



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 18, 2008

Mr. Allan S. Graves
Adams, Lynch & Loftin, P.C.
3950 Highway 360
Grapevine, Texas 76051-6741

OR2008-11260

Dear Mr. Graves:

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# 317799.

The Tarrant County Hospital District d/b/a JPS Health Network (the "district"), which you represent, received two requests from separate requestors for all records pertaining to a specified human resources investigation regarding the requestors. You indicate you have provided some of the requested information to the requestors. You claim the submitted e-mails, notes, and letter are excepted from disclosure under section 552.101 of the Government Code and the attorney-client privilege. We have considered your claims and reviewed the submitted information.¹ We have also received and considered comments submitted by the requestors. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we note, and you acknowledge in correspondence to this office dated August 11, 2008, that the district did not request a ruling within the statutory time period prescribed by section 552.301(b) of the Government Code. When a governmental body fails to comply with the requirements of section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). To overcome this presumption, the governmental body must show a compelling reason to withhold the information. *See* Gov't Code § 552.302; *Hancock*, 797 S.W.2d at 381. Normally, a compelling reason is demonstrated when some other source of

¹ Although you have labeled the submitted information as Exhibits C through G, we note that the exhibits contain duplicate information. Accordingly, we will not rule on the submitted information as individual exhibits, but will instead rule on the submitted information as a whole.

law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977).

You claim some of the submitted information is protected by the attorney-client privilege. A portion of this information is part of a completed investigation. The portion of this information that is not part of the completed investigation is properly addressed under section 552.107 of the Government Code, which protects information coming within the attorney-client privilege. Gov't Code § 552.107. Section 552.107 is discretionary in nature. It serves only to protect a governmental body's interests and may be waived; as such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. *See* Open Records Decision Nos. 676 at 12 (2002) (attorney-client privilege under section 552.107 constitutes compelling reason to withhold information under section 552.302 only if information's release would harm third party), 663 at 5 (1999) (governmental body may waive section 552.107); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general).

The information that is part of the completed investigation is subject to section 552.022 of the Government Code. Information pertaining to a completed investigation must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Gov't Code § 552.022(a)(1). The Texas Supreme Court has held that the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, your attorney-client privilege claim for this information may be considered under rule 503. Like section 107, rule 503 is discretionary in nature. It serves only to protect a governmental body's interests and may be waived. *See* ORD No. 676 at 11. However, you argue your claim under rule 503 is compelling for purposes of section 552.302 because it is being raised in conjunction with section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 does not encompass the discovery privileges found in the Texas Rules of Evidence because these rules are not constitutional law, statutory law, or judicial decisions. Open Records Decision No. 676 at 1-2 (2002). As previously stated, rule 503 is discretionary and may be waived. Accordingly, rule 503 does not constitute a compelling reason to withhold information for purposes of section 552.302. *Id.* at 12 (2002) (attorney-client privilege under rule 503 constitutes compelling reason to withhold information under section 552.302 only if information's release would harm third party). Therefore, the district may not withhold any of the submitted information pursuant to the attorney-client privilege. However, your claims under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code, the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8, and the doctrine of common-law privacy can provide compelling reasons to withhold information; therefore, we will consider the applicability of these claims to the submitted information.

You claim the submitted notes and letter, as well as a portion of the e-mails, are confidential under section 161.032 of the Health and Safety Code. Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential, such as section 161.032, which provides in part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

...

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

Health & Safety Code § 161.032(a), (c). For purposes of this confidentiality provision, a "medical committee" includes any committee, including a joint committee, of . . . a hospital [or] a medical organization." *Id.* § 161.031(a). The term "medical committee" also includes "a committee . . . of one or more of the entities listed in Subsection (a)." *Id.* § 161.031(c). Section 161.0315 provides in relevant part that "[t]he governing body of a hospital [or] medical organization . . . may form . . . a medical committee, as defined by section 161.031, to evaluate medical and health care services." *Id.* § 161.0315(a).

The precise scope of the "medical committee" provision has been the subject of a number of judicial decisions. *Memorial Hosp. v. The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996); *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988); *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1986). These cases establish that "documents generated by the committee in order to conduct open and thorough review" are confidential. This protection extends "to documents that have been prepared by or at the direction of the committee for committee purposes." *Jordan*, 701 S.W.2d at 647-48; *see also* Open Records Decision No. 591 (1991) (construing, among other things, statutory predecessor to section 161.032).

