



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 3, 2010

Mr. Ryan S. Henry
Denton, Navarro, Rocha & Bernal
2517 North Main Avenue
San Antonio, Texas 78212

OR2010-18170

Dear Mr. Henry:

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# 401892.

The Dallas County Hospital District (the "district"), which you represent, received a request for information relating to all malpractice cases filed against Parkland Memorial Hospital and all related entities since January 1, 2000, to include the disposition of all local, state, and federal court actions and any settlements or jury awards paid. You state the district has released a list of malpractice cases that includes the style of each case. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the information you submitted.¹

We first note the requestor seeks access to the requested information "in spreadsheet form." We understand you to state the district does not maintain such a spreadsheet. We agree the Act does not require the district to release information that did not exist when it received this request or create responsive information.²

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes Parkland to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

²We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

You also inform us some of the submitted information is not related to medical malpractice cases. Thus, that information is not responsive to the instant request. This decision does not address the public availability of the submitted information that is not responsive to the request, and the district need not release such information in responding to the request.

Next, we must determine whether the district complied with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that must be followed in asking this office to determine whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301(a)-(b), (e). Section 552.302 of the Government Code provides that if a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). You inform us the district received the instant request for information on September 10, 2010. You also explain, and have provided documentation demonstrating, that the district received clarification of the request on September 15. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). As there is no indication the district did not act in good faith in obtaining clarification of the request, we consider the district's ten- and fifteen-business-day periods under subsections 552.301(b) and 552.301(e) for requesting this decision to have begun on September 15, the date of the district's receipt of the clarification. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (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). Therefore, we consider the district to have timely complied with section 552.301 in requesting this decision on September 28 and in submitting its further correspondence to this office on October 6.

We next note the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a) provides for required public disclosure of the following categories of information, unless the information is expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[;]

...

(17) information that is also contained in a public court record; and

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(1), (17)-(18). Thus, the submitted litigation reports, settlement agreements, and court documents must be released pursuant to section 552.022(a)(1), (17) and (18), unless the information is expressly confidential under other law. Although you seek to withhold the submitted information under sections 552.103 and 552.107(1) of the Government Code, those sections are discretionary exceptions to disclosure that protect a 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 Gov't Code § 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.107(1) are not other law that makes information confidential for the purposes of section 552.022(a)(1), (17), or (18). Therefore, the district may not withhold any of the submitted information under sections 552.103 or 552.107(1) of the Government Code. The Texas Supreme Court has held, however, that the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" that makes information confidential for the purposes of section 552.022(a). *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is found at Texas Rule of Evidence 503, and the attorney work product privilege is found at Texas Rule of Civil Procedure 192.5. Accordingly, we will consider the district's assertions of the attorney-client and attorney work product privileges under rules 503 and 192.5. We also will consider the district's claims under section 552.101 of the Government Code, which is a confidentiality provision for the purposes of section 552.022(a).

Texas Rule of Evidence 503 enacts the attorney-client privilege and provides in part:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You indicate the submitted litigation reports are communicated among attorneys for and representatives of the district in connection with the rendition of professional legal services to the district. You also indicate the litigation reports are intended to be and remain confidential. Based on your representations and our review of the information at issue, we conclude the district may withhold the litigation reports under Texas Rule of Evidence 503.³

Next, we address your claims for the rest of the information at issue. 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. You claim section 552.101 in conjunction with the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). *See* 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. *See id.* § 164.502(a).

³As we are able to make this determination, we need not address your claim under Texas Rule of Civil Procedure 192.5.

This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* ORD 681 at 8; *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the district may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

Section 552.101 of the Government Code encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. The MPA is applicable to medical records. 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.

Occ. Code § 159.002(a)-(c). You appear to contend the MPA is applicable to the remaining information at issue. You have not demonstrated, however, that the remaining information contains a communication between a patient and a physician; a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician; or information from such a communication or record. *See id.* § 159.002(a)-(c). We therefore conclude the district may not withhold any of the remaining information on the basis of the MPA.

