



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 11, 2011

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

OR2011-09737

Dear Ms. Chatterjee:

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# 423361 (OGC# 137054).

The University of Texas Medical Branch at Galveston (the "university") received a request for a specified investigation. You claim some of the submitted information is not subject to the Act. You further claim the submitted information is excepted from disclosure pursuant to sections 552.101 and 552.103 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, we address your argument that portions of the submitted information are not subject to the Act. You contend that pursuant to section 181.006 of the Health and Safety Code, the information you have marked is not subject to the Act. 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(2). We will assume, without deciding, the university is a covered entity. 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.

Next, we note the submitted information consists of a completed investigation subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108.” Gov’t Code § 552.022(a)(1). Pursuant to section 552.022(a)(1), completed investigations are expressly public unless they are either excepted under 552.108 of the Government Code or are expressly confidential under “other law.” Although you raise section 552.103 of the Government Code for this information, section 552.103 is a discretionary exception to disclosure that protects 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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not “other law” that makes information confidential for the purposes of section 552.022. Therefore, the university may not withhold the submitted information under section 552.103 of the Government Code. However, because information subject to section 552.022(a)(1) may be withheld under section 552.101, we will consider the applicability of this exception to 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.” Gov’t Code § 552.101. Section 552.101 encompasses information protected by other statutes, such as section 181.006. As stated above, assuming the university is a covered entity, we must decide whether the information you have marked consists of protected health information. Section 181.001 states that “[u]nless otherwise defined in this chapter, each term that is used in this chapter has the meaning assigned by the Health Insurance Portability and Accountability Act and Privacy Standards [(“HIPAA”).” Health & Safety Code § 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:

(1) Except as provided in paragraph (2) of this definition[.]

...

(2) Protected health information excludes individually identifiable health information in:

...

(iii) Employment records held by a covered entity in its role as employer.

45 C.F.R. § 160.103. Upon review, we find the information you have marked under section 181.006 is contained in the employment records of the clinical associate at issue and being held by the university in its role as an employer. Thus, you have failed to demonstrate the information you have marked consists of protected health information and no portion of it may be withheld under section 552.101 in conjunction with section 181.006 of the Health and Safety Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found medical information or information indicating disabilities or specific illnesses is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (information pertaining to illness from severe emotional and job-related stress), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities), 343 (1982) (references in emergency medical records to drug overdoses, acute alcohol intoxication, obstetrical or gynecological illnesses, convulsions or seizures, and emotional or mental distress). Upon review, we find you have failed to demonstrate that the information you have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the university may not withhold this information under section 552.101 on that basis. As you raise no additional exceptions against disclosure, the submitted information must be released.¹

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,

¹We note the requestor has a special right of access to some of the information being released in this instance. Gov't Code § 552.023 (person or person's authorized representative has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). Because such information may be confidential with respect to the general public, if the university receives another request for this information from a different requestor, the university must again seek a ruling from this office.

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, appearing to read 'Tamara Wilcox', written in a cursive style.

Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 423361

Enc. Submitted documents

c: Requestor
(w/o enclosures)