



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 13, 2010

Ms. Twanda Somerville  
Records Management Coordinator  
City of Harker Heights  
305 Miller's Crossing  
Harker Heights, Texas 76548

ATTORNEY GENERAL OF TEXAS

OR2010-13864

Dear Ms. Somerville:

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# 393378.

The City of Harker Heights (the "city") received a request for records related to a named police officer. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.107 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note in his request for information, the requestor agrees to the redaction of the named officer's social security number, home address and phone number, date of birth, driver's license number, and license plate information. Accordingly, any such information within the submitted documents is not responsive to the present request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the city need not release non-responsive information in response to this request.

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<sup>1</sup>Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Furthermore, section 552.107 is the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022. See ORD 676.

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. Section 552.101 encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which makes medical records confidential. *See* Occ. Code § 159.001. 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). This office has concluded that 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). This office has concluded that when a file is created as the result of a hospital stay, all the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). The submitted information contains medical records subject to the MPA. Accordingly, unless the city receives written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA, the city must withhold the medical records we have marked pursuant to section 552.101 of the Government Code in conjunction with the MPA.<sup>2</sup>

Section 552.101 of the Government Code also encompasses information protected by common-law privacy. Section 552.102(a) of the Government Code exempts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *See* 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 the test to be applied to information claimed to be protected under

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<sup>2</sup>As our ruling in this issue is dispositive, we need not address your remaining arguments against disclosure of this information.

section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Bd.*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we address the city's section 552.102(a) claim in conjunction with its common-law privacy claim under section 552.101 of the Government Code.

Common-law privacy protects information that (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 at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990). This office has determined financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORD Nos. 600 at 9-12 (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pre-tax compensation to group insurance, health care or dependent care), 545 at 4 (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities).

Upon review, we find portions of the remaining information, which we have marked, are highly intimate or embarrassing and not of legitimate public interest. Accordingly, the city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. We agree some of the remaining information at issue also contains information about a city employee which may be considered intimate and embarrassing. However, because this information pertains to workers' compensation claims, we find there is a legitimate public interest in it. *See* ORD Nos. 545 at 4, 423 at 2 (1984) (scope of public employee privacy is narrow). Further, we find you have failed to demonstrate how any portion of the remaining information is highly intimate or embarrassing and of no legitimate concern to the public. Accordingly, no portion of the remaining information may be withheld under section 552.101 or section 552.102(a) on that basis.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege

in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5):

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege, unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You assert a portion of the remaining information, which you have marked as Enclosure 4, consists of a privileged attorney-client communication. You further state the communication was made to facilitate the rendition of legal advice to the city. You assert this communication was made in confidence and has maintained its confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to Enclosure 4, which the city may generally withhold under section 552.107 of the Government Code. However, we note the attachments to the privileged e-mail have been seen by non-privileged parties. These non-privileged documents, to the extent they exist separate and apart from the privileged communication, are responsive to the request. Accordingly, to the extent these non-privileged e-mail attachments exist separate and apart from the submitted e-mail, they may not be withheld under section 552.107.

In summary, the city must withhold the medical records we have marked pursuant to section 552.101 of the Government Code in conjunction with the MPA, unless the city receives written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA. The city must also withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and section 552.102(a). The city may withhold the information you have marked as Enclosure 4 under section 552.107 of the Government Code; however, to the extent the non-privileged e-mail attachments exist separate and apart from the submitted e-mail, they may not be withheld under section 552.107. The remaining responsive 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,



Jennifer Burnett  
Assistant Attorney General  
Open Records Division

JB/dls

Ref: ID# 393378

Enc. Submitted documents

c: Requestor  
(w/o enclosures)