



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 8, 2010

Ms. Helen Bright
Managing Attorney
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2010-15368

Dear Ms. Bright:

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# 396174 (OGC# 131944).

The University of Texas Southwestern Medical Center at Dallas (the "center") received a request for (1) all communications between the Parkland Health and Hospital System and the center from 1998 to the present for sixteen specified individuals and (2) all documents and communications to and from the Joint Commission (the "commission").¹ You state some information has been or will be released to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the

¹You state the center sought and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.];

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.];

Gov't Code § 552.022(a)(1), (3). You have submitted a completed report and evaluations that are subject to section 552.022(a)(1) and contracts that are subject to section 552.022(a)(3). Although you raise section 552.103 of the Government Code for this information, which we have marked, section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the center may not withhold this marked information under section 552.103. However, we note portions of the information subject to section 552.022 may be subject to sections 552.117 and 552.137 of the Government Code, which are other laws for purposes of section 552.022; thus, we will

²We assume that the "representative sample" of information 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.

consider the applicability of these sections to the information subject to section 552.022.³ Additionally, because you claim some of the submitted evaluations are confidential under section 552.101 of the Government Code and this section also constitutes other law for purposes of section 552.022, we will address your argument under section 552.101.

Next, we address your arguments under section 552.101 of the Government Code for the information contained in Tab 7. Section 552.101 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 protected by other statutes, such as section 160.007 of the Occupations Code. Section 160.007 provides in part:

(a) Except as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.

Occ. Code § 160.007(a). "Medical peer review" is defined by the Medical Practice Act, subtitle B of title 3 of the Occupations Code, to mean "the evaluation of medical and health care services, including evaluation of the qualifications and professional conduct of professional health care practitioners and of patient care provided by those practitioners." *Id.* § 151.002(a)(7). A medical peer review committee is "a committee of a health care entity . . . or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services[.]" *Id.* § 151.002(a)(8).

Section 161.032 of the Health and Safety Code 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, medical peer review committee, or compliance officer and records, information, or reports provided by a medical committee, medical peer review committee, or compliance officer to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under [the Act].

...

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(f) This section and Subchapter A, Chapter 160, Occupations Code, do not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility.

Health & Safety Code § 161.032(a), (c), (f). For purposes of this confidentiality provision, a “‘medical committee’ includes any committee, including a joint committee, of . . . a hospital [or] a medical organization [or] a university medical school or health science center [or] a hospital district[.]” *Id.* § 161.031(a). Section 161.0315 provides in relevant part that “[t]he governing body of a hospital, medical organization, university medical school or health science center [or] hospital district . . . may form . . . a medical committee, as defined by section 161.031, to evaluate medical and health care services[.]” *Id.* § 161.0315(a).

The precise scope of the “medical committee” provision 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. This protection extends “to documents that have been prepared by or at the direction of the committee for committee purposes.” *Jordan*, 701 S.W.2d at 647-48. 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, among other statutes, statutory predecessor to section 161.032).

You state the information in Tab 7 was submitted to and obtained by the Physical Medicine and Rehabilitation Education Review Committee (the “PMRERC”). You explain the PMRERC evaluates the health care services rendered by resident physicians of the center. Based on this representation, we agree the PMRERC is a medical committee as defined by section 161.031. You assert the information at issue was created by, submitted to, reviewed, and used by the PMRERC for the purpose of assessing resident physician professional skill and care. Thus, based on your representations and our review, we agree the information in Tab 7 consists of confidential records of a medical peer review committee under section 161.032 of the Health and Safety Code and section 160.007 of the Occupations Code. Accordingly, the center must withhold the information in Tab 7 pursuant to section 552.101 of the Government Code.⁴

Next, we address section 552.103 of the Government Code for the remaining information not subject to section 552.022. Section 552.103 provides in relevant part:

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

(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 question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986).

You state, and have provided documentation showing, that prior to the center's receipt of the request, a lawsuit styled *Naiel Nassar, M.D. v. University of Texas Southwestern Medical Center*, Civil Action No. 3:08-cv-1337, was filed and is currently pending in the United States District Court, Northern District of Texas, Dallas Division. Further, you state the information not subject to section 552.022 in Tab 6 consists of personnel records of the individual whose employment is at issue in the pending lawsuit and, thus, is related to the litigation at issue. Based on your representations and our review, we find that litigation to which the center is a party was pending on the date the center received the request for information. We also find the information at issue is related to the pending litigation. Accordingly, we find section 552.103 is generally applicable to the remaining information at issue.

We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). Thus, information that has either been obtained from or provided to the center's opposing party in the pending litigation is not excepted from disclosure under section 552.103, and it must be disclosed. In this instance, a portion of the

information in Tab 6, which we have marked, reflects that it has been obtained from or provided to the center's opposing party in the pending litigation. Therefore, the information we have marked may not be withheld under section 552.103. However, the remaining information in Tab 6 that is not subject to section 552.022 may be withheld under section 552.103 of the Government Code. We note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

We note some of the remaining information in Tab 6 is subject to section 1324a of title 8 of the United States Code, which is also encompassed by section 552.101 of the Government Code. This section provides that an Employment Eligibility Verification I-9 Form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). We have marked an I-9 form. Release of this form in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we find the I-9 form we marked is confidential under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code and may only be released in compliance with the federal laws and regulations governing the employment verification system.

We note the remaining information in Tab 6 contains information that is subject to common-law privacy. Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which 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 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. This office has also found an employee's voluntary insurance choices are personal financial decisions that are highly intimate and embarrassing for purposes of common-law privacy. *See* Open Records Decision Nos. 600 (personal financial information protected by common-law privacy includes designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Furthermore, we find there is no legitimate public interest in these types of information. Upon review, we conclude a portion of the remaining information in Tab 6, which we have marked, is highly intimate or embarrassing and of no legitimate public concern. Thus, the center must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

We note the information subject to section 552.022 and the remaining information in Tab 6 contain information that may be subject to sections 552.117 and 552.137 of the Government Code. Section 552.117(a)(1) excepts from public 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. *See* Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *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. Accordingly, to the extent the employees whose information is at issue timely elected confidentiality under section 552.024, the center must withhold the information we have marked under section 552.117(a)(1) of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue do not appear to be of types specifically excluded by section 552.137(c) of the Government Code. Accordingly, the center must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure.

In summary, the center must withhold the information in Tab 7 under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code and section 160.007 of the Occupations Code. With the exception of the marked information that has been obtained from or provided to the center's opposing party in the pending litigation, the center may withhold the information in Tab 6 under section 552.103 of the Government Code. In releasing the information subject to section 552.022 of the Government Code and the information that has been obtained from or provided to the center's opposing party in the pending litigation, the center must withhold: (1) the I-9 form we marked under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; (2) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (3) the information we have marked under section 552.117(a)(1) of the Government Code, to the extent the employees whose information is at issue timely elected confidentiality under section 552.024; and

(4) the e-mail addresses we have marked under section 552.137, unless the owners affirmatively consent to their disclosure.⁵ 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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 396174

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We 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 I-9 form under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code and 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.