



December 29, 2000

Ms. Tina Plummer
Open Records Coordinator
Texas Department of Mental Health and Mental Retardation
P. O. Box 12668
Austin, Texas 78711-2668

OR2000-4880

Dear Ms. Plummer:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 142156.

The Texas Department of Mental Health and Mental Retardation (the "department") received two requests for complaints, reports, and other information pertaining to medical professionals employed by or providing services to the department. As revised by the requestor pursuant to a telephone conversation with the department, the first request seeks records relating to seventeen identified medical professionals, and the second request seeks information relating to medical professionals who were employed by or consulted with the department during the last three years. You have submitted representative samples of seventeen kinds of responsive records, including several groups of legal pleadings. You claim that the submitted records contain information that is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.116, and 552.117 of the Government Code. The department also submits responsive records that previously were the subject of Open Records Letter No. 2000-2544 (2000). We have considered the exceptions you claim and have reviewed the information you submitted.¹

¹This letter ruling assumes that the representative samples of requested information that you submitted are truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes the department to withhold any responsive information that is substantially different from the samples of information that you submitted. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Initially, we consider whether the submitted pleadings are subject to required public disclosure under section 552.022 of the Government Code. Section 552.022(a) provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). Thus, information that also is contained in a public court record must be released under section 552.022(a)(17), unless the information in question is "expressly confidential under other law." You point out that the responsive pleadings contain the names of clients of the department and clients' family members. We conclude that section 552.022(a)(17) requires the release of the submitted pleadings. *See Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992) (concluding that once sexual assault victim's identity had been included in court records, it could not be withdrawn retroactively from public domain). We have marked the pleadings that are subject to disclosure in accordance with section 552.022(a)(17).

The submitted records also appear to include information that is subject to required public disclosure under section 552.022(a)(1). Section 552.022(a)(1) requires the release of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]" Gov't Code § 552.022(a)(1). You do not raise section 552.108 of the Government Code. You claim that the information in question is excepted from disclosure under section 552.116. Section 552.116 excepts from disclosure "an audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education[.]" Gov't Code § 552.116(a). However, you do not specify any portions of the records in question that you claim are audit working papers under section 552.116(a). *See Gov't Code § 552.116(b)(2)*. Furthermore, section 552.116 is a discretionary exception to disclosure and not "other law," for the purposes of section 552.022(a), that makes information that is encompassed by section 552.022(a)(1) expressly confidential. Thus, the department may withhold information that constitutes an audit working paper under section 552.116. On the other hand, the department must release information that constitutes a completed report, audit, evaluation, or investigation. We have marked the records that may be subject to disclosure under section 552.022(a)(1). You must release information that constitutes a completed report, audit, evaluation, or investigation. In releasing such records, however, you must withhold any information that is expressly confidential under other law. We also have marked the types of information that are expressly confidential under other law.

Section 552.022(a) also requires the disclosure of the following kinds of information, unless they are expressly confidential under other law:

(10) a substantive rule of general applicability adopted or issued by an agency as authorized by law, and a statement of general policy or interpretation of general applicability formulated and adopted by an agency;

...

(13) a policy statement or interpretation that has been adopted or issued by an agency;

(14) administrative staff manuals and instructions to staff that affect a member of the public[.]

Gov't Code § 552.022(a)(10), (13), (14). We have marked the information that you must release under these provisions of section 552.022.

The submitted information also includes autopsy records, which are subject to disclosure under other law.² Section 11 of article 49.25 of the Code of Criminal Procedure provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. The full report and detailed findings of the autopsy, if any, shall be a part of the record. Copies of all records shall promptly be delivered to the proper district, county, or criminal district attorney in any case where further investigation is advisable. The records are subject to required public disclosure in accordance with Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

(1) under a subpoena or authority of other law; or

(2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

²As a general rule, statutes outside the Public Information Act that expressly make certain information public prevail over exceptions to required public disclosure under chapter 552 of the Government Code. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989).

Code Crim. Proc. art. 49.25, § 11. Responsive autopsy records are public and must be disclosed in accordance with section 11 of article 49.25 of the Code of Criminal Procedure.

You also inform us that the requested information includes medical records. The Medical Practice Act (the "MPA") is codified at subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the Occupations Code provides in relevant part:

(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 . . . 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(b), (c). The MPA also includes provisions that govern the disclosure of information that it encompasses. *See* Occ. Code §§ 159.003, .004, .005, .006. This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Public Information Act.³ Responsive records that are within the scope of section 159.002 of the Occupations Code may be released only if and as permitted by the Medical Practice Act. We have marked that information.

