



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 13, 2011

Mr. Cary Bovey
City Attorney
City of Llano
2251 Double Creek Dr., Ste 204
Round Rock, Texas 78664

OR2011-05134

Dear Mr. Bovey:

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#414457.

The City of Llano (the "city"), which you represent, received a request for the reports and statements regarding a specified incident. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(b). You state the city received the request for information on January 19, 2011. Accordingly, the city was required to request a decision from this office by February 2, 2011. The envelope in which your request for a ruling was submitted bears a postmark date of February 3, 2011. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we determine the city failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption

that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 586 (1991). This office has held a compelling reason exists to withhold information when third party interests are at stake or when information is made confidential by another source of law. *See* Open Records Decision No. 150 (1977). You claim section 552.108 of the Government Code for the submitted information. However, this exception is discretionary in nature. It serves to protect a governmental body's interests and may be waived; as such, it does not constitute a compelling reason to withhold information. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, no portion of the submitted information may be withheld under section 552.108 of the Government Code. You also raise sections 552.101, 552.130, and 552.136 of the Government Code. Because these exceptions can provide a compelling reason to withhold information, we will consider the applicability of these exceptions to the submitted information.

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. Section 552.101 encompasses information protected by other statutes, such as section 242.127 of the Health and Safety Code, which pertains to investigations of alleged or suspected abuse or neglect in convalescent or nursing homes and related facilities. Section 242.127 provides in pertinent part:

A report, record, or working paper used or developed in an investigation made under [subchapter E of chapter 242] . . . [is] confidential and may be disclosed only for purposes consistent with the rules adopted by the [Texas Board of Human Services] or the designated agency.

Health & Safety Code § 242.127. The only entities authorized to conduct an investigation under subchapter E of chapter 242 are the Texas Department of Aging and Disability Services (“DADS”) or the agency designated by a court to be responsible for the protection of a nursing home resident who is the subject of a report of abuse or neglect. *See id.* § 242.126; *see also id.* § 242.121 (defining “designated agency”). The submitted information contains a final written report completed by DADS concerning alleged abuse. You state this report was used or developed in an investigation of abuse, neglect, or exploitation of a convalescent or nursing home. Therefore, we agree that this report, which you have marked, is confidential under section 242.127 of the Health and Safety Code and must be withheld under section 552.101 of the Government Code.¹

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which makes medical records confidential. *See* Occ. Code §§ 159.001-165.160. Section 159.002 of the MPA provides in part:

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

Id. § 159.002(a)-(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 also have concluded that when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). Upon review, we find the submitted information contains medical records, which we have marked, that are subject to the MPA. Accordingly, the information we have marked may only be disclosed in accordance with the MPA.²

Section 552.101 of the Government Code also encompasses the federal and state statutes that prohibit the disclosure of information concerning a state plan for medical assistance, except for a purpose directly connected with the administration of the plan. *See* 42 U.S.C. § 1396a(a)(7); Hum. Res. Code §§ 12.003, 21.012; Open Records Decision Nos. 584 (1991), 166 (1977). Section 12.003 of the Human Resources Code provides in relevant part:

(a) Except for purposes directly connected with the administration of the department's assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, or any information

²As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.

concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties.

Hum. Res. Code § 12.003(a). In Open Records Decision No. 584, this office concluded “[t]he inclusion of the words ‘or any information’ juxtaposed with the prohibition on disclosure of the names of the department’s clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients’ names and addresses.” *Id.* at 3. Consequently, it is the specific information pertaining to individual clients, and not merely the clients’ identities, that is made confidential under section 12.003. *See* Hum. Res. Code § 21.012 (a) (requiring provision of safeguards that restrict use or disclosure of information concerning applicants for or recipients of assistance programs to purposes directly connected with administration of programs).

We note that the submitted information reveals the incident to which it pertains was also investigated by the Office of the Attorney General’s Medicaid Fraud Control Unit (“MFCU”), which is charged by federal law with investigating and prosecuting violations of all applicable state laws pertaining to fraud in the administration of the Medicaid program and reviewing “abuse or neglect of patients in health care facilities receiving payments under the State Medicaid plan[.]” *See* 42 C.F.R. § 1007.11(b)(1). Because MFCU investigated the incident, we note that the victim listed in the remaining information may be a patient in a health care facility receiving payments under the State Medicaid plan, and, therefore, the victim’s identity may be confidential under section 12.003 of the Human Resources Code. Because we are unable to make this determination, we must rule conditionally. Because release of the victim’s name in this instance is not for use in the administration of the assistance program, the city must withhold the victim’s name and identifying information, which we have marked under section 552.101 in conjunction with section 12.003 of the Human Resources Code, if the victim is a patient in a health care facility receiving payments under the State Medicaid plan. If the victim is not a patient in a health care facility receiving payments under the State Medicaid plan, the city may not withhold the victim’s name and identifying information on this basis.

Section 552.101 of the Government Code 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 some kinds of medical information or information indicating disabilities or specific illnesses to be excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we have marked the portions

of the remaining information that are highly intimate or embarrassing and of no legitimate public interest. This information is generally confidential under section 552.101 in conjunction with common-law privacy. However, we note the city may only withhold the marked information, which pertains to the victim, if the victim's name and identifying information are not being withheld under section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resources Code. However, we find the remaining information you marked is either not highly intimate or embarrassing or is of legitimate public interest. Accordingly, the city may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

You have marked driver's license numbers you seek to withhold under section 552.130 of the Government Code. Section 552.130 provides that information relating to a motor vehicle operator's license or driver's license issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1). We note, however, you have also marked the state of issuance of the driver's licenses. Generally, this office does not withhold the state of issuance because, in order for section 552.130 to be applicable, the motor vehicle information must be issued by an agency of the State of Texas. *See id.* Accordingly, with the exception of the state of issuance, the city must withhold the driver's license numbers you have marked under section 552.130 of the Government Code.

In summary, the city must withhold the report you have marked under section 552.101 of the Government Code in conjunction with section 242.127 of the Health and Safety Code. The city may only release the medical records we have marked in accordance with the MPA. If the victim is a patient in a health care facility receiving payments under the State Medicaid plan, the city must withhold the victim's name and identifying information, which we have marked, under section 552.101 in conjunction with section 12.003 of the Human Resources Code. If the victim is not a patient in a health care facility receiving payments under the State Medicaid plan, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. With the exception of the state of issuance, the city must withhold the drivers's license numbers you have marked under section 552.130 of the Government Code.³ The remaining information must be released.⁴

³We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

⁴We note the information being released contains social security numbers. 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. *See* Gov't Code § 552.147.

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,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 414457

Enc. Submitted documents

c: Requestor
(w/o enclosures)