



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 28, 2011

Ms. Jacqueline E. Hojem  
Public Information Coordinator  
Metropolitan Transit Authority of Harris County  
P.O. Box 61429  
Houston, Texas 77208-1429

OR2011-09198

Dear Ms. Hojem:

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# 423807 (ORR# 2011-0209).

The Metropolitan Transit Authority of Harris County ("METRO") received a request for a specified claim file. You state METRO has released some of the requested information, but claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code and protected under Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information.

Initially, we note Exhibits 6 and 7 are subject to section 552.022 of the Government Code. Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Gov't Code § 552.022(a)(1). Although you assert this information is excepted under sections 552.103 and 552.111 of the Government Code, these sections are discretionary exceptions under the Act and do not constitute "other law" for purposes of section 552.022. *See 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 section 552.103); Open Records Decision Nos. 663 at 5 (1999) (governmental body may waive section 552.111), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, METRO may not withhold Exhibit 6 or 7 under section 552.103 or 552.111. However, the

Texas Supreme Court has held the Texas Rules of Civil Procedure are "other law" that makes information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Section 552.101 of the Government Code also constitutes other law for purposes of section 552.022. We will therefore consider your arguments under Texas Rule of Civil Procedure 192.5 and section 552.101 for Exhibits 6 and 7, as well as your arguments for Exhibit 5.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You assert some of the information in Exhibit 5 is confidential under section 5.08 of former article 4495b of the Texas Civil Statutes. However, in 1999, the former article 4495b was codified as the Medical Practice Act (the "MPA") at subtitle B of title 3 of the Occupations Code and section 5.08 of former article 4495b was codified at chapter 159 of the Occupations Code. *See* Act of May 13, 1999, 76th Leg., R.S., ch. 388, § 6(b)(1), 1999 Tex. Gen. Laws 1431, 2440. Thus, we will address your arguments for this information under the MPA. Section 159.002 of the MPA provides in part the following:

(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). Medical records must be released upon the patient's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *Id.* §§ 159.004, 159.005. Section 159.002(c) also requires any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the portion of the submitted information that constitutes medical records and that METRO may only release in accordance with the MPA. The remaining information at issue does not consist of medical records and, thus, METRO may not withhold any of the remaining information pursuant to the MPA.

Section 552.101 also encompasses section 773.091 of the Health and Safety Code, which is applicable to certain information related to the provision of emergency medical services ("EMS"). Section 773.091(b) provides as follows:

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). This confidentiality “does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.” *Id.* § 773.091(g). Accordingly, METRO must withhold the EMS records we have marked in Exhibit 5 under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code, except for the information subject to section 773.091(g), which must be released.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (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 the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Some of the submitted information is highly intimate or embarrassing and is not of legitimate concern to the public; therefore, METRO must withhold this information, which we have marked, under section 552.101 in conjunction with common-law privacy. Upon review, however, we find the remaining information either is not highly intimate or embarrassing, or is of legitimate public interest; therefore, the remaining information is not confidential under common-law privacy, and METRO may not withhold it under section 552.101 on that ground.

You assert Exhibit 7 is privileged under Texas Rule of Civil Procedure 192.5. For the purpose of section 552.022, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 at 9-10 (2002). Core work product is defined as the work product of an attorney or an attorney’s representative developed in anticipation of litigation or for trial that contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a

governmental body must demonstrate the material was (1) created for trial or in anticipation of litigation and (2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *Id.*

The first prong of the work product test, which requires a governmental body to show the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second prong of the work product test requires the governmental body to show the documents at issue contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

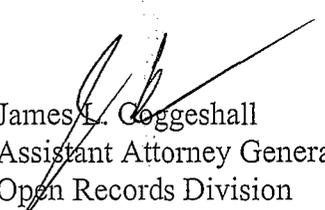
You inform us Exhibit 7 "consists of an analysis that was created for METRO by Rimkus Consulting Group Inc[.]" You also state "the analysis was commissioned by METRO after it received notice of representation in compliance with the notice provisions of the Texas Torts Claims Act, and was commissioned by METRO for the purposes of such litigation[.]" Upon review, we find you have established Exhibit 7 consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. Therefore, METRO may withhold Exhibit 7 under rule 192.5.

To conclude, METRO may only release the marked medical records in accordance with the MPA. METRO must withhold the EMS records we have marked in Exhibit 5 under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code, except for the information subject to section 773.091(g), which must be released. METRO must also withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. METRO may withhold Exhibit 7 under Texas Rule of Civil Procedure 192.5. METRO must release the remaining information.

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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/eb

Ref: ID# 423807

Enc. Submitted documents

c: Requestor  
(w/o enclosures)