You claim that responsive Abuse and Neglect Reports are confidential under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code. Section 552.101 excepts from disclosure "information considered to be confidential by law," including information that is made confidential by a statute. Chapter 48 of the Human Resources Code governs investigations and protective services for elderly and disabled persons. Section 48.101 provides in relevant part:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

(1) a report of abuse, neglect, or exploitation made under this chapter;

(2) the identity of the person making the report; and

³*See* Open Records Decision No. 598 (1991). The Seventy-sixth Legislature repealed the predecessor statute, article 4495b of Vernon's Texas Civil Statutes, in enacting the Occupations Code. *See* Act of May 13, 1999, 76th Leg., R.S., ch. 388, §§ 6, 7, 1999 Tex. Gen. Laws 1431, 2439-40. The legislation was a non-substantive codification.

(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 [D]epartment [of Protective and Regulatory Services] or investigating state agency rule and applicable federal law.

Hum. Res. Code § 48.101(a), (b). We have marked information that we believe is governed by section 48.101 of the Human Resources Code. As it does not appear that the release of that information in question would be for a purpose that is consistent with chapter 48 of the Human Resources Code, that information is confidential and must be withheld from the requestor under section 552.101 of the Government Code.

The submitted records also include information that is encompassed by chapter 247 of the Health and Safety Code, the Assisted Living Facility Licensing Act. Pursuant to section 247.003(b) of the Health and Safety Code, subchapter D, chapter 242, of that code applies to an assisted living facility, and the Texas Department of Human Services is required to enforce subchapter D for such a facility. Section 242.127, part of subchapter D of chapter 242, provides as follows:

A report, record, or working paper used or developed in an investigation made under this subchapter and the name, address, and phone number of any person making a report under this subchapter are confidential and may be disclosed only for purposes consistent with the rules adopted by the board or the designated agency.

Health & Safety Code § 242.127. We have marked information that we believe constitutes reports, records, or working papers used or developed in an investigation under subchapter D of chapter 242 of the Health and Safety Code. We are not aware of any rule under which the department is authorized to release that information to the requestor. Therefore, you must withhold that information under section 242.127 of the Health and Safety Code.

The submitted records also contain information that is confidential under section 576.005 of the Health and Safety Code. Section 576.005, part of the Texas Mental Health Code, subtitle C of title 7 of the Health and Safety Code, provides that “[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 do not advise us that the submitted records are subject to disclosure under any other state law, nor are we aware of such a law. Accordingly, we have marked records that you must withhold under section 576.005 of the Health and Safety Code.

You also raise section 595.001 of the Health and Safety Code. Section 595.001, part of the Persons With Mental Retardation Act, subtitle D of title 7 of the Health and Safety Code, provides as follows:

Records of the identity, diagnosis, evaluation, or treatment of a person that are maintained in connection with the performance of a program or activity relating to mental retardation are confidential and may be disclosed only for the purposes and under the circumstances authorized under Sections 595.003 and 595.004.

Health & Safety Code § 595.001. We have marked records that you must withhold under section 595.001 of the Health and Safety Code.

You claim that other responsive records are confidential under section 160.007 of the Occupations Code and section 161.032 of the Health and Safety Code. Subchapter A of chapter 160 of the Occupations Code governs medical peer review. Section 160.007 provides in relevant part that, “[e]xcept as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.” Occ. Code § 160.007(a). For purposes of section 160.007, “medical peer review” is defined as “the evaluation of medical and health care services, including evaluation of the qualifications of professional health care practitioners and of patient care provided by those practitioners.” Occ. Code § 151.002(a)(7). “Medical peer review committee” means “a committee of a health care entity, the governing board of a health care entity, or the medical staff of a health care entity, that . . . is authorized to evaluate the quality of medical and health care services or the competence of physicians[.]” *Id.* § 151.002(a)(8).

Subchapter D of chapter 161 of the Health and Safety Code also addresses the confidentiality of records relating to medical committees and medical peer review committees. Section 161.031 provides that the term “medical committee” encompasses any committee of a hospital and “includes a committee appointed ad hoc to conduct a specific investigation or established under state or federal law or rule or under the bylaws or rules of the organization or institution.” *See* Health & Safety Code § 161.031(a), (b). Section 161.032 of the Health and Safety Code provides in relevant part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena Records, information, or reports provided by a medical committee or medical peer review committee and records, information, or reports provided by a medical committee or medical peer review committee to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under Chapter 552, Government Code.

