



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 13, 2011

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

OR2011-05115

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# 414370 (DSHS File No.: O18532-2011).

The Texas Department of State Health Services (the "department") received a request for fifteen specified categories of information pertaining to a named chemical dependency counselor and a named chemical dependency treatment facility. You state the department has released or will release some of the requested information, with redactions made in accordance with the previous determination in Open Records Decision No. 684 (2009).<sup>1</sup> We note the requestor excluded from his request "personal identifying information, like social security number, personal home address, medical history and other protected information" and you indicate the department will redact such information from the submitted documents. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>See ORD 684 (previous determination authorizing any governmental body to withhold ten categories of information without necessity of requesting attorney general opinion).

<sup>2</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

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. This section encompasses information protected by other statutes. Criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code.<sup>3</sup> *See* Gov't Code § 411.083.

Section 411.1105 of the Government Code authorizes the department to obtain CHRI relating to an applicant for or a holder of a chemical dependency counselor's license from DPS; however, the department may not release CHRI except as provided by chapter 411. *See id.* §§ 411.083, .084, .1105. Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The information at issue contains CHRI for the purposes of chapter 411. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.

Section 552.101 also encompasses section 48.101 of the Human Resources Code. Section 48.101(a) provides the following:

The following information is confidential and not subject to disclosure under [the Act]:

- (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.

Hum. Res. Code § 48.101(a). Section 48.101 makes confidential information used or developed in an investigation made under chapter 48 of the Human Resources Code. *See*

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<sup>3</sup>Although you assert the information at issue is confidential under section 411.084 of the Government Code, we note section 411.083 of the Government Code is the proper section to address for the substance of your arguments.

*id.*; 25 T.A.C. § 1.207(a). Chapter 48 regulates the investigation of abuse, neglect, or exploitation of an elderly or disabled person. *See* Hum. Res. Code § 48.051. For purposes of chapter 48, a disabled person means “a person with a mental, physical, or developmental disability that substantially impairs the person’s ability to provide adequately for the person’s care or protection and who is 18 years of age or older; or under 18 years of age and who has had the disabilities of minority removed.” *Id.* § 48.002(a)(8). In addition, an elderly person means “a person 65 years of age or older.” *Id.* § 48.002(a)(1).

You inform us the submitted information pertaining to complaint number 1068091377 relates to an allegation of abuse of a patient in a chemical dependency treatment facility. You assert a person receiving chemical dependency treatment is a disabled person for purposes of section 48.002. You argue that, if the victim of the alleged abuse is a person receiving chemical dependency treatment, then the victim is disabled for purposes of chapter 48 and, thus, the investigation related to the abuse is confidential under section 48.101. However, you state the department “does not have sufficient facts relating to the client to conclude with assurance either that the complainant is or is not ‘disabled’ within the definition of [chapter] 48.” You also state the victim is not an elderly person for purposes of chapter 48. *See id.* § 48.002(a)(1). Accordingly, because you have not established the victim in complaint number 1068091377 is elderly or disabled for purposes of chapter 48, we find you have failed to establish this complaint relates to a report of abuse, neglect, or exploitation under chapter 48. *See id.* § 48.101(a). You also assert complaint numbers 1069032907 and 1069100103 are confidential under section 48.101; however, upon review, we find you have not provided arguments establishing the complainants in these investigations are elderly or disabled for purposes of chapter 48. Therefore, we conclude you have not established any of this information is confidential under section 48.101, and the department may not withhold it under section 552.101 on that ground.

Section 552.101 also encompasses section 290dd-2 of title 42 of the United States Code. Section 290dd-2(a) reads 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), 2.12(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). Although you assert some of the submitted information may be confidential under section 290dd-2, you inform us “[t]he [d]epartment does not have specific facts to verify whether [the named chemical dependency treatment facility] constituted a ‘federally assisted’ program as defined by [section 2.12(b) of title 42 of the Code of Federal Regulations] at the time of any disclosure of information from its records.” *See* 42 C.F.R. § 2.12(b). Thus, because you do not inform us the submitted information relates to substance abuse education, prevention, training, treatment, rehabilitation, or research that is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States, we find you have failed to establish any of the submitted information is confidential under section 290dd-2, and the department may not withhold the information under section 552.101 on that ground. *See* 42 U.S.C. § 290dd-2(a).

Section 552.101 also encompasses section 81.006 of the Civil Practice and Remedies Code, which provides in relevant part the following:

(a) If a mental health services provider or the employer of a mental health services provider has reasonable cause to suspect that a patient has been the victim of sexual exploitation by a mental health services provider during the course of treatment, or if a patient alleges sexual exploitation by a mental health services provider during the course of treatment, the mental health services provider or the employer shall report the alleged conduct not later than the 30th day after the date the person became aware of the conduct or the allegations to:

- (1) the prosecuting attorney in the county in which the alleged sexual exploitation occurred; and
- (2) any state licensing board that has responsibility for the mental health services provider’s licensing.

...

(c) A report under this section need contain only the information needed to:

- (1) identify the reporter;
- (2) identify the alleged victim, unless the alleged victim has requested anonymity; and
- (3) express suspicion that sexual exploitation has occurred.

(d) Information in a report is privileged information and is for the exclusive use of the prosecuting attorney or state licensing board that receives the information. A person who receives privileged information may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the person first obtained the information. The identity of an alleged victim of sexual exploitation by a mental health services provider may not be disclosed by the reporter, or by a person who has received or has access to a report or record, unless the alleged victim has consented to the disclosure in writing.

