



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 1, 2010

Ms. Zeena Angadicheril
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR2010-17982

Dear Ms Angadicheril:

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# 401569 (OGC# 133292).

The University of Texas at Austin (the "university") received a request for documents related to a named individual in the Ann W. Richards Papers Capital Clemency Files at the Dolph Briscoe Center for American History. You state, and provide documentation showing, that you have notified the Office of the Governor (the "governor"), which is a governmental body to whom the requested information relates, about the instant request for information in accordance with section 552.304 of the Government Code. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for Attorney General ruling should or should not be released). We have received comments from the governor. The governor claims portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This exception encompasses information that other statutes make confidential. The governor claims the submitted mental health records are confidential under section 611.002 of the Health and Safety Code. This section provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health and Safety Code § 611.002(a)-(b); *see also id.* § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to information that section 611.002 makes confidential only by certain individuals. *See id.* §§ 611.004, .0045; Open Records Decision No. 565 (1990). We note portions of the submitted documents contain mental health records and information obtained from mental health records. Accordingly, the mental health records we have marked must be withheld under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code, unless the requestor is authorized to obtain the records under sections 611.004 and 611.0045.¹

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *See Occ. Code* §§ 151.001-165.160. 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 also have concluded that when a file is created as the result of a hospital stay, all of 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). Upon review, we find the information we have marked constitutes information obtained from medical records, which may only be released in accordance with the MPA.

¹As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

Section 552.107(1) of the Government Code protects information that comes 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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. *See* 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. *See In re Tex. 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 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, and lawyer representatives. *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. *See 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 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).

The governor claims a portion of the submitted information is excepted from disclosure under the attorney-client privilege. The governor asserts the information at issue consists of confidential communications between the governor’s general counsel that were made for the purpose of rendering recommendations about the potential of granting clemency to the governor. The governor also asserts these communications were intended to be and have remained confidential. All parties to the communications are identified. Based on the governor’s representations and our review, we conclude the information at issue, which we have marked, may be withheld under section 552.107(1).²

²As our ruling on this information is dispositive, we need not address the governor’s argument under section 552.111 of the Government Code.

In summary, the mental health records we have marked must be withheld under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code, unless the requestor is authorized to obtain the records under sections 611.004 and 611.0045. The medical records we have marked may only be released in accordance with the MPA. The university may withhold the information we have marked under section 552.107 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,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 401569

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Katherine R. Fite
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711
(w/o enclosures)