



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 24, 2010

Mr. Benjamin V. Lugg  
Attorney  
San Antonio Housing Authority  
P.O. Box 1300  
San Antonio, Texas 78295-1300

OR2010-07512

Dear Mr. Lugg:

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# 380402.

The San Antonio Housing Authority (the "authority") received a request for all documentation pertaining to a named individual and her address. You state some requested information will be provided to the requestor. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.<sup>1</sup> We have considered the exception you claim and reviewed the submitted information.

Initially, we note you have redacted portions of the submitted information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. Gov't Code § 552.301(a), (e)(1)(D). We note you have redacted a social security number. 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. *See id.* § 552.147. However, you do not assert, nor does our review of our records indicate, the authority has been otherwise authorized to withhold the claim number you redacted without seeking a ruling from this office. *See id.* § 552.301(a). In this instance, we can discern the nature of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. However, in the future, the

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<sup>1</sup>In your brief dated March 23, 2010, you state the authority has withdrawn its remaining assertions under the Act.

authority must not redact requested information that it submits to this office in seeking an open records ruling, unless the information is the subject of a previous determination under section 552.301. *See id.* §§ 552.301(e)(1)(D), .302. Failure to comply with section 552.301 may result in the information being presumed public under section 552.302 of the Government Code. *See id.* § 552.302.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses the Americans with Disabilities Act (the "ADA"), which provides for the confidentiality of certain medical records of employees and employment applicants. 42 U.S.C. § 12112(d)(3), (4). Specifically, the ADA provides that information about the medical conditions and medical histories of applicants for employment or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. *Id.*; 29 C.F.R. § 1630.14(b)(1), (c)(1), (d)(1). This confidentiality provision is found in Subchapter I, entitled "Employment." The Equal Employment Opportunity Commission ("EEOC") determined medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997).

You cite to the above EEOC letter to the National Labor Relations Board as the basis for your contention the submitted information is excepted under the ADA. The EEOC letter addressed the confidentiality requirement of Title I of the ADA, the predecessor to Subchapter I. *Id.* Subchapter I of the ADA prohibits "covered entities" from discriminating "against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a); *see also* 29 C.F.R. § 1630.4. A "covered entity" is defined as an employer, an employment agency, a labor organization, or a joint-labor management committee. 42 U.S.C. § 12111(2); 29 C.F.R. § 1630.2(b). Thus, the EEOC letter discusses a covered entity's obligation to keep medical information obtained in an employment context under Title I of the ADA confidential. In this instance, the authority is not a covered entity and did not obtain the submitted information as part of an employment matter. Rather, the authority obtained the submitted information as part of a request for reasonable accommodation in one of its housing units. Thus, the confidentiality provision of Subchapter I of the ADA is not applicable to the submitted information. *See Ballard v. Healthsouth Corp.*, 147 F.Supp.2d 529 (N.D. Tex. 2001) (information not confidential under ADA when not obtained by an employer as a result of job related medical examination); *Wiggins v. DaVita Tidewater, L.L.C.*, 451 F.Supp.2d 789 (E.D. Va. 2006) (information not confidential as medical information under ADA if not obtained as part of employee health program or from medical

examinations conducted at employer's direction). Consequently, we find the authority failed to demonstrate how the ADA is applicable to the submitted information and the authority may not withhold any of the submitted information under section 552.101 of the Government Code on such basis.

You also raise section 552.101 of the Government Code in conjunction with the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8. 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 section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent 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 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 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 authority 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 claim the submitted documents contain information protected under the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code. Section 552.101 of the Government Code also encompasses the MPA, which governs release of medical records. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in 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.

*Id.* § 159.002(b)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* 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). Medical records must be released upon the patient's signed, written consent, provided 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. 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). Upon review, we agree a portion of the submitted information constitutes medical records subject to the MPA. Accordingly, unless the authority receives written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA, the authority must withhold the medical records we have marked pursuant to section 552.101 in conjunction with the MPA. However, we find you have failed to demonstrate how any portion of the remaining information constitutes a physician-patient communication or a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician. Consequently, the authority may not withhold any of the remaining information under section 552.101 in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses the common-law right of privacy, which 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. In Open Records Decision No. 373 (1983), this office addressed the availability of personal financial information submitted to a city by an applicant for a housing rehabilitation grant. In that decision, this office concluded:

all financial information relating to an individual – including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history – ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

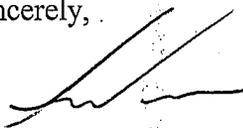
*Id.* at 3. Furthermore, as this office stated in Open Records Decision No. 373, although any record maintained by a governmental body is arguably of legitimate public interest, if the only relation of an individual to a governmental body is as an applicant for a housing rehabilitation grant, the individual's personal financial information is not of legitimate public concern. *Id.* at 3-4. Additionally, this office has determined certain kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review of the remaining information, we find the personal financial and medical information we have marked is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the authority must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

In summary, unless the authority receives written consent in accordance with the MPA for release of the marked medical records, the authority must withhold the marked medical records pursuant to section 552.101 of the Government Code in conjunction with the MPA. The authority must withhold the personal financial and medical information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/eeg

Ref: ID# 380402

Enc. Submitted documents

c: Requestor  
(w/o enclosures)