



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 23, 2011

Ms. Luara Pfefferle  
Assistant General Counsel  
Texas Department of State Health Services  
P.O. Box 149347  
Austin, Texas 78714-9347

OR2011-12208

Dear Ms. Pfefferle:

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# 427864 (DSHS File 19113-2011).

The Texas Department of State Health Services (the "department") received a request for all reports, disciplinary actions, violations, and enforcement actions pertaining to a named company during a specified period. You state the department will release some of the information to the requestor. You claim 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 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. This exception encompasses 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). 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 also has concluded when a file is created as the result of a hospital stay, all 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). Medical records must be released on receipt of the patient's signed, written consent, provided 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. 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).

As an attorney for the individual whose medical records are at issue, the requestor might have a right of access to the information you have submitted as Exhibit C. However, we are unable to determine whether the requestor has acquired the proper consent to receive this information. Therefore, we conclude the department must release the information submitted as Exhibit C upon receipt of a proper authorization under the MPA. However, in the absence of a proper authorization, the department must withhold the information submitted as Exhibit C under section 552.101 of the Government Code in conjunction with the MPA. *See* Open Records Decision No. 598 (1991).

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681–82. This office has concluded some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required 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). Upon review, we agree the information we have marked is highly intimate and embarrassing and of no legitimate concern to the public. The department must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. However, as previously mentioned, the requestor in this case is the attorney for one of the individuals whose private information is at issue. Therefore, the department may not withhold information pertaining solely to the requestor's

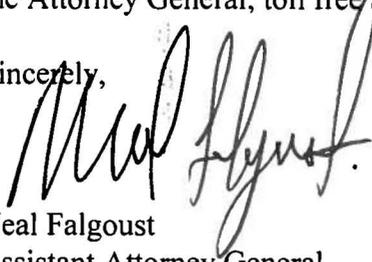
client on the basis of common-law privacy. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Further, we find the remaining information you have marked is not highly intimate and embarrassing and of no legitimate concern to the public. Thus, the department may not withhold the remaining information under section 552.101 of the Government Code on that basis.

In summary, the department must release the information submitted as Exhibit C upon receipt of a proper authorization under the MPA. However, in the absence of a proper authorization, the department must withhold the information submitted as Exhibit C under section 552.101 of the Government Code in conjunction with the MPA. The department must withhold the information we have marked in Exhibit B under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information must be released.<sup>1</sup>

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,



Neal Falgoust  
Assistant Attorney General  
Open Records Division

NF/agn

---

<sup>1</sup>We note the requestor has a right of access to some of the information being released. Therefore, if the department receives another request for the same information from a different requestor, it must again seek a ruling from our office.

Ms. Luara Pfefferle - Page 4

Ref: ID# 427864

Enc. Submitted documents

c: Requestor  
(w/o enclosures)