



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 10, 2010

Ms. Janet Smith
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2010-12115

Dear Ms. Smith:

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# 389962 (DSHS File No. 017538-2010).

The Texas Department of State Health Services (the "department") received a request for: 1) all documents related to physical injuries sustained by staff, patients, or visitors at the San Antonio State Hospital (the "hospital") that required hospitalization from a specified time period, 2) investigations into these injuries by the department, a state agency, or federal agency, and 3) the amount of legal expenses associated with the defense of the hospital or staff members.¹ You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

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 exception encompasses information other statutes make confidential, such as 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:

¹The department sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request).

²We assume 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.

(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). Upon review, we find a portion of the submitted information constitutes confidential medical records and information taken from medical records. Thus, the information we have marked may only be released in accordance with the MPA.³ ORD 598. However, you have not shown how the remaining information at issue constitutes communications between a physician and a patient, or contains the identity, diagnosis, evaluation, or treatment of a patient by a physician for purposes of the MPA. Therefore, the department may not withhold any of the remaining information at issue on the basis of the MPA.

You contend a portion of the remaining information is excepted from public disclosure under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code. Section 161.032 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 [or] medical peer review committee, . . . and records, information, or reports provided by a medical committee [or] medical peer review committee. . . to the governing

³As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.

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). A “medical committee” is defined as any committee, including a joint committee of a hospital, medical organization, university medical school or health science center, health maintenance organization, extended care facility, a hospital district, or a hospital authority. *See id.* § 161.031(a). The term also encompasses “a committee appointed ad hoc to conduct a specific investigation or established under state or federal law or rule or under the bylaws or rules of the organization or institution.” *Id.* § 161.031(b).

The precise scope of section 161.032 has been the subject of a number of judicial decisions. *See, e.g., Memorial Hosp.—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. *Jordan*, 701 S.W.2d at 647-48. This protection extends “to documents that have been prepared by or at the direction of the committee for committee purposes.” *Id.* at 648. However, this protection does not extend to documents “gratuitously submitted to a committee” or “created without committee impetus and purpose.” *Id.* at 648; *see also* Open Records Decision No. 591 (1991) (construing statutory predecessor to section 161.032). We note that section 161.032 does not make confidential “records made or maintained in the regular course of business by a hospital[.]” Health & Safety Code § 161.032(f); *see Memorial Hosp.—The Woodlands*, 927 S.W.2d at 10 (stating that reference to statutory predecessor to section 160.007 in section 161.032 is clear signal that records should be accorded same treatment under both statutes in determining if they were made in ordinary course of business).

You contend that a portion of the remaining information consists of records of the Peer Review Committee for Sentinel Events (the “committee”), which you contend is a medical committee. You state this information was prepared for use of the committee. You also state the information at issue was not prepared in the regular course of business, but rather, was created by the Quality Management Director of the hospital at the direction of the hospital’s superintendent and the committee. Upon review, we agree the committee constitutes a medical committee as defined by section 161.031 and find that the information you have marked under section 161.032 is confidential. Thus, this information must be withheld under section 552.101 of the Government Code in conjunction with section 161.032(a) of the Health and Safety Code.⁴

You argue some of the remaining information is excepted from public disclosure under section 576.005 of the Health and Safety Code. Section 552.101 of the Government Code

⁴As our ruling is dispositive, we need not address your remaining argument against the disclosure of this information.

also encompasses section 576.005, which provides that “[r]ecords of a mental health facility that directly or indirectly identify a present, former, or proposed patient are confidential unless disclosure is permitted by other state law.” Health and Safety Code § 576.005. Upon review, we find the confidentiality provision of section 576.005 applies to some of the remaining information. You do not indicate that any other state law would permit disclosure of this information in this instance. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 576.005 of the Health and Safety Code. However, we find you have failed to demonstrate how any of the remaining information at issue is subject to section 576.005 of the Health and Safety Code. Therefore, none of this remaining information may be withheld under section 552.101 of the Government Code on this basis.

