



September 25, 2001

Mr. George D. Cato
Deputy General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2001-4295

Dear Mr. Cato:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152348.

The Texas Department of Health (the “department”) received a request for “the findings of the survey/audit conducted on” a general hospital licensed by the department. You note that the requestor is with the U.S. Department of Health and Human Services. You state that the department will release some of the requested information, including a Medicare statement of deficiencies that federal law requires the department to prepare. *See* 42 U.S.C. § 1306; 42 C.F.R. § 401.133. You claim that the remaining information must be withheld from the requestor under section 552.101 of the Government Code in conjunction with state law. We have considered the exception you raise and have reviewed the information you submitted.

You concede that the department did not comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) provides that “[t]he governmental body must ask for the attorney general’s decision and state the exceptions that apply . . . not later than the 10th business day after the date of receiving the written request [for information].” Section 552.302 provides that “[i]f a governmental body does not request an attorney general decision as provided by Section 552.301 . . . the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.”

You inform this office that the department received this request for information on June 22, 2001. You requested our decision by letter dated July 19, 2001. Thus, the department did not request our decision within 10 business days of the date of its receipt of this request

for information, as required by section 552.301(b). Therefore, the information in question is presumed to be public and must be released under section 552.302, unless there is a compelling reason why it should be withheld from disclosure. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 380-81 (Tex. App.--Austin 1990, no writ). The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or that third-party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982).*

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

Id. § 159.002(b), (c). The MPA also includes provisions that govern the disclosure of information that the MPA encompasses. *See id.* §§ 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 chapter 552 of the Government Code. *See Open Records Decision No. 598 (1991) (construing statutory predecessor).* We also have concluded that when a file is created as the result of a hospital stay, all of the documents in the file relating to diagnosis and treatment constitute physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See Open Records Decision No. 546 (1990).*

You assert that the MPA is applicable to portions of the submitted documents. You inform this office that the department received these documents under section 159.004(1) of the MPA, which permits the disclosure of confidential information to "a governmental agency, if the disclosure is required or authorized by law[.]" You also inform us that "[t]he marked requested documents are copies of actual records or information from medical records and/or consist of physician/patient communications[.]" Based on your representations and our review of the records in question, we have marked the documents and portions of documents that are governed by the MPA. The department may release this information only if the MPA permits the department to do so.

You claim that other responsive information is confidential under sections 81.046 and 81.103 of the Health and Safety Code. Chapter 81 of the Health and Safety Code codifies the Communicable Disease Prevention and Control Act. *See* Health and Safety Code § 81.001. Section 81.046 provides in relevant part:

(a) Reports, records, and information furnished to a health authority or the department that relate to cases or suspected cases of diseases or health conditions are confidential and may be used only for the purposes of this chapter.

(b) Reports, records, and information relating to cases or suspected cases of diseases or health conditions are not public information under Chapter 552, Government Code, and may not be released or made public on subpoena or otherwise except as provided by Subsections (c) and (d).

Id. § 81.046(a)-(b). In Open Records Decision No. 577 (1990), this office concluded that any information acquired or created during an investigation under chapter 81 of the Health and Safety Code is confidential and may not be released unless an exception set out in section 81.046 applies.

You represent to this office that parts of the submitted records “were either furnished to [the department] or were created/gathered by [the department] and relate to cases or suspected cases of diseases or health conditions.” You also state that section 81.046 does not require the department to release the information in question to this requestor. Based on your representations and our review of the information at issue, we agree that the information falls within the scope of section 81.046 of the Health and Safety Code and that none of the statute’s permissive release provisions appears to apply. *See id.* § 81.046(c). The department must withhold this information, which we have marked, under section 552.101 of the Government Code.

You assert that other responsive records are confidential under section 161.032 of the Health and Safety Code. Subchapter D of chapter 161 of the Health and Safety Code governs medical and medical peer review committees. Section 161.031 defines a “medical committee” as including “any committee, including a joint committee, of . . . a hospital” and further provides that “[t]he term 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.” Health & Safety Code § 161.031(a)(1), (b). Section 161.032 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 of a medical committee . . . and records, information, or reports provided by a medical committee . . . to the governing body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code.

...

(c) This section . . . do[es] not apply to records made or maintained in the regular course of business by a hospital[.]

Id. § 161.032(a), (c). You represent to this office that some of the submitted documents relate to the proceedings of a medical committee in a health care facility. You state that the documents in question are records of the committee's proceedings. Based on your representations and our review of the documents in question, we agree that they constitute records, information, or reports of a medical committee under subchapter D of the Health and Safety Code and are therefore confidential under section 161.032(a) of the Health and Safety Code. *See also Barnes v. Whittington*, 751 S.W.2d 493, 495-96 (Tex. 1988) (construing predecessor statute); Open Records Decision No. 591 at 2-3 (1991) (addressing Health & Safety Code §§ 161.031, .032). Thus, the department also must withhold these documents, which we have marked, under section 552.101 of the Government Code.

You also raise section 552.101 in conjunction with the common law right to privacy. Information must be withheld from disclosure under section 552.101 in conjunction with common law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The matters that the Texas Supreme Court deemed to be intimate or embarrassing in *Industrial Foundation* include sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimacy, psychiatric treatment, attempted suicide, and injuries to reproductive organs. *See* 540 S.W.2d at 683; *see also* Open Records Decision No. 659 at 5 (1999) (listing other types of information that attorney general has held to be protected by a right to privacy). We have marked the items of information that are protected by common law privacy. The department must also withhold this information under section 552.101.

In summary, some of the submitted information is governed by the Medical Practice Act. The department may release that information only if the MPA permits the department to do so. Other portions of the submitted information are confidential under section 552.101 of the Government Code in conjunction with sections 81.046 and 161.032 of the Health and Safety Code and under the common law right to privacy. The department must withhold this information. The remaining information must be released.

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).

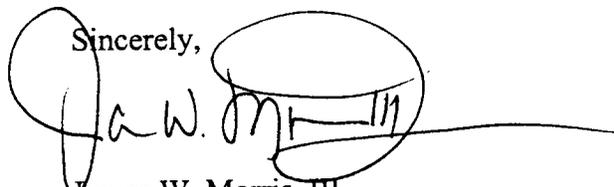
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,

A handwritten signature in black ink, appearing to read "J.W. Morris III", with a long horizontal line extending to the right.

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

JWM/sdk

Ref: ID# 152348

Enc: Marked documents

c: Ms. Linda S. Little
Regional Inspector General for Investigations
Department of Health and Human Services
1100 Commerce Street, Room 6B13
Dallas, Texas 75242
(w/o enclosures)