



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 2, 2012

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

OR2012-15692

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# 466698 (DSHS File# 20574/2012).

The Texas Department of State Health Services (the "department") received a request for inspection and complaint reports, and other reviews concerning the Starlight Recovery facility, the Starlight Recovery IOP facility (collectively the "Starlight Facility"), and the Wellspring Texas facility from January 1, 2010 to the date of the request.<sup>1</sup> You state the department does not maintain any responsive information pertaining to the Wellspring Texas facility.<sup>2</sup> You state some information has been or will be made available to the requestor with redactions pursuant to the previous determinations issued in Open Records Decision No. 684 (2009)<sup>3</sup> and Open Records Letter No. 2003-4169 (2003).<sup>4</sup> You claim that the

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<sup>1</sup>We note the requestor has excluded client names from her request.

<sup>2</sup>We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. — San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

<sup>3</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision.

<sup>4</sup>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, 78<sup>th</sup> Leg., R.S. (2003).

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 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. This exception encompasses information other statutes make confidential. You raise section 552.101 of the Government Code in conjunction with the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. *See id.* § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* ORD 681 at 8; *see also* Gov’t Code §§ 552.002, .003, .021. We, therefore, held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, the department may not withhold any portion of the submitted information on this basis.

Section 552.101 also encompasses section 92.006 of the Health and Safety Code, which makes certain information reported to the department confidential. *See* Health & Safety Code § 92.006. Section 92.006 provides in relevant part:

- (a) All information and records relating to injuries are confidential, including information from injury investigations. That information may not be released or made public on subpoena or otherwise, except that release may be made:

- (1) for statistical purposes, but only if a person is not identified;
- (2) with the consent of each person identified in the information released; or
- (3) to medical personnel in a medical emergency to the extent necessary to protect the health or life of a named person.

*Id.* § 92.002(a). An “injury” is defined as “damage to the body that results from intentional or unintentional acute exposure to thermal, mechanical, electrical, or chemical energy or from the absence of essentials such as heat or oxygen.” *Id.* § 92.001(1); 25 T.A.C. § 103.2(9). Injuries required to be reported to the department include “[s]pinal cord injuries, traumatic brain injuries, and submersion injuries[.]” Health & Safety Code § 92.002.

You state the information contained in Exhibit B pertains to an investigation by the department’s Substance Abuse Compliance Group regarding the death of a patient at the facility at issue. Upon review, we find the information contained in Exhibit B does not pertain to an injury reported to the department for the purposes of chapter 92 of the Health and Safety Code. *See id.*; *see also* 25 T.A.C. § 103.2(18) (defining “spinal cord injury” as acute, traumatic lesion of neural elements in spinal canal resulting in deficit to sensory, motor or bladder/bowel dysfunction), 103.2(19) (defining “submersion injury” as process of experiencing respiratory impairment from submersion/immersion in liquid), 103.2(24) (defining “traumatic brain injury” as acquired injury to brain). Accordingly, none of the submitted information may be withheld under section 552.101 of the Government Code on this basis.

Section 552.101 of the Government Code 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 also id.* § 611.001 (defining “patient” and “professional”). Upon review, we find some of the submitted information, which we have marked, consists of mental health records and information obtained from mental health records. This information is confidential under section 611.002 of the Health and Safety Code. Therefore, the department must withhold the information we have marked under section 552.101 in conjunction with section 611.002 of the Health and Safety Code, unless the department receives written consent for release of the records that complies with sections 611.004 and 611.0045 of the Health and Safety Code. However, we find none of

the remaining information constitutes mental health records or information obtained from mental health records for the purposes of section 611.002, and thus, no portion of the remaining information may be withheld under section 552.101 on this basis.