You claim some of the remaining information is confidential under section 412.0128 of the Labor Code, which is also encompassed by section 552.101 of the Government Code. Section 412.0128 provides that “[i]nformation in or derived from a worker’s compensation claim file regarding an employee is confidential and may not be disclosed by the [State Office of Risk Management (the “SORM”)] except as provided by this subchapter or other law.” Labor Code § 412.0128. We note the language of section 412.0128 is substantially identical to section 402.083 of the Labor Code, which provides that “[i]nformation in or derived from a claim file regarding an employee is confidential and may not be disclosed by the [Division of Workers’ Compensation of the Texas Department of Insurance (the “division”)] except as provided by this subtitle or other law.” *Id.* § 402.083(a). In Open Records Decision No. 533 (1989), this office construed the predecessor to section 402.083(a) to apply only to information the governmental body obtained from the Industrial Accident Board, subsequently the Texas Workers’ Compensation Commission, and now the division. *See* Open Records Decision No. 533 at 3-6 (1989); *see also* Labor Code § 402.086 (transferring confidentiality conferred by section 402.083(a) of the Labor Code to information other parties obtain from division files). Accordingly, for purposes of section 402.083(a), information that was not obtained from the division may not be withheld on that basis. Based on this analysis, we find information in the possession of the department that was not obtained from the SORM may not be withheld on the basis of section 412.0128. Further, this office has interpreted section 402.083 to protect only that “information in or derived from a claim file that explicitly or implicitly discloses the identities of employees who file workers’ compensation claims.” Open Records Decision No. 619 at 6 (1993). Prior decisions of this office have found that information revealing the date of injury, as well as an injured employee’s name, beneficiary name, commission claim number, social security number, home telephone number, home address, and date of birth implicitly or explicitly identifies claimants and is therefore excepted from disclosure under section 552.101 in conjunction with section 402.083 of the Labor Code.⁵ Only in those cases where release of the employer’s identity would reveal the claimant’s identity may the identity of an employer

⁵The “commission” refers to the predecessor agency of the Texas Department of Insurance, Division of Workers’ Compensation, which was established under House Bill 7, 79th Legislature, R.S. (2005).

be withheld. We will apply the same analysis in applying section 412.0128 to the information at issue.

We understand the SORM administers the workers' compensation insurance program for state employees. Although you assert most of the remaining documents are copies of information from the SORM, you do not clearly state any of the information at issue was obtained by the department from the SORM. As it is unclear whether the information at issue was obtained from the SORM, we must rule conditionally. To the extent the information at issue was obtained by the department from the SORM and implicitly or explicitly identifies claimants, including a claimant's date of injury, name, beneficiary name, claim number, social security number, home telephone number, home address, or date of birth, the department must withhold this information under section 552.101 in conjunction with section 412.0128 of the Labor Code. We have marked a representative sample. To the extent this information was not obtained by the department from the SORM or does not implicitly or explicitly identify claimants, the department may not withhold this information under section 552.101 in conjunction with section 412.0128 of the Labor Code. In that instance, we address your remaining arguments against the disclosure of portions of this information as well as some of the remaining information.

You raise section 552.101 in conjunction with the doctrines of common-law and constitutional privacy for portions of the remaining information. Common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (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. *See id.* at 683. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are confidential 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).

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. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7. 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. ORD 455 at 4. 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.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most

intimate aspects of human affairs.” *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)).

Upon review, we find some of the remaining information at issue is highly intimate or embarrassing and of no legitimate public concern. Thus, the department must withhold the information we have marked under section 552.101 of the Government Code on the basis of common-law privacy. However, we find none of the remaining information at issue is highly intimate or embarrassing and of no legitimate public concern. Further, we find you have not demonstrated how any portion of this information falls within the zones of privacy or implicates an individual’s privacy interests for purposes of constitutional privacy. Therefore, the department may not withhold any of the remaining information at issue under section 552.101 on the basis of common-law or constitutional privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address, home telephone number, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov’t Code § 552.117(a)(1). 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 department may only withhold information 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 on which the request for this information was made. You indicate some of the employees whose information is at issue timely elected to keep certain personal information confidential. Therefore, the department must withhold the information we have marked under section 552.117(a)(1). You also indicate you do not know whether one of the employees whose information is at issue made a timely election for any of his personal information. Thus, to the extent this employee timely elected to keep his personal information confidential, the department must withhold the personal information we have marked under section 552.117(a)(1). However, to the extent this employee did not make a timely election under section 552.024, the department may not withhold any portion of this employee’s information under section 552.117(a)(1).⁶ The remaining information you have marked under section 552.117 does not constitute an employee’s home address or telephone number, social security number, or family member information. Therefore, the department may not withhold any of the remaining information at issue under section 552.117(a)(1).

In summary, the information we have marked may only be released in accordance with the MPA. The information you have marked must be withheld under section 552.101 of the

⁶We note that to the extent the employee’s social security number is not excepted from disclosure under section 552.117(a)(1), 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 under the Act. Gov’t Code § 552.147.

Government Code in conjunction with section 161.032 of the Health and Safety Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 576.005 of the Health and Safety Code. To the extent the information at issue was obtained by the department from the SORM and implicitly or explicitly identifies claimants, the department must withhold this information, a representative sample of which we have marked, under section 552.101 in conjunction with section 412.0128 of the Labor Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. As to those employees whom you state made a timely election for certain personal information, the department must withhold the information we have marked under section 552.117(a)(1) of the Government Code. To the extent the remaining employee at issue made a timely election for any of his personal information, the department must also withhold the information we have marked under section 552.117(a)(1) of the Government Code. 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, 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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/tp

Ref: ID# 389962

Enc. Submitted documents

c: Requestor
(w/o enclosures)