



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 17, 2010

Ms. Neera Chatterjee
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2010-17434

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# 400352 (The University of Texas System OGC # 132994).

The University of Texas Medical Branch at Galveston (the "university") received a request for a personnel file, notes, statements, time sheets, and information pertaining to the requestor during the requestor's employment with the university.¹ You state the university is releasing some of the requested information. You claim portions of the submitted information are not subject to the Act. Alternatively, you claim this information, as well as portions of the remaining submitted information, are excepted from disclosure under section 552.101 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, we note that one of the submitted emails originated after the date the request for information was received. This information, which we have marked, 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 university need not release such information.

¹We note the university sought and received clarification from the requestor regarding the request. See Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request).

Next, we address your argument that portions of the submitted information are not subject to the Act. You contend that, pursuant to section 181.006 of the Health and Safety Code, the information you have marked is not subject to the Act. Section 181.006 states that “[f]or a covered entity that is a governmental unit, an individual’s protected health information . . . is not public information and is not subject to disclosure under [the Act].” Health & Safety Code § 181.006. We will assume, without deciding, the university is a covered entity. Subsection 181.006(2) does not remove protected health information from the Act’s application, but rather states this information is “not public information and is not subject to disclosure under [the Act].” We interpret this to mean a covered entity’s protected health information is subject to the Act’s application. Furthermore, this statute, when demonstrated to be applicable, makes confidential the information it covers. Thus, we will consider your arguments for this information, as well as for the remaining information.

You assert portions of the submitted information are confidential under section 552.101 of the Government Code in conjunction with section 58.005 of the Family Code. 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. Section 552.101 encompasses information protected by other statutes, such as section 58.005 of the Family Code, which provides in pertinent part:

(a) Records and files concerning a child, including personally identifiable information, and information obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment of a child by a public or private agency or institution providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court may be disclosed only to:

- (1) the professional staff or consultants of the agency or institution;
- (2) the judge, probation officers, and professional staff or consultants of the juvenile court;
- (3) an attorney for the child;
- (4) a governmental agency if the disclosure is required or authorized by law;
- (5) a person or entity to whom the child is referred for treatment or services if the agency or institution disclosing the information has entered into a written confidentiality agreement with the person or entity regarding the protection of the disclosed information;
- (6) the Texas Department of Criminal Justice and the Texas Juvenile Probation Commission for the purpose of maintaining statistical records of recidivism and for diagnosis and classification; or

(7) with leave of the juvenile court, any other person, agency, or institution having a legitimate interest in the proceeding or in the work of the court.

Fam. Code § 58.005(a). Under section 58.005 of the Family Code, a "child" means a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See id.* § 51.02(2) (defining "child" for purposes of title 3 of Family Code). You state the requestor is no longer employed by the university; thus she is not a person to whom the information may be disclosed under the statute. *See id.* § 58.005(a)(1). After review of the information at issue and consideration of your arguments, we conclude the patient identification numbers you have marked are generally subject to section 58.005(a). We note, however, the information at issue does not reflect the ages of the juveniles involved. Because we are unable to determine the ages of the juveniles involved in these documents, we must rule conditionally. To the extent the information at issue pertains to children who are ten years of age or older and under seventeen years of age, it is confidential pursuant to section 58.005(a) of the Family Code and must be withheld in its entirety under section 552.101 of the Government Code. However, to the extent the information at issue pertains to children who are not ten years of age or older and under seventeen years of age, the university may not withhold the information at issue under section 58.005. In that case, we will address your remaining arguments against the disclosure of this and the remaining submitted information.

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. *Id.* at 681-82. The type 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. *Id.* at 683. This office has found that some 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, we find the patient identification numbers you have marked may not be withheld on the basis of common-law privacy. Accordingly, to the extent the marked patient identification numbers are not confidential under section 552.101 of the Government Code in conjunction with section 58.005 of the Family Code as discussed above, the university may not withhold the information under section 552.101 of the Government Code in conjunction with common-law privacy.

