



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

September 26, 2003

Ms. Sunny Y. Lin
Henslee Fowler Hepworth & Schwartz
3200 S.W. Freeway, Suite 2300
Houston, Texas 77027

OR2003-6805

Dear Ms. Lin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188394.

The Bryan Independent School District (the "district"), which you represent, received a request for "[a] copy of the proposal for service rates letter provided to [a named physician] on 04/14/2003 by . . . the representative of the College Station Medical Center and the attached BISD District employee's survey." You claim that the requested information is excepted from disclosure under sections 552.101 and 552.104 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The "principal purpose of this exception is to protect a governmental body's purchasing interests by preventing a competitor or bidder from gaining an unfair advantage over other competitors or bidders." *See* Open Records Decision Nos. 541 at 3 (1990), 592 (1991) (purpose of section 552.104 is to protect governmental body's interests in competitive bidding situations). Section 552.104 "makes sense when applied to information related to a competition for a government contract or benefit, such as a competitive bidding situation, where the government may wish to withhold information in order to obtain more favorable offers." Open Records Decision No. 592 at 5 (1991). Furthermore, section 552.104 is generally invoked to "protect the integrity of the competitive bidding process and to preserve the advantages it offers a governmental body." Open Records Decision No. 541 at 3 (1990).

Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Generally, section 552.104

does not except information relating to competitive bidding situations once the bidding process has ceased and a contract has been awarded. *See id.*; *see also* Open Records Decision Nos. 514 (1988), 319 (1982). However, in some situations section 552.104 will operate to protect from disclosure bid information that is submitted by successful bidders. *See id.* at 5 (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids).

In this instance, you state that “[a]lthough the bidding process has been completed and a new contract has been awarded in regard to the health plan for [the district], the new contract is not effective until January 1, 2004.” You argue that because the contract will not be “in effect” until January 1, 2004, the submitted information should be excepted under section 552.104. We have reviewed your arguments and find that you have not met your burden of demonstrating how section 552.104 is applicable in this instance. As stated above, the purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations. Once bidding has ceased and a contract has been awarded and executed, the applicability of section 552.104 has ended. You have not stated that you intend to accept any more bids on this matter; consequently, we fail to see how release of the submitted information would give an advantage to a competitor or bidder when the contract has already been awarded. Thus, we conclude you may not withhold the submitted information under section 552.104 of the Government Code.

You also assert that the submitted information is confidential under section 552.101 of the Government Code¹ in conjunction with the Medical Practice Act, (the “MPA”). Occ. Code §§ 159.001-165.160. Section 159.002 of the MPA provides:

- (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.

¹Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information another statute makes confidential.

Occ. Code § 159.002. Information that is subject to the MPA includes both medical records and information obtained from those medical records. See Occ. Code §§ 159.002, . 004; Open Records Decision No. 598 (1991).

You state that the submitted surveys reflect requests made by patients to their physicians for access to different facilities. You also state that the surveys “amount to ‘a communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient[.]’” However, we do not agree that the submitted surveys constitute the type of communication “between a physician and a patient, relative to or in connection with any professional services as a physician to the patient” as contemplated by the MPA. Occ. Code § 159.002(a). We do not agree that a request for access to different medical facilities demonstrates professional services “as a physician to the patient.” Furthermore, the submitted surveys contain neither details regarding the “identity, diagnosis, evaluation, or treatment of a patient” nor the results of treatment administered. Consequently, we find that the submitted documents do not constitute medical records and are not subject to the MPA. Cf. Open Records Decision Nos. 598 (1991), 546 (1990) (because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records).

Finally, you argue that the submitted surveys must be withheld under common-law privacy, which is also encompassed by section 552.101 of the Government Code. Common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included 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. 540 S.W.2d at 683. After reviewing the submitted information, we find that it does not contain highly intimate or embarrassing facts, and thus conclude this information is not protected by common-law privacy. As such, the submitted information must be released to the requestor in its entirety.

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).

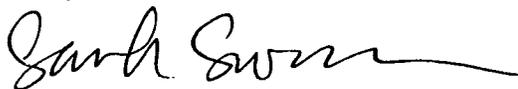
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/sdk

Ref: ID# 188394

Enc. Submitted documents

c: Brent Munyon
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(w/o enclosures)