



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 7, 2010

Honorable Terri Hodge  
State Representative, District 100  
Texas House of Representatives  
P.O. Box 2910  
Austin, Texas 78768-2910

Mr. Jeff Archer  
Chief Legislative Counsel  
Texas Legislative Council  
P.O. Box 12128  
Austin, Texas 78711-2128

OR2010-00313

Dear Representative Hodge and Mr. Archer:

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# 365109.

Representative Terri Hodge (the "representative") received a request for correspondence and attachments between the representative and the Texas Department of Criminal Justice (the "department") pertaining to requests for a hardship transfer for a specified time period. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.134 of the Government Code. In addition, you state that you have notified the department of the request for information and of its right to submit comments to this office. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released). We have received correspondence from the department. The department claims the submitted information is excepted from disclosure under sections 552.101 and 552.134 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

Initially, you indicate that the information you have marked in purple is not responsive to the instant request for information because it does not pertain to requests for a hardship transfer. Upon review, we agree that the information you have marked in purple is non-responsive. This ruling does not address the public availability of any information that is not responsive to the request, and the representative is not required to release that information in response to the request.

Next, the representative and the department both raise section 552.101 in conjunction with section 159.002 of the Occupations Code for some of the submitted information. Section 552.101 excepts 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, including the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 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). 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). Medical records must be released upon the governmental body's receipt of the patient'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. *See* Occ. Code §§ 159.004, .005. After the death of a patient, medical records may be released only on the signed written consent of the deceased individual's personal representative. *See id.* § 159.005(a)(5). Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). We have marked the medical records and specific information taken from medical records that may only be released in accordance with the MPA.

The representative claims the remaining responsive information is confidential under section 508.313 of the Government Code. Additionally, the representative and the department both claim the remaining responsive information is excepted under section 552.134 of the Government Code. We note that, generally, sections 508.313 and 552.134 of the Government Code apply to information that is held by the department and not information held by another governmental body. *See* Gov't Code

§§ 508.313, 552.134(a), *but see id.* § 552.134(d) (release by department of information subject to section 552.134 in certain circumstances does not waive future right to assert exceptions to public disclosure for such information). In this instance, the representative and the department inform us that the department transferred some of the submitted information to the representative pursuant to section 552.008 of the Government Code, which states in part as follows:

[A] governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting individual member, agency, or committee of the legislature if the requesting member, agency or committee states that the public information is requested under [the Act] for legislative purposes.

Gov't Code § 552.008(b). We note that disclosure of excepted or confidential information to a legislator under section 552.008 does not waive or affect the confidentiality of the information or the right to assert exceptions in the future regarding that information, and provides specific procedures relating to the confidential treatment of the information. *Id.* Accordingly, we will address the representative's and department's claims under sections 508.313 and 552.134.

Section 552.101 of the Government Code also encompasses section 508.313 of the Government Code, which provides in part:

(a) All information obtained and maintained [by the department], including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

- (1) an inmate of the institutional division [of the department] subject to release on parole, release to mandatory supervision, or executive clemency;
- (2) a releasee; or
- (3) a person directly identified in any proposed plan of release for an inmate.

*Id.* § 508.313(a). The representative claims the remaining responsive information is subject to section 508.313. Upon review, however, we find the representative has failed to demonstrate that any of the remaining responsive information pertains to an inmate of the department subject to release on parole, release to mandatory supervision, or executive clemency, a releasee, or a person directly identified in any proposed plan of release for an inmate. *See id.* Therefore, section 508.313 is not applicable to any of the remaining information and the representative may not withhold it under section 552.101 on that basis.

Section 552.134(a) of the Government Code relates to inmates of the department and provides:

Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the [department] is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

*Id.* § 552.134(a). Upon review, we find that some of the remaining responsive information consists of information obtained or maintained by the department which pertains to inmates confined in department facilities. The representative and the department inform us that the documents at issue were transferred to the representative by the department pursuant to section 552.008. Thus, we agree portions of the remaining responsive information are subject to section 552.134. Further, none of this information is subject to release under section 552.029 of the Government Code. Accordingly, the representative must withhold the information we have marked pursuant to section 552.134 of the Government Code. The remaining information, however, consists of letters that the representative wrote to the department and information pertaining to inmates that was not submitted to the representative by the department. Thus, the representative and the department have failed to demonstrate how section 552.134 is applicable to the remaining information at issue. Accordingly, the representative may only withhold the information we have marked under section 552.134.

Section 552.101 of the Government Code also encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (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. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under 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 have marked information that is highly intimate or embarrassing and not of legitimate public concern. The representative must withhold the marked information pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The representative and the department have failed to demonstrate, however, how any of the remaining information is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the representative may not withhold the remaining information you have marked under section 552.101 in conjunction with common-law privacy.

Section 552.101 also encompasses constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has applied privacy to protect certain information about incarcerated individuals. See Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). Citing *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976) as authority, this office held those individuals who correspond with inmates possess a "first amendment right . . . to maintain communication with [the inmate] free of the threat of public exposure," and this right would be violated by the release of information that identifies those correspondents, because such a release would discourage correspondence. ORD 185. The information at issue in Open Records Decision No. 185 was the identities of individuals who had corresponded with inmates. Our office found "the public's right to obtain an inmate's correspondence list is not sufficient to overcome the first amendment right of the inmate's correspondents to maintain communication with him free of the threat of public exposure." *Id.* Implicit in this holding is the fact an individual's association with an inmate may be intimate or embarrassing. In Open Records Decision Nos. 428 and 430, our office determined inmate visitor and mail logs that identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors), 428. Further, we recognized that inmates had a constitutional right to visit with outsiders and could also be threatened if their names were released. See also ORD 185. The rights of those individuals to anonymity was found to outweigh the public's interest in this information. *Id.*; see ORD 430.

We have marked the information that reveals actual inmate visitors that the representative must withhold under section 552.101 in conjunction with constitutional privacy. The representative and department also seek to withhold under section 552.101 in conjunction with constitutional privacy information relating to the inmates' family members when those family members are not listed as actual visitors or correspondents, but only as individuals who are seeking hardship transfers for the inmates or as relatives of the inmate. However, the representative and the department have failed to demonstrate how this information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the remaining information at issue may not be withheld under section 552.101 on this basis. As no further exceptions to the disclosure are claimed for this information, it must be released.

In summary, this ruling does not address the information the representative has marked as non-responsive and the representative need not release that information. The medical records and specific information taken from medical records, which we have marked, may only be released in accordance with the MPA. The representative must withhold the information we have marked under section 552.134 of the Government Code. The representative must also withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law and constitutional privacy. The remaining information must be released to the requestor.

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](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,



Laura Ream Lemus  
Assistant Attorney General  
Open Records Division

LRL/jb

Ref: ID# 365109

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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