



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 7, 2008

Mr. James Downes
Assistant County Attorney
Harris County Attorney's Office
2525 Holly Hall, Suite 190
Houston, Texas 77054

OR2008-15409

Dear Mr. Downes:

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# 327418.

The Harris County Hospital District (the "district") received a request for information pertaining to a specified district employee and district policies and procedures. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.136, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.²

¹Although, you raised sections 552.103, 552.107, 552.111, 552.114, 552.116, 552.125, 552.130, 552.132, 552.1325, 552.138, and 552.139 of the Government Code as exceptions to disclosure of the requested information, you have provided no arguments regarding the applicability of these sections. Since you have not submitted arguments concerning these exceptions, we assume that you no longer urge them. *See* Gov't Code §§ 552.301(b), (e), .302

²We 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.

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. Section 552.101 encompasses confidentiality provisions such as section 161.032 of the Health and Safety Code, which provides in relevant 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.

...

(e) The records, information, and reports received or maintained by a compliance officer retain the protection provided by this section only if the records, information, or reports are received, created, or maintained in the exercise of a proper function of the compliance officer as provided by the Officer of Inspector General of the United States Department of Health and Human Services.

...

(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), (e), (f). You state that pages 00202 through 00729 are part of an internal compliance investigation into "allegations of misuse of public assets for personal purposes." You inform us that this investigation was performed in accordance with the district's compliance program which was developed pursuant to the guidelines issued by the Office of Inspector General of the United States Department of Health and Human Services. You further state that these documents are not made or maintained in the regular course of business. 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). Based on your representations and our review of the representative documents, we conclude that pages 00202 through 00729 consists of records, information, or reports of a compliance officer acting under subchapter D of chapter 161 of the Health and Safety Code. Accordingly, the district must withhold pages 00202 through 00729 under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.

Next, we address your assertion that the remaining information is excepted from disclosure in its entirety under section 552.102 of the Government Code, which excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd

n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. *See Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82.

The information you seek to withhold pertains solely to a public employee's qualifications, job performance, and work conduct. This office has stated, in numerous decisions, that 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. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). Thus, the department may not withhold any portion of the remaining information under section 552.102.

Next, you argue that pages 00048 and 00049 are subject to the Privacy Rule adopted by the United States Department of Health and Human Services, Office for Civil Rights, to implement the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). 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* HIPAA, 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. 45 C.F.R. § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. *See* Open Records Decision No. 681 (2004). In that decision, 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. *Id.*; *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* ORD 681 at 9; *Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.) (disclosures under the Act fall within section 164.512(a)(1) of the Privacy Rule); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, 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.

You also raise part 482 of title 42 of the Code of Federal Regulations, which pertains to Medicare and Medicaid patients’ rights, for pages 00048 and 00049. *See* 42 C.F.R. § 482.1(b) (purpose of part 482 is to determine whether a hospital qualifies for a provider agreement under Medicare and Medicaid). Section 552.101 also encompasses section 482.13 of title 42, and states in relevant part:

(d) Standard: Confidentiality of patient records.

(1) The patient has the right to the confidentiality of his or her clinical records.

42 C.F.R. § 482.13(d)(1). In this instance, the pages you seek to withhold under this provision consist of sign-in sheets to a community health education class provided by the district. You do not explain, nor can we discern, how pages 00048 and 00049 constitute the clinical records of a Medicare or Medicaid patient. Thus, we find you have failed to establish the applicability of section 482.13(d)(1) of title 42 to pages 00048 and 00049.

You also argue that pages 00048 and 00049 are subject to the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 552.101 of the Government Code also encompasses section 159.002 of the of the MPA, which 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.

Id. § 159.002(a), (b), (c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded 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). Upon review, we find you have failed to demonstrate how pages 00048 and 00049 constitute records of the identity, diagnosis, evaluation, or treatment of a patient by a physician for the purposes of the MPA. Accordingly, pages 00048 and 00049 may not be withheld under section 552.101 of the Government Code in conjunction with the MPA.

