



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 20, 2014

Mr. Timothy E. Bray
Deputy General Counsel
Office of General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2014-10666

Dear Mr. Bray:

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# 526793 (DSHS OR File 222823/2014).

The Texas Department of State Health Services (the "department") received a request for a specified e-mail and all e-mail transmissions regarding a named individual by four other named individuals or any employee of Rio Grande State Center (the "center") during a specified time period. You state the department has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

¹We 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.

Gov't Code § 552.101. Section 552.101 encompasses information other statutes make confidential, such as 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. You indicate the center is a mental health facility as defined by chapter 571. *See id.* § 571.003(12). You contend the information in Exhibit C consists of records of a mental health facility that directly or indirectly identify a patient. Upon review, we find the confidentiality provision of section 576.005 applies to the information at issue. You state there is no exception in state law that would permit disclosure of this information in this instance. Accordingly, the department must withhold the information in Exhibit C under section 552.101 of the Government Code in conjunction with section 576.005 of the Health and Safety Code.²

Section 552.101 of the Government Code also encompasses section 48.101 of the Human Resources Code, which provides, in relevant part, the following:

(a) 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.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department or investigating state agency rule and applicable federal law.

Hum. Res. Code § 48.101(a), (b). You state the information in Exhibit D consists of an investigation of abuse of an Adult Protective Services (“APS”) client under chapter 48 of the Human Resources Code. Such information must not be released to the public, except for a purpose consistent with chapter 48 and as provided by a department or investigating state agency rule or federal law. *See id.* § 48.101(b)-(g) (permitting release of confidential information only in certain circumstances). In this instance, the requestor is an attorney for the alleged perpetrator. Subchapter M of chapter 705 of title 40 of the Texas Administrative

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

Code was adopted by the executive commissioner of the Texas Health and Human Services Commission (the "commissioner") to explain to whom and under what circumstances case records made confidential under section 48.101 may be released. 40 T.A.C. § 705.7101. Section 705.7107 of that subchapter provides, in relevant part, the following:

Upon request and to the extent required by state or federal law, [the department] must make case records or portions of case records available after appropriate redactions to the following persons:

...

- (3) An alleged or designated perpetrator of abuse, neglect, or exploitation of an APS client. The perpetrator is only entitled to those portions of the investigation records that relate to the alleged or designated perpetrator[.]

Id. § 705.7107(3). Consequently, pursuant to section 48.101(b) of the Human Resources Code in conjunction with section 705.7107(3) of title 40 of the Texas Administrative Code, the department must release all information in Exhibit D that pertains to the requestor's client. However, the information in Exhibit D that does not pertain to the requestor's client must be withheld under section 552.101 of the Government Code in conjunction with section 48.101(a) of the Human Resources Code.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental

body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Finally, the attorney-client privilege applies only to a confidential communication, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The department states the information in Exhibit B consists of communications involving department attorneys and other department employees. The department states the communications were made for the purpose of facilitating the rendition of professional legal services to the department and these communications have remained confidential. Upon review, we find the department has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the department may withhold the information in Exhibit B under section 552.107(1) of the Government Code.

In summary, the department must withhold the information in Exhibit C under section 552.101 of the Government Code in conjunction with section 576.005 of the Health and Safety Code. The department must release the information in Exhibit D that pertains to the requestor’s client pursuant to section 48.101(b) of the Human Resources Code in conjunction with section 705.7107(3) of title 40 of the Texas Administrative Code and withhold the information in Exhibit D that does not pertain to the requestor’s client under section 552.101 of the Government Code in conjunction with section 48.101(a) of the Human Resources Code. The department may withhold the information in Exhibit B under section 552.107(1) of the Government 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/bhf

Ref: ID# 526793

Enc. Submitted documents

c: Requestor
(w/o enclosures)