



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 8, 2010

Ms. Zeena Angadicheril  
The University of Texas System  
Office of the General Counsel  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2010-18433

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# 402505 (OGC# 133541).

The University of Texas Southwestern Medical Center at Dallas ("UTSW") received a request for information relating to an incident involving a patient. You state some of the requested information either has been or will be released. You contend some of the submitted information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, we address your assertion that pursuant to section 181.006 of the Health and Safety Code, the information at Tab 5C is not subject to the Act. Section 181.006 provides in part 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(2). We will assume, without deciding, that UTSW is a covered entity. Section 181.006(2) does not remove protected health information from the Act's application, but rather states that such information is "not public information and is not subject to disclosure under [the Act]." We interpret this language to mean that a covered entity's protected health information is subject to the Act's application. Furthermore, section 181.006, when demonstrated to be applicable, makes confidential information it covers. Thus, we will consider your arguments for the information at Tab 5C, along with the rest of the submitted information.

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. You claim section 552.101 in conjunction with section 161.032 of the Health and Safety Code, which provides in part:

(c) Records, information, or reports of a . . . compliance officer and records, information, or reports provided by a . . . compliance officer to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under Chapter 552, Government Code.

...

(e) The records, information, and reports received or maintained by a compliance officer retain the protection provided by this section only if the records, information, or reports are received, created, or maintained in the exercise of a proper function of the compliance officer as provided by the Office of Inspector General of the United States Department of Health and Human Services.

...

(f) This section . . . do[es] not apply to records made or maintained in the regular course of business by a hospital . . . university medical center or health science center, [or] hospital district[.]

Health & Safety Code § 161.032(c), (e), (f). You state that the submitted information at Tab 5B was generated as a result of a review by UTSW’s Office of Institutional Compliance (the “OIC”) in connection with a complaint of alleged professional and ethical misconduct. You indicate the records in question were not made or maintained in the regular course of business. *Cf. Texarkana Mem’l Hosp., Inc. v. Jones*, 551 S.W.2d 33, 35 (Tex. 1977) (defining records made or maintained in regular course of business). You explain the OIC is charged with ensuring that all federal, state, and local statutes governing publicly funded health care programs are being followed and fulfills a legal duty to ensure false or inaccurate claims are not submitted to the government and private payors. We understand UTSW’s compliance program was developed pursuant to guidelines issued by the Office of Inspector General of the United States Department of Health and Human Services. *See id.* § 161.032(e). Based on your representations and our review of the information at issue, we conclude UTSW must withhold the information at Tab 5B under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.<sup>1</sup>

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<sup>1</sup>As we are able to make this determination, we need not address your other arguments against disclosure of this information.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Medical records are confidential under section 159.002 of the MPA, which provides in part:

(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(b)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). When a file is created as the result of a hospital stay, we have concluded that 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, created or maintained by a physician, for purposes of the MPA. *See* Open Records Decision No. 546 (1990). Medical records must be released on the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. The medical records of a deceased patient may only be released on the signed written consent of the decedent's personal representative. *See id.* § 159.005(a)(5). Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We agree the submitted information at Tab 5C is a medical record governed by the MPA. Therefore, the information at Tab 5C must be withheld under section 159.002 of the MPA, unless UTSW receives the required consent for release under sections 159.004 and 159.005 of the MPA.<sup>2</sup>

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 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

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<sup>2</sup>As we are able to make this determination, we need not address your other arguments against disclosure of this information.

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 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).

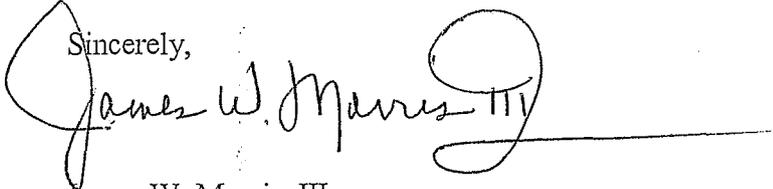
You contend the submitted information at Tab 5A either consists of or documents communications between attorneys for and representatives of UTSW. You have identified the parties to the communications. You explain these communications were made in connection with the rendition of professional legal services to UTSW. You state the communications were intended to be and remain privileged. Based on your representations and our review of the information at issue, we conclude UTSW may withhold the information at Tab 5A under section 552.107(1) of the Government Code.

In summary: (1) UTSW must withhold the information at Tab 5B under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code; (2) the information at Tab 5C must be withheld under section 159.002 of the MPA, unless UTSW receives the required consent for release under sections 159.004 and 159.005 of the MPA; and (3) UTSW may withhold the information at Tab 5A under section 552.107(1) of the Government Code.

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,

A handwritten signature in cursive script that reads "James W. Morris III". The signature is written in black ink and is positioned above a horizontal line.

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

JWM/em

Ref: ID# 402505

Enc: Submitted documents

c: Requestor  
(w/o enclosures)