



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

September 30, 2003

Mr. Donald Jansky
Assistant General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2003-6918

Dear Mr. Jansky:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187726.

The Texas Department of Health (the "Department") received two requests for information concerning Baylor University Medical Center's designation as a Level I trauma facility. You explain the Department will release some of the responsive material to the requestors; however, you assert that portions of the submitted information are excepted from disclosure under sections 552.101, 552.136, and 552.137 of the Government Code. We have reviewed the information you submitted and we have considered the exceptions you claim.

Initially, we must address the Department's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Further, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You state that the Department received the present requests for information on May 29, 2003 and June 18, 2003. However, the Department did not request a decision from this office until July 14, 2003, and did not submit its comments stating why the stated exceptions should apply or copies of the written request for

information until July 14, 2003. Moreover, the Department did not submit to this office a copy of, or a representative sample of, the specific information requested until July 17, 2003. *See* Gov't Code § 552.308(a). Consequently, the Department failed to comply with the requirements of both section 552.301(b) and section 552.301(e) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). A compelling interest exists where some other source of law makes the information confidential or affects the interest of a third party. Open Records Decision No. 630 at 3 (1994). You contend that the submitted information is protected under sections 552.101, 552.136, and 552.137 of the Government Code. As these sections can provide compelling reasons to overcome the presumption of openness, we will address your arguments under these exceptions. *See* Open Records Decision No. 150 (1976) (confidentiality provisions and exceptions designed to protect the interests of third parties can provide compelling reasons for overcoming presumption of openness).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by other statutes. You assert that most of the submitted information is confidential under the Medical Practice Act (the "MPA"). 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.

The MPA defines a "patient" as a person who consults with or is seen by a physician to receive medical care. Occ. Code § 159.001. Based on this definition, a deceased individual cannot be a "patient" under section 159.001 of the MPA. Section 159.002 protects only the medical records of people who were alive at the time the records were created. Following the death of a patient, medical records may be released only on the signed consent of the deceased's personal representative. Occ. Code §§ 159.005(a)(5). 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 records at issue contain information that was obtained from medical records and communications. Upon review of your arguments and the submitted information, we agree that some of the submitted information was obtained from medical records and therefore may be disclosed only in accordance with the MPA. *See* Occ. Code §§ 159.002, .004; 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). We have marked the information that may be released only in accordance with the MPA.

With regard to the remainder of the submitted information, we address your claim under section 773.091 of the Health and Safety Code. Section 773.091 provides in pertinent part:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

....

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

After reviewing the documents at issue, we find that they are not records of the identity, evaluation, or treatment of a patient created by the emergency medical services personnel or physician or maintained by an emergency medical services provider. As such, these documents do not fall within the ambit of section 773.091 and may not be withheld under section 552.101 of the Government Code in conjunction with that provision.

You also contend that portions of the remaining information are excepted under section 773.095 of the Health and Safety Code. Section 773.095 pertains to records of certain medical committees and provides:

(a) The proceedings and records of organized committees of hospitals, medical societies, emergency medical services providers, emergency medical services and trauma care systems, or first responder organizations relating to the review, evaluation, or improvement of an emergency medical services provider, a first responder organization, an emergency medical services and trauma care system, or emergency medical services personnel are confidential and not subject to disclosure by court subpoena or otherwise.

(b) The records and proceedings may be used by the committee and the committee members only in the exercise of proper committee functions.

(c) This section does not apply to records made or maintained in the regular course of business by an emergency medical services provider, a first responder organization, or emergency medical services personnel.

You inform us that a hospital's trauma Morbidity and Mortality (M&M) Committee is an organized committee that evaluates all aspects of trauma care and is approved by the hospital governing body. Some of the submitted information consists of records of a trauma M&M Committee. However, you have not demonstrated, nor do the submitted documents reveal, that the remainder of the information marked by the Department as confidential under section organized committee for the purposes of section 773.095. Consequently, we are unable to conclude from the information provided that all of the information marked by the Department as confidential under section 773.095 is indeed confidential under that section. However, we have marked the information that is confidential pursuant to section 773.095 of the Health and Safety Code and must therefore be withheld in accordance with section 552.101 of the Government Code.

You also claim exception under section 161.032 of the Health and Safety Code which provides in part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

....

(c) 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.

....

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

For purposes of this confidentiality provision, a "medical committee" includes any committee, including a joint committee, of . . . a hospital[or] a medical organization" Health & Safety Code § 161.031(a). Although you state that the previously mentioned trauma M&M Committee is hospital committee, you have not demonstrated, nor do the submitted documents reveal, that the information marked by the Department as confidential under section 161.032 consists of records, information, or reports of a hospital's trauma M&M Committee. Consequently, we are unable to conclude from the information provided

that the submitted documents contain any information that is confidential under section 161.032 of the Health and Safety Code.

You also assert that portions of the submitted documents are exempt from disclosure under section 552.101 of the Government Code in conjunction with section 1304(b) of title 8 of the United States Code. Section 1304(b) of the United States Code addresses the confidentiality of the registration of aliens under section 1301 of the United States Code and provides:

All registration and fingerprint records made under the provisions of this subchapter shall be confidential, and shall be made available only

(1) pursuant to section 1357(f)(2) of this title, and

(2) to such persons or agencies as may be designated by the Attorney General.

We have marked the information that consists of an alien registration number. This number is made confidential under title 8, section 1304(b) of the United States Code and must not be released by the Department.

You next assert that portions of the submitted documents are exempt from disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* You state that the social security numbers in the submitted records were “obtained/maintained pursuant to Tex. Health & Safety Code §§ 773.111 through 773.120, that were enacted in 1991” However, as those sections do not appear to contemplate the obtaining or maintaining of social security numbers, we are unable to determine whether the submitted social security numbers are confidential under this federal statute. We note, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information.

You state that the responsive information contains a bank account number on a copy of a check. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. The Department must, therefore, withhold the bank account number under section 552.136.

Lastly, you claim that the submitted documents contain information that is protected from disclosure under section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential. Section 552.137 provides:

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You inform us that the Department has not received affirmative consent from any member of the public to release any of the e-mail addresses contained in the submitted materials. The Department must, therefore, withhold the marked e-mail addresses of members of the public under section 552.137.

In summary, we have marked the information that may be released only in accordance with the MPA and the information that is confidential pursuant to section 773.095 of the Health and Safety Code and must therefore be withheld in accordance with section 552.101 of the Government Code. We have also marked the alien registration information that is confidential and must be withheld under section 552.101, as well as the e-mail addresses that must be withheld under section 552.137. Lastly, with the exception of the bank account number that must be withheld under section 552.136, 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 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,



Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/sdk

Ref: ID# 187726

Enc: Submitted documents

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