



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 22, 2010

Ms. Neera Chatterjee  
Public Information Coordinator  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2010-11009

Dear Ms. Chatterjee:

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# 385858 (OGC #130033).

The University of Texas Medical Branch at Galveston (the "university") received a request for twenty eight categories of information, including information pertaining to a named deceased inmate, the facility he was housed in, named university employees, and specified university policies and guidelines. You state you do not maintain information responsive to five categories of the requested information.<sup>1</sup> You inform this office the university will redact the home addresses, telephone numbers, social security numbers, and family member information of certain current and former university employees, and provide notice to the requestor pursuant to section 552.024(c-2).<sup>2</sup> You also inform this office the university will redact any remaining social security numbers under section 552.147 of the Government

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<sup>1</sup>We note that the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>Section 552.024(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the home address, home telephone number, social security number, and family member information of a current or former employee who properly elected to keep this information confidential. Gov't Code § 552.024(c).

Code.<sup>3</sup> Additionally, you state you will redact certain information pursuant to Open Records Decision No. 684 (2009).<sup>4</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. You state you have notified the Texas Department of Criminal Justice and the Texas Board of Nursing (the "board") of the request and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from the board contending portions of the submitted information are excepted from disclosure under sections 552.101, 552.117, 552.130, 552.136, and 552.137 of the Government Code.. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>5</sup>

Initially, we note the requestor has excluded from her request personal financial and medical information pertaining to the university employees at issue in the present request. Therefore, any such information in the submitted information is not responsive to the instant request. The university need not release non-responsive information in response to the request, and this ruling will not address that information.

Next, we note the submitted information includes university employee performance evaluations subject to section 552.022(a)(1) of the Government Code.

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<sup>3</sup>Section 552.147(b) of the Government Code authorizes a government 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. Gov't Code § 552.147(b).

<sup>4</sup>This office recently issued Open Records Decision No. 684, a previous determination to all governmental bodies, which authorizes the withholding of ten categories of information, including: a direct deposit authorization form under section 552.101 of the Government Code in conjunction with the common-law right to privacy; a Form I-9 under section 552.101 in conjunction with section 1324a of title 8 of the United States Code; a W-4 form under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code; a Texas driver's license number and copy of a Texas driver's license under section 552.130 of the Government Code; and a bank account number and bank routing number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>5</sup>We 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 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]” unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). Although the university seeks to withhold the information subject to section 552.022(a)(1) under section 552.103 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the university may not withhold the performance evaluations, which we have marked, under section 552.103 of the Government Code. We note both the university and the board raise section 552.101 of the Government Code as an exception to disclosure of the completed evaluations. Because section 552.101 of the Government Code is “other law” that makes information confidential for purposes of section 552.022, we will consider the applicability of the university’s and board’s arguments under this exception for the completed evaluations.

We first address the arguments to withhold the information not subject to section 552.022 of the Government Code. 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 the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *See Occ. Code* § 151.001. Section 159.002 of the MPA 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)-(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). We have also 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). Upon review, we have marked medical records pertaining to the named deceased inmate that are subject to the MPA. We note, however, the requestor is the attorney for the family of the deceased inmate. Medical records pertaining to a deceased individual may be released only on the signed consent of the personal representative of the deceased. Occ. Code § 159.005(a)(5). The consent must specify (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, .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). Although you claim the medical records are excepted under section 552.103 of the Government Code, the MPA’s specific right of access provision prevails over the Act’s general exceptions to disclosure. *See* Open Records Decision No. 451 at 4 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under statutory predecessor to Act). Accordingly, the submitted medical records pertaining to the deceased inmate, which we have marked, may only be released in accordance with the MPA.<sup>6</sup>

The university asserts the remaining information not subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code, which provides in relevant part:

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<sup>6</sup>As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The university states, and provides documentation showing, the university is named as a defendant in a lawsuit with the requestor's client, styled *Tonia White v. Brad Livingston* that is currently pending in the United States District Court for the Southern District of Texas, Houston Division. The university states the lawsuit was pending on the date the university received the request. Thus, based on the university's representations and our review of the submitted information, we find that litigation was pending on the date the university received the request for information. The university states the submitted information pertains to the university's defense against the claims of the requestor's clients. Based on the university's representations, we also conclude the information at issue relates to the pending litigation. Therefore, we find section 552.103 of the Government Code is generally applicable to the remaining information.