Section 552.101 of the Government Code also encompasses section 181.006 of the Health and Safety Code. 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. Section 181.001(b)(2) defines “[c]overed entity,” in part, as meaning

any person who:

(A) for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site[.]

Id. § 181.001(b)(2)(A). You state the district is a governmental unit for purposes of section 181.006. You also inform us the district operates Parkland Memorial Hospital and a number of outpatient and community-oriented primary care clinics (collectively “Parkland”). You contend the district is a covered entity for purposes of section 181.006.

In order to determine whether the district is a covered entity for purposes of section 181.006, we must consider whether the district engages in the practice of assembling, collecting, analyzing, using, evaluating, storing or transmitting protected health information. *See id.* § 181.001(b)(2)(A). Section 181.001 states that “[u]nless otherwise defined in [chapter 181 of the Health and Safety Code], each term that is used in [chapter 181] has the meaning assigned by [HIPAA].” *Id.* § 181.001(a). Accordingly, as chapter 181 does not define “protected health information,” we turn to HIPAA’s definition of the term. HIPAA defines “protected health information” as individually identifiable health information that is transmitted or maintained in electronic media or any other form or medium. *See* 45 C.F.R. § 160.103. HIPAA defines “individually identifiable health information” as information that is a subset of health information, including demographic information collected from an individual, and:

(1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and

(2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and

(I) That identifies the individual; or

(ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual[.]

Id. You indicate, and the documents in question reflect, that the submitted settlement agreements and court documents identify individuals who were patients of Parkland. We also note the information at issue relates to the provision of healthcare to these patients. Accordingly, we conclude the documents in question contain individually identifiable health information for purposes of section 160.103 of title 45 of the Code of Federal Regulations. Thus, the submitted settlement agreements and court documents contain protected health information for purposes of section 181.006 of the Health and Safety Code. You also indicate these documents were collected, assembled, used, or stored by the district. Therefore, with respect to these documents, the district is a health care entity that is in the practice of collecting, assembling, using, and storing protected health information. Thus, the district is a covered entity for purposes of section 181.006. Accordingly, the district must withhold the protected health information we have marked in the settlement agreements and court documents under section 552.101 of the Government Code in conjunction with section 181.006 of the Health and Safety Code. We conclude the remaining information in these documents is not confidential under section 181.006 and may not be withheld on that basis under section 552.101.

You also claim section 552.101 in conjunction with section 241.152 of the Health and Safety Code, which provides in part:

(a) Except as authorized by Section 241.153 [of the Health and Safety Code], a hospital or an agent or employee of a hospital may not disclose health care information about a patient to any person other than the patient or the patient's legally authorized representative without the written authorization of the patient or the patient's legally authorized representative.

Health & Safety Code § 241.152(a). Section 241.151(2) of the Health and Safety Code defines "health care information" as "information . . . recorded in any form or medium that identifies a patient and relates to the history, diagnosis, treatment, or prognosis of a patient." *Id.* § 241.151(2). We find the remaining information in the submitted settlement agreements and court documents does not identify a patient. We therefore conclude the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 241.152 of the Health and Safety Code.

Section 552.101 also encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy protects the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined other types of

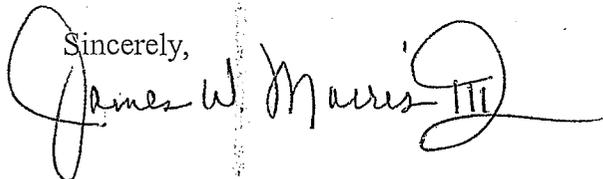
information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). In this instance, the information at issue is contained in settlement agreements and other court documents. Common-law privacy is not applicable to information contained in public court records. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992). We therefore conclude the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary: (1) the district may withhold the submitted litigation reports under Texas Rule of Evidence 503; and (2) the district must withhold the information we have marked in the settlement agreements and court documents under section 552.101 of the Government Code in conjunction with section 181.006 of the Health and Safety Code. The rest of the 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,

A handwritten signature in black ink that reads "James W. Morris, III". The signature is written in a cursive style with a large, looping initial "J" and a long horizontal flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 401892

Enc: Submitted documents

c: Requestor
(w/o enclosures)