Section 552.101 also encompasses section 290dd-2 of title 42 of the United States Code. Section 290dd-2(a) provides 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 concerning [Starlight facility’s] status as a ‘federally assisted’ program as defined by [section 2.12(b) of title 42 of the Code of Federal Regulations]” *See* 42 C.F.R. § 2.12(b). Furthermore, we find most of the submitted documents do not constitute patient records, but rather consist of records created by the department pertaining to the department’s investigation and regulation of the facility. Thus, 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 basis. *See* 42 U.S.C. § 290dd-2(a).

Section 552.101 also encompasses section 576.005 of the Health and Safety Code, which provides “[r]ecords of a mental health facility that directly or indirectly identify a present, former, or proposed patient are confidential unless disclosure is permitted by other state law.” Health & Safety Code § 576.005. We note department records pertaining to the department’s investigation of complaints against the facility are not records of a mental health facility as contemplated by section 576.005. As such, we conclude that none of the submitted information may be withheld under section 552.101 of the Government Code in conjunction with section 576.005 of the Health and Safety Code. *See* Open Records Decision No. 163 (1977) (construing predecessor statute).

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-168.202. 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). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has determined 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 find none of the remaining information constitutes medical records or information obtained from medical records for the purposes of the MPA. Thus, no portion of the submitted information may be withheld under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy 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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. 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. *See id.* at 683. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history

information). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. This office has also recognized that individuals may have a privacy interest in their drug test results. *See* Open Records Decision Nos. 594 (1991) (suggesting identification of individual as having tested positive for use of illegal drug may raise privacy issues), 455 at 5 (1987) (citing *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3rd Cir. 1986)). We note the right to privacy is a personal right that lapses at death and therefore does not encompass information that relates to a deceased individual. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, *writ ref'd n.r.e.*); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). You seek to withhold dates of birth of witnesses under section 552.101 of the Government Code in conjunction with common-law privacy. We note, however, the dates of birth of members of the public are generally not highly intimate or embarrassing. *See* ORD 455 at 7 (home addresses, telephone numbers, dates of birth not protected under privacy). Upon review, we find the information we have marked is highly intimate or embarrassing information that is of no legitimate public concern. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, the department has failed to demonstrate any of the remaining information is highly intimate or embarrassing and not of legitimate public concern, and thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law 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. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4, 455 at 3-7 (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. ORD 455 at 4. 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.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)). As noted above, the right to privacy is a personal right that lapses at death. *See Moore*, 589 S.W.2d 489, 491; ORD 272 at 1. However, the United States Supreme Court has determined that surviving family members can have a privacy interest in information relating to their deceased relatives. *See Nat'l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570 (2004). Upon review, we find you have failed to demonstrate any portion of the submitted information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the department may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with constitutional privacy.

You raise section 552.101 in conjunction with the common-law informer's privilege for portions of the remaining information. 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). See *Aguilar v. State*, 444 S.W.2d 935, 937; *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The common-law informer's privilege, which has long been recognized by Texas courts, 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 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 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 (1988). Upon review, we find none of the remaining information identifies an individual who reported a violation of a criminal or civil statute to the department for the purposes of the informer's privilege. Thus, you have failed to demonstrate the applicability of the common-law informer's privilege to the remaining information. Accordingly, the department may not withhold any of the remaining information under section 552.101 on this basis.

You have marked e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684. However, we note the remaining information contains additional e-mail addresses that are subject to section 552.137.<sup>5</sup> Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. Accordingly, the department must also withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release.

In summary, unless the department receives written consent for release that complies with sections 611.004 and 611.0045 of the Health and Safety Code, the department must withhold the information we have marked under section 552.101 in conjunction with section 611.002 of the Health and Safety Code. The department must withhold the information we have

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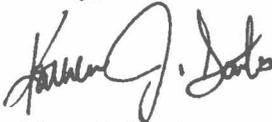
<sup>5</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

marked under section 552.101 in conjunction with common-law privacy. Unless the owners have affirmatively consented to their release, the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining information must be released.

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,



Kathleen J. Santos  
Assistant Attorney General  
Open Records Division

KJS/eb

Ref: ID# 466698

Enc. Submitted documents

c: Requestor  
(w/o enclosures)