



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 1, 2004

Re: TDA-PIR-04-0387, TDA-PIR-04-0390

Mr. Martin A. Hubert
Deputy Commissioner
Texas Department of Agriculture
P. O. Box 12847
Austin, Texas 78711

OR2004-5367

Dear Mr. Hubert:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 204338.

The Texas Department of Agriculture (the "department") received two requests for information pertaining to a particular incident. You inform us that you will release some information to the requestor but claim that other requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted records indicate that the department did not maintain the document in Exhibit F at the time it received these requests. Therefore, this document is not encompassed by these requests, and we do not address it in this ruling either. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

We turn now to your arguments for the remaining submitted information. You contend that some of the requested information constitutes medical records, access to which is governed by the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

(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.

Occ. Code § 159.002(a)-(c). This office has concluded that the protection afforded by section 159.002 extends to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). In addition, because hospital treatment is routinely conducted under the supervision of physicians, documents relating to diagnosis and treatment during a hospital stay also constitute protected medical records. *See* Open Decision Nos. 598 (1991), 546 (1990). Further, information that is subject to the MPA also includes information that was obtained from medical records. *See* Occ. Code § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991).

Medical records must be released upon the governmental body's receipt of the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). We have reviewed the submitted records and marked those portions that are subject to the MPA. Absent the applicability of an MPA access provision, the department must withhold this information pursuant to the MPA.

You also contend that a social security number contained in Exhibit E is confidential. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information that another statute makes confidential. Section 231.302 of the Family Code provides in part:

(c) To assist in the administration of laws relating to child support enforcement under Parts A and D of Title IV of the federal Social Security Act (42 U.S.C. Sections 601-617 and 651-669):

(1) each licensing authority shall request and each applicant for a license shall provide the applicant's social security number[.]

.....

(e) Except as provided by Subsection (d), a social security number provided under this section is confidential and may be disclosed only for the purposes of responding to a request for information from an agency operating under the provisions of Part A or D of Title IV of the federal Social Security Act (42 U.S.C. Sections 601 et seq. and 651 et seq).

.....

(g) In this section, "licensing authority" has the meaning assigned by Section 232.001.

Fam. Code § 231.302(c)(1), (e), (g). You inform us that the department is a licensing authority under section 232.001 of the Family Code. *See* Fam. Code § 232.001(2) (defining "licensing authority" as department of state that issues license). You do not inform us, nor do the submitted records indicate, that release of the submitted social security number in this instance would be for a permitted purpose under section 231.302(e) of the Family Code. *See id.* § 231.302(e). Based on your representations, we agree that the department must withhold the social security number that you have marked under section 552.101 of the Government Code in conjunction with section 231.302(e) of the Family Code.

Section 552.101 also encompasses the common law right of privacy, which 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types 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. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339

(1982). We have reviewed the submitted records and marked the information that must be withheld under section 552.101 on the basis of common law privacy.

In addition, you assert that a portion of the submitted information is excepted from disclosure under section 552.107 of the Government Code, which 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 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). Having considered your representations and reviewed the information at issue, we find that you have established that Exhibit B constitutes a privileged attorney-client communication and may be withheld pursuant to section 552.107.

In summary, the marked medical record information may only be released in accordance with the MPA. The department must withhold the marked social security number under section 552.101 of the Government Code in conjunction with section 231.302 of the Family Code. We have marked information that must be withheld under section 552.101 in conjunction with common law privacy. Exhibit B may be withheld under section 552.107. The remaining responsive submitted 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).

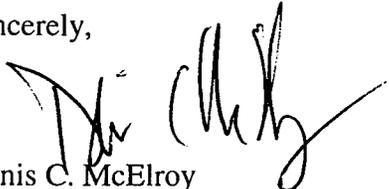
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/krl

Ref: ID# 204338

Enc. Submitted documents

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