You also raise section 241.152 of the Health and Safety Code for pages 00048 and 00049. Section 552.101 also encompasses 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). 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." *Id.* § 241.151(2). In this instance, you do not explain how pages 00048 and 00049 relate to the history, diagnosis, treatment, or prognosis of a patient. Thus, we find you have failed to establish that pages 00048 and 00049 are confidential under section 241.152 of the Health and Safety Code.

You also contend that pages 00048 and 00049 are confidential under the doctrines of common-law privacy and constitutional privacy. Section 552.101 also encompasses common-law privacy and constitutional privacy. As we set forth in our discussion of section 552.102 of the Government Code, common-law privacy protects information if the information (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.*, 540 S.W.2d at 685. 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. This office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently; and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected under constitutional privacy is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)).

You claim that pages 00048 and 00049 are excepted from disclosure under section 552.101 in conjunction with common-law and constitutional privacy. Upon review of pages 00048 and 00049, we find that a portion of the information, which we have marked, constitutes highly intimate or embarrassing information that is of no legitimate concern to the public. Accordingly, the district must withhold the information we have marked in pages 00048 and 00049 under section 552.101 of the Government Code in conjunction with common-law privacy.

However, we find that none the remaining information in pages 00048 and 00049 constitutes highly intimate or embarrassing information that is of no legitimate concern to the public. Therefore, none of the remaining information may be withheld based on common-law privacy. Furthermore, we conclude you have not shown that the remaining information in pages 00048 and 00049 comes within one of the constitutional zones of privacy or involves the most intimate aspects of human affairs. *See* Open Records Decision Nos. 470, 455, 444, 423 at 2. Therefore, the remaining information in pages 00048 and 00049 may not be withheld under section 552.101 on the basis of constitutional privacy. As you raise no other exceptions against the disclosure of the remaining information in pages 00048 and 00049, it must be released.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). We note that section 552.117 does not encompass an employee's e-mail address or a date of birth. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of

the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. You state, and provide documentation showing that the employees whose information you have marked elected to keep their information confidential prior to the date the district received the instant request. Accordingly, with the exception of the information we have marked for release, we find that the district must withhold the information that you have marked in pages 00047, 00144, 00151, and 00155 under section 552.117(a)(1).³

We next address your assertion that the marked district employee identification numbers ("EINs") are excepted from disclosure under section 552.136 of the Government Code. Section 552.136 provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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. You assert that the EINs may be used, "with the necessary software to access both patient financial information and patient health information in the [d]istrict electronic records." Based on your representations and our review, we agree that the district must withhold the EINs you have marked under section 552.136 of the Government Code.

Finally, we note that page 00151 contains the personal e-mail address of a district employee. Section 552.137 of the Government Code states that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental

³As our ruling on the submitted social security number is dispositive, we need not address your argument under section 552.147 of the Government Code for that information.

body is confidential and not subject to disclosure under this chapter," unless the owner of the e-mail address has affirmatively consented to its public disclosure.⁴ *Id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). We have marked the personal e-mail address on page 00151 that the district must withhold under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its disclosure.

In summary, the district must withhold pages 00202 through 00729 under section 552.101 of the Government Code in conjunction with section 161.032(c) of the Health and Safety Code. The district must also withhold the information we have marked in pages 00048 and 00049 under section 552.101 of the Government Code in conjunction with common-law privacy. With the exception of the information we have marked for release, the district must withhold the information you have marked under section 552.117(a)(1) of the Government Code. The district must withhold the EINs you have marked under section 552.136 of the Government Code. The district must also withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consented to its release. 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

⁴The Office of the Attorney General will raise a mandatory exception like section 552.137 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Laura E. Ream
Assistant Attorney General
Open Records Division

LER/jb

Ref: ID# 327418

Enc. Submitted documents

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