



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 30, 2004

Ms. Lorna R. Jones  
Assistant County Attorney  
Harris County  
2525 Holly Hall, Suite 190  
Houston, Texas 77054

OR2004-6434

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 206236.

The Harris County Hospital District (the "district") received a request for information pertaining to two specified research projects at the Thomas Street Clinic. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code.<sup>1</sup> You also provide documentation showing that you notified Baylor College of Medicine ("Baylor") of the request and of its right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). We note

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<sup>1</sup> We note that you raise section 552.305 of the Government Code as an exception to disclosure. Section 552.305 states in relevant part that "[i]n a case in which information is requested under this chapter and a person's privacy or property interests may be involved . . . a governmental body may decline to release the information *for the purpose of requesting an attorney general decision.*" Gov't Code § 552.305 (emphasis added). Thus, section 552.305 is not an exception to disclosure under the Public Information Act (the "Act"). Rather, section 552.305 is a procedural provision permitting a governmental body to withhold information that may be private while the governmental body is seeking an attorney general's decision under the Act.

that Baylor has submitted arguments to this office. We have reviewed all of the submitted information.<sup>2</sup>

Initially, we address the scope of the present request. We note that a portion of the submitted information was created after the district received the present request. The Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). Therefore, this decision does not address the public availability of this information, which we have marked, and it need not be released. We also note that Baylor seeks to withhold information that the district has not submitted to this office for review. This ruling does not address information that has not been submitted for our review by the district. *See Gov't Code* § 552.301(e)(1)(D) (governmental body seeking attorney general's opinion under Act must submit copy or representative samples of specific information requested).

First, we note that the submitted information includes a medical record, access to which is governed by the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

(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. 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). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See Open Records Decision* Nos. 487 (1987), 370

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<sup>2</sup> We assume that the "representative samples" of records submitted to this office are truly representative of the requested records as a whole. *See Open Records Decision* Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office. To the extent that additional types of responsive information existed on date the district received the present request, we assume that you have released them to the requestor. If you have not released any such information, you must do so at this time. *See Gov't Code* §§ 552.301(a), .302; *see also Open Records Decision* No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

(1983), 343 (1982). We have further found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990).

The medical records must be released upon 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. 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. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We find that a portion of the submitted information is subject to the MPA and, therefore, may be released only in accordance therewith. We have marked the information that is subject to the MPA.

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 protected by other statutes. We understand you to assert that Exhibits A and A-1 are confidential under section 81.103 of the Health and Safety Code, which provides in relevant part:

A test result is confidential. A person that possesses or has knowledge of a test result may not release or disclose the test result or allow the test result to become known except as provided by this section.

Health & Safety Code § 81.103(a). “Test results” are defined as:

any statement that indicates that an identifiable individual has or has not been tested for AIDS or HIV, or infection, antibodies to HIV, or infection with any other probable causative agent of AIDS, including a statement or assertion that the individual is positive, negative, at risk, or has or does not have a certain level of antigen or antibody.

Health & Safety Code § 81.101(5). You inform this office that the Thomas Street Clinic (the “clinic”) is an HIV outpatient clinic. Upon review, we agree that Exhibits A and A-1 contain confidential test results. Because the requestor is aware of the HIV status of the patients participating in the research projects at issue in the present request, we find that the information in Exhibits A and A-1 that identifies clinic patients is confidential under section 81.103(a) of the Health and Safety Code. Therefore, the district must withhold this information under section 552.101.

You claim that the remaining portions of Exhibits A and A-1 are confidential under section 241.152 of the Health and Safety Code, which states in relevant part:

(a) Except as authorized by Section 241.153, a hospital or an agent or employee of a hospital may not disclose health care information *about a patient* to any person other than the patient or the patient's legally authorized representative without the written authorization of the patient or the patient's legally authorized representative.

Health & safety Code § 241.152(a) (emphasis added). Section 241.151(2) of the Health and Safety Code defines "health care information" as "information recorded in any form or medium that *identifies* a patient and relates to the history, diagnosis, treatment, or prognosis of a patient." Health & Safety Code § 241.151(2) (emphasis added). However, we have determined that patients' identifying information must be redacted under section 552.101 in conjunction with section 81.103 of the Health and Safety Code. The redacted records do not identify any particular patient; therefore, we find that section 241.152 is inapplicable to the remaining information, and it may not be withheld on that basis.

You also claim that the remaining portions of Exhibits A and A-1 are protected under the doctrine of common-law privacy.<sup>3</sup> Common-law privacy protects information that (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 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. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are protected by common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, specific illnesses, procedures, and physical disabilities). In this instance, however, references to the patients' identities must be redacted under section 81.103 of the Health and Safety Code. Thus, the release of the remaining information in Exhibits A and A-1 would not implicate the privacy rights of any identifiable individual. Therefore, none of this information may be withheld under section 552.101 in conjunction with common-law privacy. As you claim no other exceptions for this information, it must be released.

You assert that Exhibits B-1, B-2, and B-3 are confidential under section 161.032 of the Health and Safety Code. Section 161.032 provides in pertinent part:

(c) Records, information, or reports of a . . . compliance officer and records, information, or reports provided by a . . . compliance officer to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under Chapter 552, Government Code.

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<sup>3</sup>Section 552.101 also encompasses the doctrine of common-law privacy.

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

Health & Safety Code § 161.032(c), (f). You indicate that portions of the submitted information constitute records of the district's compliance officer, as well as information provided by Baylor's compliance officer. Based on our review of the submitted documents, we conclude that the information at issue consists of records, information, or reports of or provided by a compliance officer acting under subchapter D of chapter 161 of the Health and Safety Code. *Cf. Texarkana Mem'l Hosp., Inc. v. Jones*, 551 S.W.2d 33, 35 (Tex. 1977) (defining records made or maintained in regular course of business). Accordingly, the district must withhold Exhibits B-1, B-2, and B-3 under section 552.101 in conjunction with section 161.032 of the Health and Safety Code.<sup>4</sup>

In summary, the district must withhold the marked medical records pursuant to the MPA. The district must withhold the portions of Exhibits A and A-1 that identify clinic patients under section 552.101 in conjunction with section 81.103 of the Health and Safety Code. The district must withhold Exhibits B-1, B-2, and B-3 under section 552.101 in conjunction with section 161.032 of the Health and Safety Code. The remaining submitted information must be released to the requestor.

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

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<sup>4</sup>As we are able to make this determination, we do not address your remaining argument.

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,



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Open Records Division

ADP/sdk

Ref: ID# 206236

Enc. Submitted documents

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