



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 29, 2003

Mr. Jeffrey S. Young
Associate General Counsel
Texas Tech University Health Sciences Center
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Lubbock, Texas 79430-6246

OR2003-7784

Dear Mr. Young:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190176.

The Texas Tech University Health Sciences Center ("TTUHSC") received a request for all communications and correspondence to or from any official or administrator of TTUHSC from June 1, 2001 to the date of the request, regarding a named TTUHSC faculty member. The requestor also seeks all documents and evaluations maintained in any personnel file kept by any officials of TTUHSC. You indicate that you interpret the second part of the request to be limited to the personnel information of the faculty member named in the first part of the request. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.117 of the Government Code. We assume that TTUHSC has released any remaining requested information to the extent that it exists. If not, it must do so at this time. *See Gov't Code* §§ 552.021, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under circumstances). We have considered the exceptions you claim and have reviewed the submitted information. We have also considered written comments submitted by the requestor. *See Gov't Code* § 552.304 (providing that member of public may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

You claim that some of the submitted documents contained in Exhibit E are not subject to release pursuant to regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), and that the information is therefore excepted from disclosure under section 552.101 of the Government Code in conjunction with these regulations. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164; *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. Pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

Section 160.103 defines a covered entity as a health plan, a health clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction covered by subchapter C, Subtitle A of Title 45. 45 C.F.R. § 160.103. You inform this office that the center is a covered entity under section 160.103, by virtue of being a health care provider that "transmits health information in electronic form in connection with a transaction covered by HIPAA." We understand that TTUHSC is a health care provider for purposes of section 160.103. Therefore, we will next determine whether the identified documents contain confidential protected health information under the federal law.

Section 160.103 of title 45 of the Code of Federal Regulations defines the following relevant terms:

Health information means any information, whether oral or recorded in any form or medium, that:

- (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual, and:

(1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and

(2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and

(i) That identifies the individual; or

(ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

Protected health information means individually identifiable health information:

(1) Except as provided in paragraph (2) of this definition, that is:

(i) Transmitted by electronic media;

(ii) Maintained in electronic media;

(iii) Transmitted or maintained in any other form or medium.

45 C.F.R. § 160.103. You assert that some of the submitted documents contains protected health information. Upon review of the information in question, we agree that it contains some protected health information under HIPAA. With regard to this information, however, we note that a covered entity may use protected health information to create information that is not individually identifiable health information, i.e., information that has been de-identified. *See id.* § 164.502(d)(1). The privacy standards that govern the uses and disclosures of protected health information under HIPAA do not apply to information that has been de-identified in accordance with sections 164.514(a) and (b) of the Code of Federal Regulations. *See id.* § 164.502(d)(2).¹

Under HIPAA, a covered entity may determine that health information is not individually identifiable only under certain circumstances. One method requires a person with specialized knowledge of generally accepted statistical and scientific principles and methods for rendering information de-identifiable to apply and document such methods and principles to determine that release of protected health information would result in a very small risk of

¹ We note that a covered entity must comply with the requirements of subpart E of part 164 of title 45 of the Code of Federal Regulations with respect to the protected health information of a deceased individual. *See* 45 C.F.R. § 164.502(f).

individual identification. *See id.* § 164.514(b)(1). The other method requires the covered entity to meet the following two criteria: (1) remove specific identifiers, including but not limited to names, dates directly related to an individual, telecommunication numbers, vehicle identifiers, and any other unique identifying number, characteristic, or code, and (2) have no actual knowledge that the information could be used alone or in combination with other information to identify an individual who is a subject of the information. *See id.* § 164.514(b)(2)(i), (ii). We have marked the types of specific identifiers contained in the submitted protected health information. *See id.* § 164.514(b)(2)(i)(A)-(R). To the extent that TTUHSC has no actual knowledge that the de-identified information could be used alone or in combination with other information to identify the subject of the health information, TTUHSC must withhold the types of information that we have marked under section 552.101 of the Government Code in conjunction with HIPAA. However, if TTUHSC has actual knowledge that the de-identified information could be used alone or in combination with other information to identify the subject of the health information, then it must withhold the marked documents in Exhibit E in their entirety under section 552.101 of the Government Code in conjunction with HIPAA.

