



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 27, 2020

Mr. Jonathan Miles  
Open Records Attorney  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711-3247

OR2020-11923

Dear Mr. Miles:

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# 824290 (Ref. No. OR-20200214-21380).

The Texas Health and Human Services Commission (the "commission") received a request for information pertaining to investigations and interviews at a specified location during a certain time period. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.<sup>1</sup> 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 chapter 611 of the Health and Safety Code. Section 611.002 pertains 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.

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<sup>1</sup> We note, and you acknowledge, the commission did not comply with the requirements of section 552.301(e) of the Government Code in providing some of the information at issue. See Gov't Code § 552.301(e). Nonetheless, because section 552.101 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will consider its applicability to the submitted information. See *id.* §§ 552.007, .302, .352.

(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 id.* § 611.001 (defining “patient” and “professional”). 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. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See id.* §§ 611.004, .0045; *see also* Open Records Decision No. 565 (1990). Upon review, we find a portion of the submitted information, which we marked, consists of a mental health record that is subject to chapter 611 of the Health and Safety Code. Accordingly, the commission must withhold the marked mental health record under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.<sup>2</sup>

Section 552.101 of the Government Code also encompasses information made confidential by statute, such as the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. 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.

Occ. Code § 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). Upon review, we find some of the remaining information constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician or that was created or is maintained by someone under the supervision of a physician. Accordingly, the commission must withhold the

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

information you marked under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses section 40.005 of the Human Resources Code. Section 40.005 authorizes the Texas Department of Family and Protective Services (“the department”) to adopt rules for the purpose of preserving the confidentiality of information concerning child abuse and neglect, and provides, in relevant part:

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

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

Hum. Res. Code § 40.005(a)-(b). Rules governing the confidentiality of department investigation records are found at chapter 745 of title 40 of the Texas Administrative Code. Section 745.8493(a) states, in relevant part:

(a) [The department] may not release the following portions of Licensing records to anyone:

...

(2) Any information identifying the person who made a report that resulted in an investigation;

...

(7) The identity of any child or information identifying the child in an abuse or neglect investigation[.]

40 T.A.C. § 745.8493(a)(2), (7). Thus, section 745.8493(a) prohibits, in relevant part, the release of the identities of the reporting party and of children involved in the investigation. *Id.* § 745.8493(a)(2), (7). Section 745.8493(a)(7) lists parties who may obtain certain confidential information related to an investigation contained in the monitoring file of a licensed facility. *Id.* § 745.8493(a)(7). The commission informs us the requestor does not fall within any of the categories of individuals or entities who may obtain the confidential portions of the information. Upon review, we find the information you marked consists of the identifying information of children and their families that is protected by section 745.8493(a)(7) of title 40 of the Texas Administrative Code. Accordingly, the commission must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 745.8493(a)(7) of title 40 of the Texas Administrative Code.

The commission must also withhold the identities of the reporting parties, which you marked, under section 552.101 in conjunction with section 745.8493(a)(2) of title 40 of the Texas Administrative Code.

Section 745.8495(a) of title 40 of the Texas Administrative Code provides that the department “may provide a copy of a photograph or an audio or visual recording, depiction, or documentation of a child in Licensing records” to five categories of individuals. *Id.* § 745.8495(a). Additionally, section 745.8495(b) provides that the department may allow four categories of individuals to “review a photograph or an audio or visual recording, depiction, or documentation of a child in Licensing records,” but those individuals “may not have a copy.” *See id.* § 745.8495(b). The commission states the requestor is not one of the parties to whom the department may release the information at issue under section 745.8495. Accordingly, we find the commission must withhold the information you indicated under section 552.101 of the Government Code in conjunction with section 745.8495 of title 40 of the Texas Administrative Code.

Section 552.101 of the Government Code also encompasses the doctrine of 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 and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. However, upon review, we find the information you marked pertains to an individual who has been de-identified and whose privacy interest is, thus, protected. Thus, none of the remaining information may be withheld under section 552.101 on the basis of common-law privacy.

In summary, the commission must withhold the marked mental health record under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code. The commission must withhold the information you marked under section 552.101 of the Government Code in conjunction with the MPA. The commission must withhold the information you marked under section 552.101 of the Government Code in conjunction with sections 745.8493(a)(2) and 745.8493(a)(7) of title 40 of the Texas Administrative Code. The commission must withhold the information you indicated under section 552.101 of the Government Code in conjunction with section 745.8495 of title 40 of the Texas Administrative Code. The commission must release the remaining information.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open

Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Emily Kunst  
Assistant Attorney General  
Open Records Division

EK/eb

Ref: ID# 824290

Enc. Submitted documents

c: Requestor  
(w/o enclosures)