



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 17, 2003

Mr. Gordon R. Hikel  
Brown & Hofmeister, L.L.P.  
1717 Main Street, Suite 4300  
Dallas, Texas 75201

OR2003-8250

Dear Mr. Hikel:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191078.

The City of McKinney (the "city") received a request for the name, age, and city of residence of an individual who died in a specified incident. 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.<sup>1</sup>

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You claim that the submitted information is 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).

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<sup>1</sup>Although you have submitted twenty-six pages of information, you state that only pages 4, 25, and 26 contain the requested information. Thus, we will only address the applicability of the Public Information Act (the "Act") to these pages. The remaining submitted information is not responsive to the request for information, and we will not address the applicability of the Act to it.

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 assert that the McKinney Fire Department (the "department") is a covered entity for purposes of section 160.103.<sup>2</sup> The department explains that its Emergency Medical Services is a health care provider. HIPAA defines health care as care, services, or supplies related to the health of an individual, and a health care provider as, among other things, a provider of medical or health services and an organization who furnishes, bills, or is paid for health care in the normal course of business. *See* 45 C.F.R. § 160.103. We understand you to assert that the department's Emergency Medical Services furnishes "health care" as defined in section 160.103 in the normal course of business. You further state that the department "processes medical calls and then completes a Patient Care Report," and that this report "contains all the patient's personal health information." You also explain that this information is placed into a computer system by a third party billing service that "submits that information, in electronic format via either an extranet or through private networks, to the appropriate private or government insurer for processing or payment." Section 160.103 defines a transaction as the transmission of information between two parties to carry out financial or administrative activities related to health care, including health care payment or equivalent encounter information. Upon review of your arguments, we agree that the department is a covered entity for purposes of section 160.103 because it is a health care provider that transmits health information in electronic form and conducts "covered transactions." Therefore, we will next determine whether the responsive information is confidential as protected health information under the federal law.

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

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.

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<sup>2</sup>Pursuant to section 552.303(c) of the Government Code, on October 24, 2003 this office sent a notice to the city via facsimile requesting that it provide further information regarding the applicability of HIPAA. The city submitted its response on October 31, 2003.

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 contend that the responsive information constitutes individually identifiable protected health information. Upon review of the information, we agree that it is protected health information as contemplated by HIPAA. However, we note that a covered entity may use protected health information to create information that is not individually identifiable health information, i.e., de-identified. 45 C.F.R. § 164.502(d)(1). The privacy standards that govern the uses and disclosures of protected health information do not apply to information de-identified in accordance with sections 164.514(a) and (b) of the Code of Federal Regulations. 45 C.F.R. § 164.502(d)(2).

Under HIPAA, a covered entity may determine 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 release of protected health information would result in a very small risk of individual identification. 45 C.F.R. § 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, geographic subdivisions smaller

than a state, 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* 45 C.F.R. § 164.514(b)(2)(i), (ii). We have marked the specific identifiers in the responsive protected health information. *See* 45 C.F.R. § 164.514(b)(2)(i)(A)-(R). To the extent that the city has no actual knowledge that release of the de-identified information could be used alone or in combination with other information to identify the subject of the health information, you must withhold the information we have marked under section 552.101 of the Government Code in conjunction with HIPAA, and release the remaining de-identified information, subject to the section 773.091 of the Health and Safety Code discussion. However, if the city has actual knowledge that release of the de-identified information could be used alone or in combination with other information to identify the subject of the health information, you must withhold the protected health information in its entirety under section 552.101 of the Government Code in conjunction with HIPAA.

Next, we note the applicability of section 773.091 of the Health and Safety Code to the de-identified health information. Generally, HIPAA 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.

45 C.F.R. § 160.202. It is not impossible for the city to comply with both section 773.091 and HIPAA. Furthermore, section 773.091 is not an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA. In fact, one of the purposes of section 773.091 is to protect patient privacy. Therefore, HIPAA does not preempt section 773.091.

You assert that the remaining responsive information consists of Emergency Medical Service (“EMS”) patient records that are protected from disclosure under section 773.091 of the Health and Safety Code. This section provides:

- (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.

Health & Safety § 773.091. This confidentiality “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.” *Id.* § 773.091(g).

We agree that the remaining responsive information consists of EMS records that constitute records of the identity, evaluation, or treatment of a patient by emergency medical services personnel and are made confidential under section 773.091. None of the exceptions to confidentiality listed in section 773.092 appear to apply in this instance. Accordingly, EMS records must be withheld under section 552.101 of the Government Code. However, information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of the patient receiving emergency medical services is not confidential under section 773.091 and may not be withheld on that basis. Although the patient’s city of residence is not confidential under section 773.091 of the Health and Safety Code, HIPAA does require this identifier to be withheld. In this instance, however, the responsive information does not contain the patient’s city of residence.

In summary, we conclude that to the extent that the city has no knowledge that release of the de-identified information could be used alone or in combination with other information to identify the subject of the health information, you must withhold the information we have marked under section 552.101 of the Government Code in conjunction with HIPAA, and release the remaining de-identified information, subject to section 773.091 of the Health and Safety Code. However, if the city has knowledge that release of the de-identified information could be used alone or in combination with other information to identify the subject of the health information, you must withhold the protected health information in its entirety under section 552.101 of the Government Code in conjunction with HIPAA. With the exception of the information described in section 773.091(g), we conclude that the remaining de-identified information consists of EMS records that are confidential under section 773.091 of the Health and Safety Code.

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,



W. Montgomery Meitler  
Assistant Attorney General  
Open Records Division

WMM/lmt

Ref: ID# 191078

Enc: Submitted documents

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