You also contend that Exhibit E as a whole is confidential under section 552.101 in conjunction with Texas statutory law. Because HIPAA may not require TTUHSC to withhold all of the submitted information, we also must consider the applicability of the state statutory provisions that you have raised. We note that HIPAA generally preempts a contrary provision of state law. *See* 45 C.F.R. § 160.203. For purposes of HIPAA, “contrary” means the following:

- (1) A covered entity would find it impossible to comply with both the State and federal requirements; or
- (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act or section 264 of Pub. L. 104-191, as applicable.

Id. § 160.202. You contend that the confidentiality provision found in section 160.007 of the Occupations Code is applicable to the documents that we have de-identified under HIPAA. We find that it is not impossible for TTUHSC to comply with both HIPAA and section 160.007. We likewise find that section 160.007 does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA. We will therefore consider the applicability of section 160.007 to the remaining information at issue.

You advise that the documents at issue are records of a medical peer review committee. Medical peer review is defined by the Medical Practice Act (the “MPA”), found at subtitle B of title 3 of the Occupations Code, to mean “the evaluation of medical and health care services, including evaluation of the qualifications of professional health care practitioners and of patient care rendered by those practitioners.” Occ. Code § 151.002(a)(7). A medical

peer review committee is “a committee of a health care entity . . . or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services[.] . . .” *Id.* § 151.002(a)(8). Section 160.007 of the MPA states 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.

After reviewing the submitted documents and your brief to this office, we agree that the information at issue here is protected by medical peer review committee confidentiality. *See St. Luke’s Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997); *Memorial Hosp.—the Woodlands v. McCown*, 927 S.W.2d 1, 5 (Tex. 1996) (finding that review by medical staff committee of application for staff privileges qualifies as medical peer review because it necessarily involves review of physician’s qualifications, competence, and ethics). Therefore, Exhibit E must be withheld under section 552.101 of the Government Code in conjunction with section 160.007 of the Occupations Code except to the extent the information is made confidential under HIPAA.²

We now turn to your claim under section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client

² Because we resolve this aspect of your request under section 160.007, we need not address your other argument for withholding this information.

privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You advise that Exhibit F consists of confidential communications that were transmitted between privileged parties, or that reveal confidential communications between privileged parties, and that these communications were made in furtherance of the rendition of professional legal services to the client. Upon review of your arguments and the information at issue, we agree that Exhibit F is protected by the attorney-client privilege, and thus, may be withheld under section 552.107.

Finally, the documents submitted as Exhibit G contain information that may be confidential under section 552.117. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 (a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Thus, if a current or former employee whose personal information is at issue elected under section 552.024, prior to the governmental body’s receipt of the request, to keep this information confidential, it must ordinarily be withheld under section 552.117(a)(1) of the Government Code. However, in this instance, the requestor has stated that he is representing the individual whose personal information is at issue. Section 552.023 states that a person or a person’s authorized representative has a special right of access to information that relates to the person and that is protected from disclosure by laws intended to protect the person’s privacy interest. Gov’t Code § 552.023. Therefore, if the requestor is the authorized representative of the individual who is the subject of the request, TTUHSC must release the individual’s section 552.117 information to the requestor. Otherwise, TTUHSC must withhold the individual’s section 552.117 information pursuant to that exception if the individual made a timely request under section 552.024.

In summary, we conclude that Exhibit E must be withheld under section 552.101 of the Government Code in conjunction with section 160.007 of the Occupations Code except to

the extent the information is made confidential under HIPAA. TTUHSC may withhold Exhibit F under section 552.107 of the Government Code. If the requestor is the authorized representative of the individual who is the subject of the request, TTUHSC must release the individual's section 552.117 information to the requestor, and otherwise must withhold this information under section 552.117 if this exception is applicable. The remaining responsive 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,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/lmt

Ref: ID# 190176

Enc. Submitted documents

c: Mr. Robert H. Jackson, Ph.D.
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(w/o enclosures)