ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 12, 2009

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

OR2009-08157

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# 345885 (DSHS File No. O14782--2009).

The Texas Department of State Health Services (the "department") received a request for inspection reports for the last two years pertaining to a specified facility.[1] You state that the department is withholding some of the responsive information pursuant to the previous determination issued in Open Records Letter No. 2003-4169(2003).[2] *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001) (delineating circumstances under which attorney general ruling constitutes previous determination under section 552.301). You claim that the submitted information at issue is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

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[1]You inform us that the department sought and received clarification of the request from the requestor. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

[2]You state that Open Records Letter No. 2003-4169 was issued to the Texas Commission on Alcohol and Drug Abuse, one of the department's legacy agencies whose powers, duties, and functions, as applicable to the Open Records Letter Ruling, were transferred to the department pursuant to HB 2292, 78th Leg., R.S. (2003).

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. Section 552.101 of the Government Code encompasses section 290dd-2 of title 42 of the United States Code, which provides in relevant 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, 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). You state that the records in question were obtained by the department based on the department's regulatory function and are not subject to redisclosure. You inform us that the facility at issue is a federally funded substance abuse treatment program. We note that federal law allows for the release of a patient's substance abuse records upon proper written consent. 42 C.F.R. §§ 2.15, .31, .33; *see* 42 U.S.C. § 290dd-2(b)(1). Accordingly, based upon your representations and our review, we conclude that the facility record we have marked may be released only as provided under section 290dd-2 of title 42 of the United States Code and sections 2.15, 2.31, and 2.33 of title 42 of the Code of Federal Regulations. However, the remaining submitted documents are not records from the facility, but rather constitute department records pertaining to the department's investigation of the facility. Accordingly, section 290dd of title 42 to the United States Code does not apply to this information.

Next, you claim that the information you have marked is confidential under section 48.101 of the Human Resources Code. Section 552.101 also encompasses section 48.101, 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.

Hum. Res. Code § 48.101 (a), (b). You contend that the information you have marked was used by the department in an investigation of abuse of a disabled person under chapter 48. *See* §§ 48.002(a)(2)(B) (defining "abuse" for the purposes of chapter 48 to include assaultive offenses committed by the person's caretaker), .002(a)(8) (defining "disabled person" for the purposes of chapter 48). Upon review, we agree that the information you have marked consists of files, reports, records, communications, and working papers used or developed in an investigation made under chapter 48. We note that 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 id.* § 48.101(b). *But see id.* § 48.101(c), (d), (e), (f) (permitting release of confidential information in certain circumstances); 25 T.A.C. § 1.207. It does not appear that any of the exceptions outlined in section 1.207 of title 25 of the Texas Administrative Code are applicable in this instance. Accordingly, based on our review of your representations and the submitted information, we conclude that the department must withhold the information you have marked pursuant to section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code.[3]

Next, you seek to withhold portions of the remaining information under section 611.002 of the Health and Safety Code. Section 552.101 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 none of the remaining information consists of mental

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[3]Because this ruling is dispositive with regard to the information you have marked under section 48.101 of the Human Resources Code, we need not address your remaining arguments for that information.

health records. Accordingly, the department may not withhold any of the remaining information pursuant to section 611.002(a) of the Health and Safety Code.

Next, you argue that some of the remaining information is confidential under section 552.101 in conjunction with the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code. 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.

Occ. Code § 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 none of the information you have marked 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 the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5. The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990).

You state that the submitted information contains identifying information of a person who reported possible violations of various specific sections of chapter 448 of title 25 of the Texas Administrative Code to the department. *See* 25 T.A.C. §§ 448.1207(c) and (k), 448.217(5), 448.701(b)(2), 448.901(n). You inform us that violations of these provisions are

punishable by civil and criminal penalties. Based on your representations, we conclude that the department may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. However, the remaining information the department has marked does not consist of the identifying information of an informer; therefore, the department may not withhold the remaining information it has marked under section 552.101 in conjunction with the informer's privilege.

Finally, you raise common-law privacy for portions of the remaining information. Section 552.101 also 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 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. *Id.* at 683. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected by common-law privacy. *See* 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 conclude that the information we have marked is intimate or embarrassing and of no legitimate public interest. Thus, this information must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find that none of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Therefore, no portion of the remaining information is confidential under common-law privacy.

In summary, the department may only release the facility record we have marked if the department receives a proper consent as provided under section 290dd-2 of title 42 of the United States Code and sections 2.15, 2.31, and 2.33 of title 42 of the Code of Federal Regulations. The department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code. The department may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. 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.[4]

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[4]We note that the information being released contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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 at (512) 475-2497.

Sincerely,

Laura E. Ream
Assistant Attorney General
Open Records Division

LER/dls

Ref: ID# 345885

Enc. Submitted documents

c: Requestor
(w/o enclosures)