



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 28, 2009

Mr. Patrick L. Flanigan
District Attorney
36th Judicial District of Texas
P.O. Box 1393
Sinton, Texas 78387

OR2009-15304

Dear Mr. Flanigan:

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# 359649.

The 36th Judicial District Attorney's Office (the "district attorney") received a request from an investigator with the Texas Education Agency (the "TEA") for information pertaining to a named individual and a specified incident. You claim the submitted information is exempted 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 exempts 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 information protected by other statutes, such as section 261.201(a) of the Family Code, which provides as follows:

(a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under [the Act] 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). The submitted information pertains to an investigation by the Aransas Pass Police Department (the “department”) of alleged or suspected child abuse and consists of files, reports, records, communications, and working papers used or developed in the investigation. We find, therefore, the submitted information is within the scope of section 261.201 of the Family Code. *See id.* § 261.001 (defining “abuse” for purposes of chapter 261 of the Family Code); *see also id.* § 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). You have not indicated the department has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, we conclude the submitted information is generally confidential under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (construing statutory predecessor to section 261.201). Section 261.201(a) provides, however, that information encompassed by subsection (a) may be disclosed “for purposes consistent with [the Family Code] and applicable federal or state law.” Fam. Code § 261.201(a).

We note section 22.082 of the Education Code constitutes “applicable state law” in this instance. Section 22.082 of the Education Code provides the TEA “may obtain from any law enforcement or criminal justice agency all criminal history record information and all records contained in any closed criminal investigation file that relate to a specific applicant for or holder of a certificate issued under Subchapter B, Chapter 21.” Educ. Code § 22.082. The requestor, an investigator at the TEA, claims section 22.082 gives the State Board for Educator Certification (the “SBEC”) a right to the requested information and indicates that the requested information is related to an SBEC investigation of an individual who has applied for or currently holds educator credentials.¹ TEA assumed the duties of the SBEC.² You state the case is closed. Thus, as the information at issue consists of a closed criminal investigation that relates to a specific applicant for or holder of a certificate under subchapter B, chapter 21 of the Education Code, section 22.082 authorizes the requestor to obtain the information in its entirety.

¹The requestor also claims a right to the information at issue under sections 261.308 and 261.406 of the Family Code. These statutes, however, apply to information held by the Department of Family and Protective Services and not the district attorney. *See* Fam. Code §§ 261.308, .406.

²The 79th Texas legislature passed House Bill 1116, which required the transfer of SBEC’s administrative functions and services to TEA, effective September 1, 2005.

However, section 261.201(a) states that the release must be "for purposes consistent with the Family Code." *See* Fam. Code § 261.201(a). This office cannot determine whether release of the information is consistent with the Family Code. Consequently, if the district attorney determines that release of the information is consistent with the Family Code, section 261.201 does not prohibit the release of the information to the requestor in this case.³ *Id.*

If, however, the district attorney determines that release is not consistent with purposes of the Family Code, the district attorney must withhold the information in its entirety pursuant to section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. *See* Attorney General Opinions DM-353 at 4 n. 6 (1995) (finding interagency transfer of information prohibited where confidentiality statute enumerates specific entities to which release of information is authorized and where potential receiving governmental body is not among statute's enumerated entities), JM-590 at 4-5 (1986); Fam. Code § 261.201(b)-(g), (i), (k) (listing circumstances under which section 261.201 information can be released).

In the event the district attorney determines that release of the information is consistent with the Family Code, we must nevertheless consider whether the submitted information is otherwise excepted from disclosure. We note the submitted information includes medical records, access to which is governed by the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code. Section 552.101 of the Government Code also encompasses section 159.002 of the Occupations Code, which provides in relevant part the following:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (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

³Although the district attorney contends that the submitted information is also excepted under section 552.108 of the Government Code, this office has found specific statutory right of access provisions prevail over general exceptions to disclosure under the Act. *See* Open Records Decision No. 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under statutory predecessor to Act). Accordingly, we do not address your argument under section 552.108 for the submitted information.

information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a), (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 also 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). We have marked the medical records that are subject to the MPA. The district attorney must generally withhold this information under section 159.002 of the Occupations Code unless it receives the required written consent for release of the information under sections 159.004 and 159.005 of the Occupations Code.

In addition, we note some of the remaining information is subject to 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 the information we have marked consists of mental health records. Therefore, this information may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

We also note portions of the remaining information are subject to section 552.130 of the Government Code, which provides information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title, or registration issued by a Texas agency is exempted from public release.⁴ Gov’t Code § 552.130(a)(1), (2). We have marked Texas motor vehicle record information that is generally confidential under section 552.130 of the Government Code.

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Since the information at issue includes confidential information pursuant to section 552.101 of the Government Code in conjunction with the MPA and section 611.002 of the Health and Safety Code, as well as section 552.130 of the Government Code, the question becomes whether the requestor in this case, as a TEA investigator, may nevertheless obtain the records at issue, including the confidential medical and mental health records. Because section 22.082 of the Education Code authorizes the requestor to obtain the information in its entirety while section 552.101 of the Government Code in conjunction with the MPA and section 611.002 of the Health and Safety Code, and section 552.130 of the Government Code except from disclosure portions of the information, section 22.082 conflicts with sections 552.101 and 552.130. Where statutes are in irreconcilable conflict, the specific provision prevails as an exception to the general provision unless the general provision was enacted later and there is clear evidence that the legislature intended the general provision to prevail. *See id.* § 311.026(b), *City of Lake Dallas v. Lake Cities Mun. Util Auth.*, 555 S.W.2d 163, 168 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

In this instance, although section 22.082 of the Education Code generally allows a TEA investigator access to files of a closed criminal investigation, the MPA specifically protects medical records, and specifically permits release in certain circumstances that do not include the TEA's request in this instance. We therefore conclude that, notwithstanding section 22.082, the marked medical records may only be released in accordance with the MPA.

Likewise, section 611.002 of the Health and Safety Code specifically protects mental health records. Furthermore, sections 611.004 and 611.0045 of the Health and Safety Code specifically permit release in certain circumstances that do not include the TEA's request. Consequently, we find the confidentiality provision found in section 611.002 is more specific than the general right of access provided to the TEA by section 22.082 of the Education Code. We therefore find that, notwithstanding section 22.082, the marked mental health records may only be released in accordance with sections 611.004 and 611.0045.

Additionally, we note section 552.130 of the Government Code specifically protects Texas motor vehicle record information and contains its own access provisions. Therefore, we find section 552.130 is not a general exception under the Act. Furthermore, because section 552.130 specifically protects Texas motor vehicle record information while section 22.082 of the Education Code provides TEA with a general right of access, we find the confidentiality provision found in section 552.130 is more specific than the general right of access provided to TEA by section 22.082. Accordingly, notwithstanding section 22.082, we conclude the district attorney must withhold the marked Texas motor vehicle record information under section 552.130 of the Government Code.

In summary, if the district attorney determines that release of the information to the requestor in this instance is consistent with the Family code, the district attorney may only release the marked medical records in accordance with the MPA and the marked mental health records

in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. In that instance, the district attorney must withhold the marked Texas motor vehicle record information under section 552.130 of the Government Code and release the remaining information.⁵ If the district attorney determines that release of the information to the requestor in this instance is not consistent with the Family Code, the district attorney must withhold the information in its entirety under section 552.101 of the Government Code in conjunction with section 261.201 of the Family 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.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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 359649

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵Because the requestor has a statutory right of access to this information in this instance, the district attorney must again seek a decision from this office if it receives another request for the same information from another requestor.