



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 30, 2005

Ms. Cynthia Villarreal-Reyna
Section Chief, Agency Counsel
Legal and Compliance Division - MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2005-07937

Dear Ms. Villarreal-Reyna:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 231205.

The Texas Department of Insurance (the "department") received a request for twelve specific complaint records. You inform us that some of the requested information is being withheld from disclosure in accordance with a previous determination issued to the department in Open Records Letter No. 2001-4777 (2001) (identifying information regarding enrollees in health plans). *See* Open Records Decision No. 673 at 7-9 (2001) (delineating elements of second type of previous determination under Gov't Code § 552.301(a)). You claim that some of the remaining requested information is excepted from disclosure under sections 552.101, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

¹We assume that the "representative sample" of records submitted to this office is 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. In addition, we note that a portion of the submitted information is illegible. As this office cannot review illegible information, we are unable to determine whether any information contained in the illegible documents must be withheld from disclosure. *See* Gov't Code § 552.301(e)(1)(D). Therefore, we are returning those documents unmarked. To the extent, however, that the department maintains legible copies of such documents, the legible contents of any such documents must be released or withheld in conformity with our rulings and markings under sections 552.101, 552.136, 552.137, and 552.147.

Initially, we address your representation that some of the submitted information is subject to a previous determination. Open Records Letter No. 2001-4777 (2001) authorized the department to withhold, under section 552.101 of the Government Code in conjunction with common-law privacy, information that identifies an enrollee in a health plan, including the enrollee's name, address, telephone number, birth date, social security number, and claim number. However, we note that some of the information that you seek to withhold is not encompassed by the prior ruling and may not be withheld on that basis. Other than information we have marked, we agree that the department must withhold the information it has marked in accordance with Open Records Letter No. 2001-4777.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. The Medical Practice Act (the "MPA"), section 159.002 of the Occupations Code, provides in part as follows:

(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(b), (c). 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 (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).

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. *Id.* §§ 159.004, 159.005. 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 agree that some of the information you have marked constitutes medical records that may only be released in accordance with the MPA. Open Records Decision No. 598 (1991). We note however that portions of the information you have marked are not medical records and therefore may not be withheld on this basis. We have marked this information accordingly.

Section 552.101 also encompasses the doctrine of common law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person; and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

This office has determined that some personal financial information is highly intimate or embarrassing and thus meets the first part of the *Industrial Foundation* test. Open Records Decision Nos. 600 (1992) (personal financial choices concerning insurance are generally confidential), 545 (1990) (common law privacy protects personal financial information not relating to the financial transaction between an individual and a governmental body), 523 (1989) (common law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (common law privacy protects assets and income source information). You claim that information relating to a complaint involving life insurance is protected by common law privacy. Generally, we find that the decision to obtain life insurance is a private, financial decision that is excepted from disclosure under common law privacy pursuant to section 552.101 of the Government Code. In this instance, however, the insured party is deceased, and thus the insured party's right to privacy has lapsed. *See Moore v. Charles B. Pierce Film Enterprises, Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); Open Records Decision No. 272 at 1 (1981). However, the beneficiary of the insurance policy has a separate right to privacy. Therefore, the information that would reveal the beneficiary's identity is protected by common law privacy. We have marked that information, which the department must withhold under section 552.101.

You also assert that some of the remaining information is excepted under section 552.136 of the Government Code. Section 552.136 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. Section 552.136 also protects privacy interests. Therefore, unless the insurance policy number information pertaining to the deceased individual relates to an insurance policy in which a living person has an interest, it is not excepted from disclosure under section 552.136. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 (1981). We agree the remaining insurance policy numbers must be withheld under section 552.136. We note however that some of the information you

have marked may not be withheld on this basis. We have marked such information accordingly.

You also argue that the submitted information contains e-mail addresses that are excepted under section 552.137 of the Government Code. This section excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). To the extent the department has not received consent to release the submitted e-mail addresses, it must withhold these e-mail addresses pursuant to section 552.137 of the Government Code.

We note that the submitted information contains social security numbers. Section 552.147 of the Government Code² provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Therefore, the department must withhold the social security numbers we have marked in the submitted information under section 552.147.³

In summary, the department may rely on our previous determination issued to the department in Open Records Letter No. 2001-4777 with respect to information addressed in that ruling. The marked medical records may only be released in accordance with the MPA. You must withhold the marked account numbers under section 552.136 of the Government Code. To the extent a living person has an interest in the insurance policy of the deceased individual, this number must also be withheld under section 552.136. To the extent the department has not received consent to release the e-mail addresses you have marked, they must be withheld under section 552.137 of the Government Code. The social security numbers we have marked must be withheld under section 552.147 of the Government Code. The remaining 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

²Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, § 1, sec. 552.147(a) (to be codified at Tex. Gov’t Code § 552.147).

³We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/seg

Ref: ID# 213205

Enc. Submitted documents

c: Ms. Diane McGhee
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(w/o enclosures)