



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 31, 2015

Mr. James Kopp
Assistant City Attorney
Office of the City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2015-18180

Dear Mr. Kopp:

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# 575440 (COSA File No. W84192).

The City of San Antonio (the "city") received a request for all information related to the arrest of a named individual. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.¹ We have considered the exception you claim and reviewed 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 made confidential by other statutes, such as section 261.201 of the Family Code, which provides, in relevant part:

(a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent

¹We note the city failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting a decision from this office. *See* Gov't Code § 552.301(b). Nonetheless, section 552.101 of the Government Code is a mandatory exception that can provide a compelling reason to overcome the presumption of openness caused by failure to comply with section 552.301. *See id.* §§ 552.007, .302. Thus, we will address the applicability of this exception to the submitted information, notwithstanding the city's violation of section 552.301 in requesting this decision.

with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

...

(h) This section does not apply to an investigation of child abuse or neglect in a home or facility regulated under Chapter 42, Human Resources Code.

Fam. Code § 261.201(a), (h). You contend the submitted information is confidential under section 261.201(a). In this instance, however, the information at issue is related to an investigation of suspected child abuse or neglect that occurred in a home child care facility that is regulated by the Texas Department of Family and Protective Services (“DFPS”) under chapter 42 of the Human Resources Code. Section 261.201 does not apply to an investigation of alleged or suspected child abuse or neglect in a home or facility regulated under chapter 42. *Id.* § 261.201(h). Therefore, section 261.201(a) of the Family Code is not applicable to the information at issue, and the city may not withhold the submitted information under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 58.007 of the Family Code, which provides, in relevant part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Id. § 58.007(c). Section 58.007(c) is applicable to records of juvenile delinquent conduct or conduct indicating a need for supervision that occurred on or after September 1, 1997. *See id.* § 51.03(a)-(b) (defining “delinquent conduct” and “conduct indicating a need for supervision” for purposes of section 58.007). For purposes of section 58.007(c), “child” means a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See id.* § 51.02(2). Although you assert the submitted information is confidential under section 58.007, we find the information at issue does not involve a juvenile as a suspect or offender of delinquent conduct or conduct indicating a need for supervision for purposes of section 58.007. Accordingly, we find you have not demonstrated the applicability of section 58.007(c) of the Family Code to the information at issue. Consequently, the city may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code.

As previously noted, section 552.101 of the Government Code encompasses information that other statutes make confidential. Section 40.005 of the Human Resources Code authorizes DFPS to adopt rules for the purpose of preserving the confidentiality of information concerning child abuse and neglect and provides, in relevant part:

(a) [DFPS] shall establish and [DFPS] shall enforce rules governing the custody, use, and preservation of [DFPS’s] records, papers, files, and communications.

(b) [DFPS] shall prescribe safeguards to govern the use or disclosure of information relating to a recipient of a [DFPS] service or to an investigation [DFPS] conducts in performing its duties and responsibilities. The safeguards must be consistent with the purposes of [DFPS’s] programs and must comply with applicable state and federal law and [DFPS] rules.

Hum. Res. Code § 40.005(a), (b). In accordance with section 40.005, DFPS promulgated section 745.8485 of title 40 of the Texas Administrative Code to make child care facility license investigations confidential. Section 745.8485 provides, in relevant part:

(a) All investigations are confidential until [DFPS] complete[s] the investigation and make[s] a finding.

...

(c) Completed investigations of child abuse or neglect are confidential and not available to the general public, except as provided under this chapter and applicable federal or state law.

40 T.A.C. § 745.8485(a), (c). Section 745.8485 is applicable only to investigatory records used or developed by DFPS in an investigation conducted by DFPS. *See id.* § 745.8485; *see also* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision

controls scope of its protection). We note a portion of the submitted information consists of a DFPS Child-Care Licensing Investigation Report of alleged or suspected child abuse or neglect in a child care facility. *See* 40 T.A.C. §§ 745.8491(a)(5) (stating, subject to section 745.8493, law enforcement may obtain information from confidential portions of DFPS abuse or neglect investigation file), .8493(b) (DFPS may provide confidential information to law enforcement for purpose of investigating allegations of child abuse or neglect). Upon review, we find the report at issue is confidential under section 745.8485. Therefore, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 745.8485 of title 40 of the Texas Administrative Code.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides, in relevant 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 subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office has concluded 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). Upon review, we find the information we have marked constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA.

Some of the remaining information is protected under section 552.101 of the Government Code in conjunction with common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which 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, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. We find the identity of a victim of child abuse or neglect is private. *Cf.* Fam. Code § 261.201. Upon review, we find the identifying information of a child who is the subject of the reported alleged or suspected abuse or neglect satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold such information, which we have marked and indicated, under section 552.101 of the Government Code in conjunction with common-law privacy.

We note some of the remaining information may be subject to section 552.1175 of the Government Code, which protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential.² *See* Gov't Code § 552.1175. Section 552.1175 applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. *Id.* § 552.1175(a)(1). The remaining information contains personal information of a peace officer. Thus, the city must withhold the personal information, which we have indicated, under section 552.1175 of the Government Code, if it pertains to a licensed peace officer and the individual elects to restrict access to this information in accordance with section 552.1175(b). However, if the individual is not a licensed peace officer or does not elect to restrict access to this information in accordance with section 552.1175(b), then the city may not withhold this information under section 552.1175 of the Government Code.

In summary, the city must withhold under section 552.101 of the Government Code (1) the information we have marked in conjunction with section 745.8485 of title 40 of the Texas Administrative Code; (2) the information we have marked in conjunction with the MPA; and (3) the information we have marked and indicated in conjunction with common-law privacy. The city must withhold the personal information we have indicated under section 552.1175 of the Government Code, if it pertains to a licensed peace officer and the individual elects to restrict access to this information in accordance with section 552.1175(b) of the Government Code. The city must release the remaining information.³

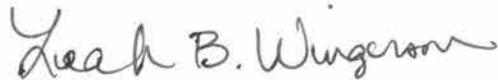
²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³We note the requestor has a right of access beyond that of the general public to some of the information being released that pertains to her client. *See* Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/bhf

Ref: ID# 575440

Enc. Submitted documents

c: Requestor
(w/o enclosures)

governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide her with information concerning herself).