Health & Safety Code § 161.032(a). Section 161.032 further provides, however, that section 161.032 and the statutory predecessor to section 160.007 of the Occupation Code “do not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility.” *Id.* § 161.032(c).⁴ See also *Memorial Hosp. -- The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996)

The information that you claim is confidential under these statutes pertains to Sentinel Event Reports, Root Cause Analyses, Clinical Death Reviews, Administrative Death Reviews, and Physician Peer Reviews. We conclude that portions of these records, which we have marked, are confidential and must be withheld under section 160.007 of the Occupations Code or section 161.032 of the Health and Safety Code.

You also contend that responsive records relating to dental peer review are confidential under chapter 261 of the Occupations Code, which governs dental peer review. Section 261.051 provides in relevant part:

(a) Except as otherwise provided by this chapter:

- (1) a dental peer review committee’s proceedings and records are confidential; and
- (2) communications made to a dental peer review committee are privileged.

Occ. Code § 261.051(a). We have marked records that we believe are encompassed by section 261.051. You do not advise us, and we are not aware, of any other provision of chapter 261 under which the records in question are subject to disclosure. Accordingly, those records must be withheld under section 261.051 of the Occupations Code.

You claim that other responsive records are confidential under section 552.101 of the Government Code in conjunction with provisions of the federal Health Care Quality Improvement Act of 1986 (the “HCQIA”), 42 U.S.C. § 11101 *et seq.* The federal law provides for the reporting of a variety of information pertaining to physicians and other licensed health care practitioners. See 42 U.S.C. §§ 11131-11133. Under section 1135 of title 42, a hospital is required to obtain reported information about physicians or other health care practitioners who apply for or hold clinical privileges at the hospital. Section 11137 provides in relevant part:

⁴Section 161.032(c) references the former section 5.06 of article 4495b of Vernon’s Texas Civil Statutes, from which section 160.007 of the Occupations Code was derived..

Information reported under this subchapter is considered confidential and shall not be disclosed (other than to the physician or practitioner involved) except with respect to professional review activity, as necessary to carry out subsections (b) and (c) of section 11135 of this title (as specified in regulations by the Secretary), or in accordance with regulations of the Secretary promulgated pursuant to subsection (a) of this section. Nothing in this subsection shall prevent the disclosure of such information by a party which is otherwise authorized, under applicable State law, to make such disclosure. Information reported under this subchapter that is in a form that does not permit the identification of any particular health care entity, physician, other health care practitioner, or patient shall not be considered confidential.

42 U.S.C. § 11137(b)(1). Section 11137(b)(2) prescribes a civil monetary penalty for a violation of section 11137(b)(1). You direct our attention to responsive information that you state was obtained from the National Practitioner Data Bank, which was established under the HCQIA. You do not advise us, and we are not aware, of any law, regulation, or exception to section 11137(b)(1) under which the information in question may be made available to the requestor. Accordingly, we have marked records that must be withheld from disclosure under section 11137 of title 42 of the United States Code.

The department also raises section 552.101 in conjunction with the common law right to privacy. Information must be withheld under section 552.101 in conjunction with common law privacy if (1) the information is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* (2) the public has no legitimate interest in it. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The matters considered to be intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include 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; *see also* Open Records Decision No. 659 at 5 (1999). We have marked the type of information that the department must withhold under section 552.101 in conjunction with common law privacy.

You also claim that responsive records relating to alleged sexual harassment are excepted from disclosure under section 552.101. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. – El Paso 1992, writ denied), the court applied the common law right to privacy addressed in *Industrial Foundation* to an investigation of allegations of sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *See* 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently

served the public's interest in the matter. *Id.* The court further held, however, that "the public does not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* Based on *Ellen*, this office has held that a governmental body must withhold both the identities of alleged victims of and witnesses to alleged sexual harassment and any information that would tend to identify such a victim or witness. Open Records Decision Nos. 393 (1983), 339 (1982).

In this instance, we have marked a document that we believe is analogous to the conclusions of the board of inquiry, the release of which was upheld in *Ellen*. You must release that document to the requestor. Please note, however, that before doing so, you must redact the identities of the alleged victim and of witnesses other than the person accused and any information that would tend to identify those individuals. That information, which we have marked, is are protected by the common law right of privacy and must not be released. The identity of the accused is not protected, however, as the common law right of privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about the employee's job performance. *See* Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978). With the exception of the document that we have marked, the records relating to the alleged sexual harassment must be withheld from the requestor under section 552.101.

