the commission authority to adopt standards for the investigation of abuse in commission facilities, authorizes the commission to provide for release of child abuse investigation information to the child's parent or legal representative without redactions made to protect the identity of the child. Accordingly, the commission need not redact identifying information of the child who is the subject of the investigation before releasing the report to the requestor. *See* Fam. Code § 261.201(a) (providing for release of confidential information for purposes consistent with rules adopted by an investigating agency).

We will next address your remaining arguments with regard to the information that is not subject to section 552.022. Section 552.101 encompasses information that other statutes make confidential. Medical records are confidential under the Medical Practice Act (the

²You state that "we are unable to redact the images of the youth [sic] on the videotape such that their depictions are not released."

“MPA”), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in 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). We have further found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990).

When medical records pertain to a minor, such records may only be released upon the parent's or legal guardian's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *Id.* §§ 159.004, 159.005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked the medical records in Attachment E that are confidential under the MPA. The commission may only release that information in accordance with the MPA. *See* Open Records Decision No. 598 (1991).³

The submitted documents also include dental records, the public availability of which is governed by chapter 258 of the Occupations Code. Section 258.102 of the Occupations Code provides as follows:

(a) The following information is privileged and may not be disclosed except as provided by this article:

³We note that you state that “ the written consent given by the mother of the youth fails to state the purpose for the release and as such does not comply with the [MPA].”

(1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and

(2) a dental record.

(b) The privilege described by this section applies regardless of when the patient received the professional service from the dentist.

Occ. Code § 258.102. A “dental record” means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *See id.* §258.101(1). Information that is privileged under chapter 258 of the Occupations Code may be disclosed only under certain specified circumstances. *See id.* § 258.104 (consent to disclosure); *see also id.* §§ 258.105, .106, .107 (exceptions to privilege). When the patient is minor, consent for the release of privileged information must be signed by a parent or legal guardian of the patient. *See id.* § 258.104 (b)(2). The written consent for the release of privileged information required under section 258.104 must specify (1) the information covered by the release, (2) the person to whom the information is to be released, and (3) the purpose for the release. *See id.* § 258.104(c). A person who receives information that is privileged under section 258.102 of the Occupations Code may disclose that information to another person only to the extent that disclosure is consistent with the purpose for which the information was obtained. *See id.* § 258.108. We have marked the dental records in Attachment E that are privileged under section 258.102 of the Occupations Code and may only be released in accordance with chapter 258 of the Occupations Code.

The submitted documents also include mental health records that are confidential under section 611.002 of the Health and Safety Code. That section provides in 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 also id.* § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to information that is made confidential by section 611.002 only by certain individuals. *See id.* §§ 611.004, 611.0045; Open Records Decision No. 565 (1990). We have marked the mental health records in Attachment E that the commission must withhold under section 611.002, unless the requestor is authorized to obtain that information under sections 611.004 and 611.0045.

With regard to the remaining information in Attachment E to which neither the Occupations Code nor the Health and Safety Code is applicable, section 61.073 of the Human Resources Code provides the following:

The commission 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. Except as provided by Section 61.093(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 61.0731, Human Resources Code, and Chapter 61, Code of Criminal Procedure.

Hum. Res. Code § 61.073. The remaining records in Attachment E pertain to the named youth. Section 61.0731 of the Human Resources Code, provides as follows:

(a) In the interest of achieving the purpose of the commission and protecting the public, the commission may disclose records and other information concerning a child to the child and the child's parent or guardian only if disclosure would not materially harm the treatment and rehabilitation of the child and would not substantially decrease the likelihood of the commission receiving information from the same or similar sources in the future. Information concerning a person who is age 18 or older may not be disclosed to the person's parent or guardian without the person's consent.

(b) The commission may disclose information regarding a child's location and committing court to a person having a legitimate need for this information.

Id. § 61.0731. As noted above, the requestor states that he is an attorney representing the youth's mother. Section 61.0731(a) provides for permissive release to the child's parent or guardian. Accordingly, we conclude that, although the remaining information in Attachment E is generally excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 61.073 of the Human Resources Code, it may be released to the requestor if the commission determines that release in this case is permitted under section 61.0731.⁴

In summary, pursuant to section 261.201(i) of the Family Code, the commission must provide the requestor with a copy of the report and its attachments submitted as Attachment C, after redacting information identifying the person making the report, any other person who may be harmed by the disclosure of the report, and any other youths identified

⁴As we are able to make this determination, we need not address your claim under section 552.103.

in Attachment C. The videotape in Attachment D must also be withheld in its entirety. The marked medical records in Attachment E may only be released in accordance with the MPA. The marked dental records in Attachment E may only be released in accordance with chapter 258 of the Occupations Code. The marked mental health records in Attachment E may only be released in accordance with chapter 611 of the Health and Safety Code. The remaining records in Exhibit E are confidential under section 61.073 of the Family Code and must be withheld under section 552.101, but may be released to the requestor if the commission determines that release in this case is permitted under section 61.0731.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Jordan Johnson".

Jordan Johnson
Assistant Attorney General
Open Records Division

JJ/jb

Ref: ID# 281440

Enc. Submitted documents

c: Mr. Charles Dunn
P.O. Box 311
Lubbock, Texas 79408
(w/o enclosures)