



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 9, 2011

Ms. Neera Chatterjee
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2011-13033

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# 429356 (OGC # 138182).

The University of Texas Southwestern Medical Center (the "university") received a request for all personnel records pertaining to a named individual.¹ You state the university has released some information to the requestor. You claim a portion of the remaining requested information is not subject to the Act. You also claim a portion of the information at issue is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹We note the requestor has agreed to the redaction of the individual's social security number, date of birth, and bank or other financial account information. Therefore, any such information within the submitted documents is not responsive to the instant request and we do not address it.

²We assume the "representative sample" of information submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

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:

(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 for this information, as well as the other submitted information.

Section 552.101 of the Government Code exempts 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 161.032 of the Health and Safety Code, which provides in part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

...

(c) Records, information, or reports of a medical committee . . . and records, information, or reports provided by a medical committee . . . to the governing body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code.

...

(f) This section and Subchapter A, Chapter 160, Occupations Code, do not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility.

Health & Safety Code §§ 161.032(a), (c), (f). Section 161.031(a) defines a "medical committee" as "any committee . . . of (3) a university medical school or health science

center[.]” *Id.* § 161.031(a)(3). Section 161.0315 provides in relevant part that “[t]he governing body of a hospital [or] university medical school or health science center . . . may form . . . a medical committee, as defined by Section 161.031, to evaluate medical and health care services[.]” *Id.* § 161.0315(a).

The precise scope of the “medical committee” provision has been the subject of a number of judicial decisions. *See, e.g., Memorial Hosp.—The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996); *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988); *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1986). These cases establish that “documents generated by the committee in order to conduct open and thorough review” are confidential. This protection extends “to documents that have been prepared by or at the direction of the committee for committee purposes.” *Jordan*, 701 S.W.2d at 647-48. Protection does not extend to documents “gratuitously submitted to a committee” or “created without committee impetus and purpose.” *Id.* at 648; *see also* Open Records Decision No. 591 (1991) (construing, among other statutes, statutory predecessor to section 161.032).

You state the university established the Medical Executive Committee (the “MEC”) and the sub-committees and ad hoc committees which report to the MEC, to make recommendations to the Board of Managers on matters of peer review, credentialing and privileging of physicians, approval of hospital rules and regulations, bylaws changes, and quality and safety. You state an ad hoc subcommittee, the Quality Assurance Committee, reviews incidents and complaints and makes recommendations to the MEC. You state the Credentialing and Privileges Committee makes recommendations regarding whether particular health care providers may be given privileges and credentials to provide services at the university’s hospitals. You state the Promotion and Tenure Committee considers recommendations from departmental chairpersons regarding faculty promotions and awards of tenure for all university faculty. You state the Surgical Peer Review Committee reviews surgical-related incidents, complaints and providers and makes recommendations to the MEC regarding matters of medical peer review, patient safety, policies and procedures, and quality assurance. Finally, you state within the otolaryngology department, there is an ad hoc Peer Review Committee, which conducts peer evaluations, assesses the qualifications of faculty, and tracks faculty performance. Thus, we agree these committees are “medical committees” under section 161.031. Upon review, we find the majority of the information you have marked was prepared at the direction of the named committees and for committee purposes. Accordingly, the university must withhold the information we have marked under section 552.101 in conjunction with section 161.032 of the Health and Safety Code. However, upon review, we find you have failed to demonstrate how the remaining portion of the ad hoc Quality Assurance Committee information was not created in the regular course of business. *See Memorial Hosp.—The Woodlands*, 927 S.W.2d at 10 (regular course of business means “records kept in connection with the treatment of . . . individual patients as well as the business and administrative files and papers apart from committee deliberations” and privilege does not prevent discovery of material presented to hospital committee if otherwise available and “offered or proved by means apart from the record of the

committee.” (quoting *Texarkana Memorial Hosp.*, 551 S.W.2d at 35-6)). Therefore, we find you have not established the remaining information of the ad hoc Quality Assurance Committee is confidential under section 161.032, and the university may not withhold it under section 552.101 on that basis.

Section 552.101 also encompasses the federal Family and Medical Leave Act (the “FMLA”). See 29 U.S.C. § 2801 *et seq.* Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements pertaining to information that is subject to the FMLA. Subsection (g) of section 825.500 provides that:

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees’ family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA, as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[], except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee’s physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). Upon review, we find the information you have marked is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find none of the release provisions of the FMLA apply to the information. Accordingly, the university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 825.500 of title 29 of the Code of Federal Regulations.

Section 552.101 of the Government Code also encompasses medical records made confidential under the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in pertinent 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 determined that 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). We have also found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990). Upon review, we find some of the remaining information constitutes confidential medical records under the MPA and the university must withhold this information, which we have marked, under section 552.101 of the Government Code.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege, unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state some of the remaining information constitutes communications between attorneys and employees of the university that were made for the purpose of facilitating the rendition of professional legal services to the university. You further state this information was made in confidence and has maintained its confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to this information. Accordingly, the university may withhold the information you have marked under section 552.107 of the Government Code.