As discussed above, common-law privacy also protects 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 Indus. Found.*, 540 S.W.2d at 683. However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and is, therefore, generally not protected from disclosure under common-law privacy. *See Open Records Decision Nos.* 470 (public employee's job performance does not generally constitute employee's private affairs), 455 (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of common-law privacy to information relating to an investigation of alleged sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *See* 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* The *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Thus, if there is an adequate summary of an investigation of sexual harassment, the summary must be released along with the statement of the person accused of sexual harassment, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. If no adequate summary of the investigation exists, then detailed statements regarding the allegations must be released, but the identities of victims and witnesses must be redacted from the statements. In either event, the identity of the individual accused of sexual harassment is not protected from public disclosure. We note that supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

The remaining information at issue pertains to a sexual harassment investigation. You assert, and we agree, the information contains an adequate summary of the investigation. The investigation report summary, which you state will be released, is not confidential under section 552.101 in conjunction with common-law privacy. However, information within the summary identifying victims and witnesses of the sexual harassment is confidential under common-law privacy and must be withheld pursuant to section 552.101. *See Ellen*, 840 S.W.2d at 525. We note, however, that some of the identifying witness information you have marked under *Ellen* does not pertain to witnesses of the alleged sexual harassment or is information that pertains to supervisors appearing in a supervisory context. The university may not withhold this information, which we have marked for release. Upon review we also find that the medical information you have marked in the submitted investigation report

summary is highly intimate or embarrassing and not of legitimate public concern. The university must withhold the identifying victim and witness information you have marked in the investigation report summary, including additional information we have marked for withholding, under section 552.101 and the court's holding in *Ellen*, and the university must withhold the medical information you have marked in the investigation report summary under section 552.101 in conjunction with common-law privacy. The university must release the remaining information and the information we have marked for release in the submitted investigation report summary. The remainder of the submitted investigative records you have marked under *Ellen* must also be withheld under section 552.101 in conjunction with common-law privacy because they relate to the sexual harassment investigation. *See id.*

You state the university will redact the marked employee family member information subject to section 552.117 within the submitted investigation report summary pursuant to section 552.024 of the Government Code. *See* Gov't Code § 552.024(c), (c-2) (authorizing a governmental body to redact, without the necessity of requesting a decision from this office, the information excepted from disclosure under section 552.117 of a current or former employee who properly elected to keep this information confidential, provided the governmental body provides the requestor with notice as required by section 552.024(c-2)). We note that the remaining information contains additional information that may be subject to section 552.117. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. *Id.* § 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). Therefore, the university may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employees whose information is at issue timely elected to keep their personal information confidential pursuant to section 552.024, the university must withhold the employee family member information the university has marked, as well as the employee family member information we have marked. The university may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential.

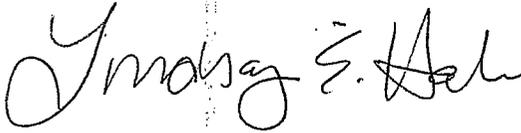
In summary: (1) to the extent the marked patient identification numbers pertain to children who are ten years of age or older and under seventeen years of age, the university must withhold this information under section 552.101 of the Government Code in conjunction with section 58.005 of the Family Code; (2) with the exception of the information we have marked for release, the university must withhold the information related to the sexual harassment investigation you have marked, and the additional information we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*; (3) the university must withhold the marked medical information in the investigation report summary pursuant to section 552.101 of the Government Code in conjunction with common-law privacy; and (4) to the extent the employees whose information is at issue timely elected to keep their personal information confidential pursuant

to section 552.024, the university must withhold the employee family member information the university has marked, as well as the employee family member information we have marked under section 552.117 of the Government Code. The remaining submitted 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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/em

Ref: ID# 400352

Enc. Submitted documents

c: Requestor
(w/o enclosures)