Civ. Prac. & Rem. Code § 81.006(a), (c), (d); *see id.* § 81.001(5) (defining sexual exploitation); *see also* 25 T.A.C. § 134.46(g)(3) (duty of private psychiatric hospital mental health services provider to report sexual exploitation by mental services provider to department). *See generally* *NCED Mental Health, Inc. v. Kidd*, 214 S.W.3d 28, 35-36 (Tex. App.—El Paso 2006, no pet.). Thus, section 81.006 imposes a duty on a mental health services provider or the employer of a mental health services provider to report alleged sexual exploitation of a patient during the course of treatment by a mental health services provider to a prosecuting attorney and the provider's licensing board in certain circumstances. Civ. Prac. & Rem. Code § 81.006(a). Section 81.006(d) makes confidential a report made under that statute. *Id.* § 81.006(d).

You assert complaint numbers 1068091377 and 1069100103 are confidential under section 81.006. You assert complaint number 1068091377 relates to an allegation of sexual exploitation committed by a chemical dependency counselor, who you inform us is a mental health service provider for purposes of section 81.006. *See* Civ. Prac. & Rem. Code § 81.001(2)(B) ("mental health service provider" includes chemical dependency counselor as defined by section 504.001 of the Occupations Code). The alleged sexual exploitation in complaint number 1068091377 was reported to the department by the victim, who you inform us is not a mental health services provider or employer. *See* Civ. Prac. & Rem. Code § 81.006(a). Accordingly, we find you have not established section 81.006 is applicable to any information in complaint number 1068091377, and the department may not withhold it under section 552.101 on that ground. *See id.* 81.006(d).

In complaint number 1069100103, an attorney representing a former employee submitted to the department a complaint alleging the former employee was a victim of sexual harassment. The attorney also includes in the complaint the allegation that a client of the facility was the victim of sexual exploitation by a mental health services provider approximately two years ago. Although you assert the former employee is a mental health services provider, we find you have not established the information at issue is a report of alleged sexual exploitation by a mental health services provider made under section 81.006(a). *See id.* Thus, you have not established section 81.006 is applicable to the information in complaint number 1069100103, and the department may not withhold it under section 552.101 on that ground. *See id.* 81.006(d).

Section 552.101 also encompasses chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) states “[c]ommunications 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.” Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Health & Safety Code § 611.001(b). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. See Open Records Decision No. 565 (1990). You assert a portion of the complaint letter in complaint number 1069100103 is confidential under section 611.002. Upon review, however, we find you have not established this information consists of communications between a patient and a mental health professional or a record of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a mental health professional. See Health & Safety Code § 611.001(b). Thus, we conclude you have not demonstrated the information at issue is subject to section 611.002, and the department may not withhold it under section 552.101 on that ground.

Section 552.101 also encompasses the informer’s privilege, which has long been recognized by Texas courts. *E.g.*, *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). The informer’s privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer’s identity. See Open Records Decision No. 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 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. 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 (1988). 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). We note, however, that witnesses who provided information in the course of an investigation, but do not make the initial report of a violation, are not informants for the purposes of the common-law informer’s privilege.

You state the department is charged with implementing and enforcing professional standards for chemical dependency counselors and chemical dependency treatment facilities, and that such enforcement may result in civil or criminal penalties. See, *e.g.*, Occ. Code § 504.351; Health & Safety Code §§ 464.016-.017. The remaining information reveals the identities of individuals who filed complaints with the department regarding the named chemical

dependency counselor or treatment facility. You assert, "In complaining to the Department, . . . a complainant is necessarily expressing the complainant's belief that the licensee may be in violation of applicable licensing standards, whether or not specific statutes and rules of the Department are cited by the complainant." See Open Records Decision No. 549 at 5 (1990) (informer's privilege applicable to statements that are not expressed in legal terms because they allege possible violations of law). Upon review, we conclude the department may withhold the information identifying these complainants, which we have marked, under section 552.101 in conjunction with the common-law informer's privilege. However, we find the remaining information at issue does not identify a complainant for purposes of the informer's privilege; thus, the department may not withhold it under section 552.101 on that basis.

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. This office has found the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, see Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, see Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, see Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Some of the remaining information is highly intimate or embarrassing and is not of legitimate concern to the public; therefore, the department must withhold this information, which we have marked, under section 552.101 in conjunction with common-law privacy. Upon review, however, we find the remaining information is either not highly intimate or embarrassing, or it is of legitimate public information; therefore, the remaining information is not confidential under common-law privacy, and the department may not withhold it under section 552.101 on that ground.

Section 552.101 also encompasses the doctrine of 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

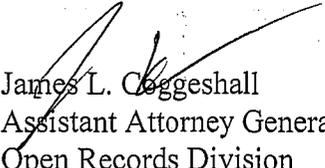
protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5; see *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985). After review of the remaining information, we find it does not contain information that is confidential under constitutional privacy; therefore, the department may not withhold it under section 552.101 on that ground.

To conclude, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and common-law privacy. The department may withhold the information we have marked under section 552.101 in conjunction with the informer's privilege. The department must release the remaining responsive information 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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/tf

Ref: ID# 414370

Enc. Submitted documents

c: Requestor  
(w/o enclosures)