



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 8, 2007

Mr. Chris Kadas
General Counsel
Texas Department of Licensing and Regulation
P.O. Box 12157
Austin, Texas 78711

OR2007-07226

Dear Mr. Kadas:

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# 280574.

The Texas Department of Licensing and Regulation (the "department") received a request for all files involving a named deceased individual, all files involving the investigation of a named individual, and complete records concerning any rule, standard, or practice concerning accepting Mexican or non-U.S. medical exams for fighters in Texas. You state that you have released a portion of the requested information. You claim that the submitted 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.

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. Access to medical records is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

- (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 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). 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. *See* Occ. Code §§ 159.004, .005. After the death of a patient, medical records may be released only on the signed written consent of the deceased's personal representative. *See id.* § 159.005(a)(5). Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). Upon review, we agree that Exhibits 2 and 4 consist of medical records that are subject to the MPA. We also agree that some of the documents in Exhibit 5, which we have marked, are medical records that are subject to the MPA. Absent the applicability of an MPA access provision, the department must withhold these records pursuant to the MPA.¹ *See* Open Records Decision No. 598 (1991). However, we find that the remaining documents are not medical records that are subject to the MPA.² For these documents, we will address your remaining arguments against disclosure.

You also claim that Exhibit 5 consists of medical laboratory test results that are subject to section 552.101 in conjunction with section 81.103 of the Health and Safety Code. Section 81.103(a) makes certain test result information confidential and provides:

¹As our ruling under the MPA is dispositive for these records, we need not address your additional arguments under section 81.103 of the Health and Safety Code for this information.

²We note that in your brief dated April 5, 2007, you inform our office that "records found to be fraudulent and thus not confidential are those of [a named individual]." You further state that "the fraudulent medical records submitted by [a named individual] have been released to the [r]equestor, excluding the laboratory test results which are included in Exhibit 5." Based on your statements, we find that the test results related to the named individual are not medical records subject to the MPA.

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 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). A test result may be released to the person tested or a person legally authorized to consent to the test on the person’s behalf. *See id.* § 81.103(b)(6). Furthermore, a person tested or a person legally authorized to consent to the test on the person’s behalf may authorize the release or disclosure of the test result. *See id.* § 81.103(d). Such authorization must be in writing and signed by the person tested or the person legally authorized to consent to the test on the person’s behalf. The authorization must state the person or class of persons to whom the test results may be released or disclosed. *See id.* § 81.103(d). Upon review, we have marked the test results that are confidential under section 81.103 of the Health and Safety Code and may only be released in accordance with section 81.103. We find that you have failed to demonstrate how the remaining documents constitute test results for the purposes of section 81.103. Therefore, we conclude that none of the remaining information can be withheld under this section.

We note, however, that a portion of the remaining information in Exhibit 5 must be withheld under section 552.101 in conjunction with the doctrine of common-law privacy. Common-law privacy 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: 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); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339

(1982). Accordingly, the department must withhold the information that we have marked in Exhibit 5 under section 552.101 in conjunction with common-law privacy.

In summary, absent the applicability of an MPA access provision, the department must withhold Exhibits 2 and 4 in their entirety, and the information we have marked in Exhibit 5, pursuant to section 552.101 in conjunction with the MPA. The department must withhold the information we have marked in Exhibit 5 under section 552.101 in conjunction with common-law privacy, and the marked test results in Exhibit 5 may only be released in accordance with section 81.103 of the Health and Safety 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 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); *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 Office of the Attorney General 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. 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,



Jordan Johnson
Assistant Attorney General
Open Records Division

JJ/jb

Ref: ID# 280574

Enc. Submitted documents

c: Mr. Duff Wilson
Staff Reporter
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(w/o enclosures)