We note, however, that once an opposing party in pending litigation has seen or had access to information that is related to litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, the information the opposing party in the pending litigation has seen or had access to is not excepted from disclosure under section 552.103(a) and must be disclosed. In this instance, the opposing party to the pending litigation has already seen or had access to a portion of the remaining information. Therefore, this information, which we have marked for release, may not be withheld under section 552.103. As you raise no additional exceptions to disclosure of this information, it must be released to the requestor.<sup>7</sup> However, the university may withhold the remaining information at issue under section 552.103 of the Government Code.<sup>8</sup> We note the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We next address the arguments to withhold the information subject to section 552.022 of the Government Code. The university contends the performance evaluations in Items 13 and 14 are confidential nursing peer review committee documents that are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 303.006 of the Occupations Code. Section 552.101 also encompasses section 303.006 of the Occupations Code, which protects all communications made to a nursing peer review committee and makes the committee proceedings confidential. Occ. Code § 303.006. Information protected by section 303.006 may be released only as provided in section 303.007. The university informs us the information at issue in Items 13 and 14 were created or reviewed by the head of nursing for the university's Correctional Managed Care as part of a nurse peer review committee. Based on your representation and our review, we find the information subject to section 552.022 in Items 13 and 14 is protected under section 303.006 of the Occupations

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<sup>7</sup>We note the information being released contains the personal e-mail address of the requestor's client. Therefore, the requestor has a right to this e-mail address under section 552.137(b) of the Government Code. We further note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. Accordingly, if the university receives another request for this information, the university is authorized to withhold the e-mail address at issue under section 552.137 without the necessity of requesting an attorney general decision.

<sup>8</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

Code. You state, and we agree, none of the provisions of section 303.007 apply in this instance. Therefore, the university must withhold the information subject to section 552.022 in Items 13 and 14 under section 552.101 of the Government Code in conjunction with section 303.006 of the Occupations Code.

The board asserts the remaining information subject to section 552.022 is excepted from disclosure under section 301.466 of the Occupations Code, which is also encompassed by section 552.101. Section 301.466 provides:

(a) A complaint and investigation concerning a nurse under this subchapter and all information and material compiled by the board in connection with the complaint and investigation are:

(1) confidential and not subject to disclosure under Chapter 552, Government Code; and

(2) not subject to disclosure, discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or a board employee or agent involved in license holder discipline.

(b) Notwithstanding Subsection (a), information regarding a complaint and an investigation may be disclosed to:

(1) a person involved with the board in a disciplinary action against the nurse;

(2) a nursing licensing or disciplinary board in another jurisdiction;

(3) a peer assistance program approved by the board under Chapter 467, Health and Safety Code;

(4) a law enforcement agency; or

(5) a person engaged in bona fide research, if all information identifying a specific individual has been deleted.

(c) The filing of formal charges against a nurse by the board, the nature of those charges, disciplinary proceedings of the board, and final disciplinary actions, including warnings and reprimands, by the board are not confidential and are subject to disclosure in accordance with Chapter 552, Government Code.

*Id.* § 301.466. The board states the remaining information subject to section 552.022 relates to the board's investigation of the named employees. We note, however, the information subject to section 552.022 consists of employee performance evaluations created and compiled by the university for its own business purposes and was not created for the board's investigation. Further, we note the present request for information went to the university and not to the board. Therefore, we find section 301.466 of the Occupations Code is not applicable to remaining information subject to section 552.022, and none of it may be withheld under section 552.101 on that basis.

In summary, the marked medical records may only be released in accordance with the MPA. With the exception of the information subject to section 552.022 and the marked information the opposing party to the pending litigation has seen or had access to, the university may withhold the remaining information at issue under section 552.103 of the Government Code. The university must withhold the information subject to section 552.022 in Items 13 and 14 under section 552.101 of the Government Code in conjunction with section 303.006 of the Occupations Code. The remaining information subject to section 552.022 and the information the opposing party to the pending litigation has seen or had access to, which we have marked, must be released to the requestor.

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.

Ms. Neera Chatterjee - Page 9

Sincerely,



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Open Records Division

ACL/em

Ref: ID# 385858

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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