A social security number also may be confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if the social security number information was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990.* *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that any social security number contained in the submitted records is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the department to obtain or maintain a social security number. Therefore, we have no basis for concluding that any social security number in the submitted information was obtained or is maintained pursuant to such a statute and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, 552.352. Therefore, prior to releasing any social security number, the department should ensure that the number was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

You also raise section 552.107 of the Government Code, which provides in relevant part that information is excepted from required public disclosure if

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under

the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct[.]

Gov't Code § 552.107(1). Although the scope of section 552.107(1) would appear to be co-extensive with that of rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, which prohibits an attorney from divulging "confidential information," this office has concluded that such an interpretation of rule 1.05 would be in potential conflict with the purposes of the Act. *See* Open Records Decision No. 574 at 4-5 (1990) (construing statutory predecessor to section 552.107(1)). Accordingly, this office has determined that section 552.107(1) protects only what rule 1.05 describes as "privileged" information, *i.e.*, information that represents confidential communications between attorney and client. *Id.* at 5. "Unprivileged" information, as defined by rule 1.05, is not excepted from disclosure under section 552.107(1). *Id.* Thus, section 552.107(1) excepts from disclosure only factual information or requests for legal advice communicated by the client to the attorney and legal advice or opinion rendered by the attorney to the client or to an associated attorney in the course of rendering legal services to the client. *Id.* at 7-8. We have marked an attorney-client communication that the department may withhold under section 552.107(1).

You also raise section 552.117 of the Government Code. Section 552.117 excepts from disclosure the home address, home telephone number, or social security number of a current or former employee of a governmental body, or information that reveals whether such a current or former employee has family members, if that employee previously elected not to allow public access to that information in accordance with section 552.024 of the Government Code. *See* Gov't Code §§ 552.024(a), .117(1); Open Records Decision Nos. 622 (1994), 530 (1989), 455 (1987). The determination of whether a particular item of information is protected by section 552.117(1) must be made at the time that the request for that information is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, if the current or former employee elected under section 552.024 for confidentiality of personal information prior to the date on which the request for information was made, then the personal information designated for withholding is excepted from disclosure under section 552.117(1).

The submitted records also contain motor vehicle record information, the disclosure of which is governed by section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from [required public disclosure] if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;

(2) a motor vehicle title or registration issued by an agency of this state; or

(3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130(a). Motor vehicle record information, including a Texas driver's license number, must be withheld in accordance with section 552.130.

Lastly, we address your assertion that a portion of the submitted information is the subject of Open Records Letter No. 2000-2544 (2000). You state that in requesting this decision, you are incorporating your request for the previous ruling because of the complexity of the situation that it involved. We therefore understand you to be raising the same exceptions to disclosure that you are asserted in requesting the previous decision, renewing your previous arguments, and representing to us that the surrounding facts and circumstances are the same. Based on that understanding and our review of the information in question, we conclude that the department must withhold or release that information in accordance with our previous decision.

In summary, portions of the submitted information are subject to required public disclosure under section 552.022 of the Government Code and section 11 of article 49.25 of the Code of Criminal Procedure. The Medical Practice Act governs the disclosure of responsive medical records. Other portions of the submitted records are confidential under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code, sections 161.032, 247.127, 576.005, and 595.001 of the Health and Safety Code, sections 160.007 and 261.051 of the Occupations Code, section 11137 of title 42 of the United States Code, and common law privacy. A privileged attorney-client communication is excepted from disclosure under section 552.107(1). Social security number, motor vehicle record, and other submitted information is or may be excepted from disclosure under sections 552.101 in conjunction with federal law, 552.117, and 552.130. The responsive records that are encompassed by Open Records Letter No. 2000-2544 (2000) must be withheld or released in accordance with that decision.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

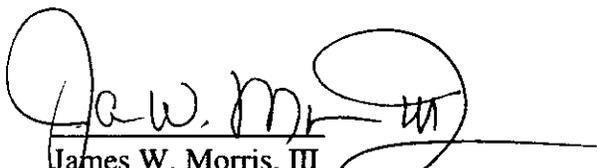
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,


James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/seg

Ref: ID# 142156

Encl. Submitted documents

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