We next address your argument under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” *See Gov’t Code* § 552.111. This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

- (1) [M]aterial prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that:

- a) 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 b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. 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; ORD 677 at 7.

You argue some of the information constitutes the core work product of the Director of Professional Liability in the university’s Office of Vice President for Legal Affairs. You contend it is reasonable to conclude litigation would ensue because the issues relate to quality assurance. You note that when a requestor seeks an attorney’s entire litigation file, and the governmental body demonstrates it was created in anticipation of litigation, the entire file may be withheld under section 552.111. In the instance, however, the present request is not for an entire litigation file. Additionally, we find you have failed to demonstrate how the information at issue was prepared in anticipation of litigation for the purposes of section 552.111; therefore, the university may not withhold the information at issue as attorney work product under section 552.111 of the Government Code.

Section 552.101 also encompasses section 181.006 of the Health and Safety Code. As noted above, 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. Section 181.001(b)(2) defines “[c]overed entity,” in part, as “any person who:

(A) for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site[.]

Id. § 181.001(b)(2). You inform us the university’s privacy policy demonstrates that it is a covered entity. You indicate the university maintains health information for the individuals it serves, including information showing that an individual received medical care from the university. You indicate the information collected, used, and stored by the university consists of protected health information. Thus, you claim the university is a covered entity for the purposes of section 181.006 of the Health and Safety Code.

In order to determine whether the university is a covered entity for the purposes of section 181.006 of the Health and Safety Code, we must address whether the university engages in the practice of collecting, analyzing, using, evaluating, storing or transmitting 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”].” *Id.* § 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 that is transmitted or maintained in electronic media or any other form or medium. *See* 45 C.F.R. § 160.103. HIPAA defines “individually identifiable health information” as information that is a subset of health information, including demographic information collected from an individual, and:

(1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and

(2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

...

(i) That identifies the individual; or

(ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual[.]

45 C.F.R. § 160.103. We note some of the information you have marked was received by the university as a health care provider and relates to the provision of health care to a named individual. Upon review, we find this information consists of protected health information for purposes of section 181.006 of the Health and Safety Code. You indicate the university collects and stores this information for the purposes of providing health care-related services. Therefore, with respect to this information, the university is a health care entity that is in the practice of collecting, using, and storing protected health information, and, consequently, is a covered entity for the purposes of section 181.006 of the Health and Safety Code. Accordingly, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 181.006 of the Health and Safety Code. We find the remaining information you have marked under section 181.006 of the Health and Safety Code does not consist of protected health information for the purposes of section 181.006; therefore it may not be withheld on this basis.

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 found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we find the personal financial information we have marked is not of legitimate public interest. Thus, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. We find the remaining information you have marked is not highly intimate or embarrassing information of no legitimate public concern. Accordingly, it may not be withheld on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of 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. Open Records Decision No. 455 at 4 (1987). The first type 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 requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than under the common-law doctrine of 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)). In this instance, you have not demonstrated how constitutional privacy applies to any portion of the remaining information. Accordingly, no portion of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with constitutional privacy.

We note, and you acknowledge, the remaining information contains information that may be subject to section 552.117. Section 552.117 excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). Whether a particular piece of information is protected by

section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the university may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, for those employees who timely elected to keep their personal information confidential, the university must withhold the information you have marked, as well as the information we have marked, in the remaining information. The university may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential.

Section 552.137 of the Government Code exempts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. The marked e-mail addresses are not any of the types specifically excluded by section 552.137(c). Accordingly, the university must withhold the e-mail addresses you have marked, as well as the e-mail addresses we have marked, under section 552.137 of the Government Code unless the owners of the addresses have affirmatively consented to their release under section 552.137(b).³

In summary, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code. The university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 825.500 of title 29 of the Code of Federal Regulations. The university must withhold the information we have marked under section 552.101 in conjunction with the MPA. The university may withhold the information you have marked under section 552.107 of the Government Code. The university must withhold the information we have marked under section 552.101 in conjunction with section 181.006 of the Health and Safety Code. The university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the employees whose information is at issue timely elected to keep their personal information confidential pursuant to section 552.024, the university must withhold the information marked under section 552.117. The university must withhold the e-mail addresses marked under section 552.137 of the Government Code

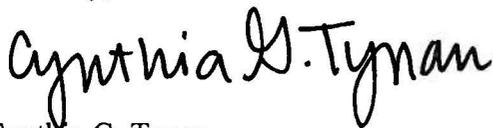
³We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

unless the owners of the addresses have affirmatively consented to their release. The remaining 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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/akg

Ref: ID# 429356

Enc. Submitted documents

c: Requestor
(w/o enclosures)