



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 14, 2003

Ms. Jennifer A. Soffer
Assistant General Counsel
Texas State Board of Medical Examiners
P.O. Box 2018
Austin, Texas 78768-2018

OR2003-5702

Dear Ms. Soffer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185975.

The Texas State Board of Medical Examiners (the "board") received a request for the licensure and application material of a named doctor. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

We begin by noting that some of the information you seek to withhold is the same type of information at issue in five pending lawsuits between the Office of the Attorney General and the, *Texas State Board of Medical Examiners v. Abbott*, Cause No. GN302004, in the 345th District Court of Travis County, Texas; *Texas State Board of Medical Examiners v. Abbott*, Cause No. GN302509, in the 353rd District Court of Travis County, Texas; *Texas State Board of Medical Examiners v. Abbott*, Cause No. GN302510 in the 53rd District Court of Travis County, Texas; *Texas State Board of Medical Examiners v. Abbott*, Cause No. GN302640, in the 98th District Court of Travis County, Texas; and *Texas State Board of Medical Examiners v. Abbott*, Cause No. GN302065, in the 250th District Court of Travis County, Texas. Furthermore, your arguments here are similar to your arguments in the litigation of the prior rulings. Accordingly, we are closing our files on this matter without a finding and will allow the trial court to resolve the issue of whether records of the type at issue must be released to public requestors.

However, we note that you have submitted information in the instant request for a ruling that is not the type of information that was at issue in the rulings that are the subject of the pending lawsuits. Therefore, we will rule on this information.

First, we note that some of the submitted information consists of mental health records and is governed by chapter 611 of the Health and Safety Code. Section 611.002 of the Health and Safety Code provides that “[c]ommunications 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.” A “professional” is defined as:

- (A) a person authorized to practice medicine in any state or nation;
- (B) a person licensed or certified by this state to diagnose, evaluate, or treat any mental or emotional condition or disorder; or
- (C) a person the patient reasonably believes is authorized, licensed, or certified as provided by this subsection.

We have marked mental health records that are confidential with respect to the general public and may only be disclosed as provided by sections 611.004 and 611.0045. Section 611.0045 states in pertinent part:

- (a) Except as otherwise provided by this section, a patient is entitled to have access to the content of a confidential record made about the patient.
- (b) The professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient’s physical, mental, or emotional health.
- (c) If the professional denies access to any portion of a record, the professional shall give the patient a signed and dated written statement that having access to the record would be harmful to the patient’s physical, mental, or emotional health and shall include a copy of the written statement in the patient’s records. The statement must specify the portion of the record to which access is denied, the reason for the denial, and the duration of the denial.

Health & Safety Code § 611.0045(a), (b), (c). In this instance, none of the circumstances provided in either section 611.004 or section 611.0045 appears to apply to the information. Therefore, the board must withhold the mental health records that we have marked under section 611.002 of the Health and Safety Code.

We next note, and you argue, that the submitted information contains medical records, access to which is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(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.

This office has concluded that the protection afforded by section 159.002 extends only to records either created by a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the medical records that appear in the submitted documents. These documents are confidential under the MPA and may be released only in accordance therewith.

In summary, this ruling does not address the documents that are the same type as those documents at issue in the board's pending lawsuits against the Office of the Attorney General. The board must withhold the mental health records and medical records that we have marked under section 611.002 of the Health and Safety Code and the MPA, respectively.

You request that this office issue a previous determination to categorically encompass the types that were requested here. You also request that the board be allowed to apply such previous determination retroactively. We decline to issue such a determination at this time. Accordingly, 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 Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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, -



Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 185975

Enc: Submitted documents

c: Mr. James Kirby Read
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(w/o enclosures)