



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 31, 2011

Ms. Nneka C. Egbuniwe
Deputy General Counsel
Dallas County Hospital District
5201 Harry Hines Boulevard
Dallas, Texas 75235

OR2011-04467

Dear Ms. Egbuniwe:

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# 413138.

The Dallas County Hospital District d/b/a Parkland Health & Hospital System (the "district") received a request for the names of all patients whose deaths have been reported to the medical examiner's office since January 1, 2009. You claim the submitted information is not subject to the Act. Alternatively, you claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, we note the request seeks only the names of the deceased patients. Accordingly, the submitted information that does not constitute names of patients is not responsive to the instant request. Further, we note a portion of the remaining information is not responsive to the instant request because it was created after the date the request was received. The district need not release non-responsive information in response to this request, and this ruling will not address that information.

You contend that, pursuant to section 181.006 of the Health and Safety Code, the submitted information is not public information subject to the Act. Section 181.006 states that:

For a covered entity that is a governmental unit, an individual's protected health information:

(1) includes any information that reflects that an individual received health care from the covered entity; and

(2) is not public information and is not subject to disclosure under [the Act].

Health & Safety Code § 181.006. 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 against disclosure of the submitted information.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 of the Government Code encompasses information made confidential by other statutes, such as the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA 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). Information that is 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). This office has also determined 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). We note that section 159.001 of the MPA defines

“patient” as a person who consults with or is seen by a physician to receive medical care. *See* Occ. Code § 159.001(3). Under this definition, a deceased person cannot be a “patient” under section 159.002 of the MPA. Thus, section 159.002 is applicable only to the medical records of a person who was alive at the time of the diagnosis, evaluation, or treatment. Upon review, we find you have failed to demonstrate how any of the responsive information constitutes medical records for purposes of the MPA. Accordingly, no portion of the responsive information may be withheld under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses section 241.152 of the Health and Safety Code, which states in relevant part:

- (a) Except as authorized by Section 241.153, a hospital or an agent or employe 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). The term “patient” is not defined for purposes of section 241.152 of the Health and Safety Code. When a word used in a statute is not defined, and that word is “connected with and used with reference to a particular trade or subject matter or is used as a word of art, the word shall have the meaning given by experts in the particular trade, subject matter, or art.” Gov’t Code § 312.002; *see also Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 485 (Tex. 1998). Taber’s Cyclopedic Medical Dictionary defines “patient” as “one who is sick with, or being treated for, an illness or injury; [or] . . . an individual receiving medical care.” Taber’s Cyclopedic Medical Dictionary 1446 (17th ed. 1989). We also note that other statutes dealing with medically related professions generally define patient as an individual who consults a health care professional. *See* Health & Safety Code § 611.001 (mental health records), Occ. Code §§ 159.001 (physician records), 201.401 (chiropractic records), 202.401 (podiatric records), 258.101 (dental records). Because the generally accepted medical definition of patient indicates that the term refers to a living individual, we find that it does not encompass a record pertaining to an individual who was deceased at the time the record was created. Upon review, we find you have failed to demonstrate how the responsive information constitutes health care information for the purposes of section 241.152 of the Health and Safety Code. Thus, the responsive information may not be withheld under section 552.101 of the Government Code on the basis of section 241.152 of the Health and Safety Code.

Section 552.101 also encompasses section 773.091 of the Health and Safety Code, which provides in relevant part:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

Health & Safety Code § 773.091(b). You assert the responsive information is confidential under section 773.091. The information at issue, however, was not created by emergency medical services ("EMS") personnel or by a physician providing medical supervision. Consequently, you have failed to demonstrate how the responsive information constitutes records of the identity, evaluation, or treatment of a patient created by EMS personnel or a physician providing medical supervision. Accordingly, none of the responsive information may be withheld under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code.

You also raise section 552.101 of the Government Code in conjunction with common-law and constitutional privacy. Common-law privacy protects information about an individual if the information (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). The types of information considered intimate or 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). Privacy is a personal right that lapses at death; thus, information may not be withheld on the basis of the privacy interests of a deceased individual. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 (1981). Upon review, we find the information we have marked, which pertains to living family members of the deceased individuals at issue in the responsive information, is highly intimate or embarrassing and of no legitimate public concern. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, the remaining information at issue pertains only to deceased individuals. Upon review, we find that none of the remaining information is highly intimate or embarrassing information that pertains to living individuals. Accordingly, no portion of the remaining responsive information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Constitutional privacy protects two kinds of interests. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy" pertaining to marriage, procreation, contraception, family relationships, and child rearing and education that the United States Supreme Court has recognized. See *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in disclosure of the information. See ORD 455 at 7. Constitutional privacy is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

As previously noted, the right to privacy is a personal right that lapses at death. See *Moore*, 589 S.W.2d at 491; ORD 272 at 1 (privacy rights lapse upon death). The United States Supreme Court has determined, however, that surviving family members can have a privacy interest in information relating to their deceased relatives. See *Nat'l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570 (2004) (holding surviving family members have a right to personal privacy with respect to their close relative's death-scene images and such privacy interests outweigh public interest in disclosure). Because the remaining responsive information relates only to deceased individuals, it may not be withheld from disclosure based on these individuals' privacy interests. However, you assert that the deceased individuals' family members may have a privacy interest in the information at issue. However, as of the date of this decision, we received no correspondence from any surviving family members of the deceased individuals. Thus, we have no basis for determining that any surviving family members have a privacy interest in any of the remaining responsive information. Therefore, the remaining responsive information may not be withheld under section 552.101 of the Government Code on the basis of constitutional privacy.

In summary, the district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The remaining responsive 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 cursive script that reads "Kate Hartfield".

Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 413138

Enc. Submitted documents

c: Requestor
(w/o enclosures)