You state the notes, letter, and e-mails at issue were prepared by the district as part of its internal investigation regarding alleged abuse of a psychiatric patient and possible misconduct by psychiatric unit staff. Although you state that the submitted information was eventually forwarded to the Patient Quality Care Unit of the Department of State Health Services, which regulates and licenses hospitals, we find you have failed to demonstrate these internal district notes and communications were prepared by or at the direction of a medical committee. *See Jordan*, 701 S.W.2d at 648 (holding that the medical committee provision's protection does not extend to documents "gratuitously submitted to a committee" or "created without committee impetus and purpose"). Accordingly, no part of the notes,

letter, and e-mails at issue is confidential under section 161.032 of the Health and Safety Code, and may not be withheld under section 552.101 of the Government Code on this basis.

You also raise section 552.101 in conjunction with HIPAA for a portion of the submitted notes and e-mails. 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 ("Privacy Rule"); *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, except as provided by parts 160 and 164 of the Code of Federal Regulations. *See id.* § 164.502(a). This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* ORD 681 at 8; *see also* Gov't Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, the district may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. 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. *Id.* at 683. However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest, and, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public

employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under common-law right of privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). You claim the submitted notes and e-mails at issue are protected in their entirety by common-law privacy. The notes and e-mails pertain to alleged misconduct of district employees in relation to a psychiatric patient. Although information pertaining to employee misconduct may be embarrassing, such information is of legitimate public interest. Thus, the notes and e-mails at issue may not be withheld in their entirety under section 552.101 of the Government Code in conjunction with common-law privacy. We note, however, the notes and e-mails at issue contain the name of psychiatric patients and an employee's medical condition. The fact that the patients were treated for psychiatric disorders and the employee's medical condition are highly intimate or embarrassing and not of legitimate public concern in this instance. Accordingly, in order to protect the patients' and employee's privacy, the district must withhold the psychiatric patients' names and employee's medical condition we have marked under section 552.101 in conjunction with common-law privacy. However, the remaining information may not be withheld under section 552.101 in conjunction with common-law privacy.

We note that some of the remaining e-mails contain information that may be protected under section 552.117(a)(1) of the Government Code.² Section 552.117(a)(1) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Additionally, section 552.117 also encompasses personal cellular telephone numbers, provided that the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117(a)(1) exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The remaining e-mails contain cellular telephone numbers, pager numbers, and other personal information of district employees. Some of these cellular telephone and pager numbers belong to the requestors. Section 552.117 protects personal privacy. Because the requestors have a right of access to their own private information under section 552.023 of the Government Code, you may not withhold the requestors' respective information from them under section 552.117(a). *See* Gov't Code

² The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

§ 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on grounds that information is considered confidential by privacy principles). However, to the extent the remaining marked cellular telephone and pager numbers belong to district employees who paid for the service and made timely elections under section 552.024, the numbers must be withheld under section 552.117(a)(1). To the extent the numbers pertain to service paid for by the district or belong to district employees who did not make timely elections under section 552.024, the marked cellular telephone and pager numbers may not be withheld under section 552.117(a)(1). The remaining e-mails also contain personal information of a district employee. If this district employee has timely elected to withhold her information under section 552.024, the information we have marked must be withheld under section 552.117(a)(1). If that employee did not make a timely election, the marked information may not be withheld under section 552.117(a)(1).

In summary, the district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. With the exception of the information that belongs to the requestors, to the extent the cellular telephone and pager numbers we have marked belong to district employees who paid for the service and who made timely elections under section 552.024, the numbers must be withheld under section 552.117(a)(1) of the Government Code. If the personal information we have marked belongs to a district employee who timely elected under section 552.024, the district must withhold the marked information under section 552.117(a)(1) of the Government Code. The remaining 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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,

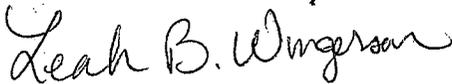
toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/ma

Ref: ID# 317799

Enc. Submitted documents

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