



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 29, 2011

Ms. Neera Chatterjee
Public Information Coordinator
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2011-10918

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# 425614 (OGC # 137544).

The University of Texas Medical Branch at Galveston ("UTMB") received a request for information relating to certain incidents involving the requestor. You state some of the requested information either has been or will be released. You contend the submitted information is not subject to the Act. You also claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the information you submitted.

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 "[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, UTMB is a covered entity. Section 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]." *Id.* 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 the information it encompasses confidential. Thus, we will consider your arguments against disclosure 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 contend the information you have marked is confidential under section 552.101 in conjunction with section 181.006 of the Health and Safety Code. Thus, and assuming, as previously stated, UTMB is a covered entity, we must determine whether the marked information consists of protected health information. Section 181.001 of the Health and Safety Code states “[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). As chapter 181 of the Health and Safety Code 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. The information you seek to withhold under section 181.006 pertains to the requestor, an employee of UTMB, and her alleged mistreatment of patients of UTMB in the course of her employment. Thus, we find the information at issue consists of employment records held by UTMB as the requestor’s employer. We therefore conclude the information you have marked is not confidential under section 181.006 of the Health and Safety Code and may not be withheld on that basis under section 552.101 of the Government Code.

You also contend the marked information is confidential under section 552.101 in conjunction with common-law and constitutional privacy. Section 552.101 also encompasses common-law privacy, which protects information if it contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and is 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 elements of the test must be established. *Id.* at 681-82. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See Open Records Decision No. 455 (1987)* (prescription drugs, illnesses, operations, and physical handicaps).

The information at issue pertains to the requestor's alleged mistreatment of a patient of UTMB. This office has determined common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978); *see also* Open Records Decision No. 408 at 11 (1984) (fact that allegations were found to be untrue could easily be released with the allegations themselves, mitigating harm). Nevertheless, the information at issue includes the identities of patients, including the patient who was the victim of the alleged mistreatment. We find the patients' identities are highly intimate or embarrassing and not a matter of legitimate public interest. We therefore conclude UTMB must withhold the information we have marked that identifies the patients under section 552.101 of the Government Code in conjunction with common-law privacy. UTMB may not withhold any of the remaining information on that basis.

Section 552.101 of the Government Code also encompasses constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See* ORD 455 at 4. The first type of constitutional privacy protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy balances an individual's privacy interests against the public's need to know information of public concern. *Id.* The scope of information protected by constitutional privacy is narrower than under common-law privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). We find you have not demonstrated how any portion of the remaining information at issue falls within the constitutional zones of privacy. Moreover, because the patients' identities must be withheld under common-law privacy, we find you have not demonstrated how any of the remaining information at issue implicates an individual's privacy interests for purposes of constitutional privacy. We therefore conclude UTMB may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with constitutional privacy.

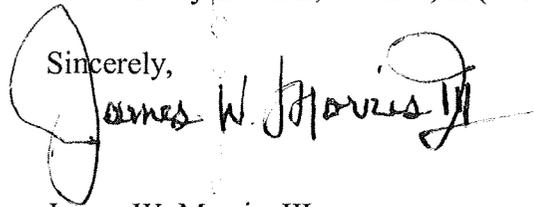
In summary, UTMB must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. UTMB must release the rest of the submitted information.

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, 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, appearing to read "James W. Morris, III". The signature is written in a cursive style and is positioned to the right of the word "Sincerely,".

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

JWM/em

Ref: ID# 425614

Enc: Submitted documents

c: Requestor
(w/o enclosures)