



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 1, 2011

Ms. Zeena Angadicheril
Office of General Counsel
University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2011-16027

Dear Ms. Angadicheril:

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# 434942 (OGC# 139193).

The University of Texas Medical Branch at Galveston (the “university”) received a request for any and all documents and records, both physical and electronic, regarding a named individual, including all evaluations and other reports that reflect on the named individual’s competence and ability as a physician and/or student. You state the university will release some of the requested information. You claim portions of the remaining information are not subject to the Act. You also claim the remaining information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹

Initially, we address your argument 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, the university is a

¹This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. See Gov’t Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

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]." 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 remaining information.

Next, we note some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) 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). In this instance, portions of the information at issue consists of completed evaluations. Section 552.022(a)(1) makes this information expressly public unless it is confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Although you raise section 552.103, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential). As such, section 552.103 is not other law that makes information confidential for the purpose of section 552.022(a)(1). Therefore, the university may not withhold the information subject to section 552.022(a)(1) under section 552.103 of the Government Code. However, you also raise section 552.101 of the Government Code, which does constitute other law for purposes of section 552.022(a)(1). Accordingly, we will address the applicability of this exception to the information at issue. We will also consider the applicability of section 552.103 for the information not subject to section 552.022.

We next turn to your claim under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 states in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The university has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation is pending or reasonably anticipated on the date the university received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The university must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.² Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In this instance, the requestor's client is the subject of the present request for information. You contend the university reasonably anticipates litigation because, prior to the date the request was received, the university received a representation letter from the requestor stating his client "undoubtedly has valid claims under the [Federal Medical Leave Act] and potentially under [f]ederal whistleblower acts." The letter further states the attorney will

²In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

resolve his client's employment issues through the court system if they cannot be resolved amicably. You state there has been no movement towards the resolution of the requestor's client's claims. Based on these representations and our review, we find the university reasonably anticipated litigation on the date the request was received. You also argue the information at issue is related to the anticipated litigation. Upon review, we agree the information not subject to section 552.022 is related to the anticipated litigation. Thus, we conclude section 552.103 of the Government Code is applicable to the information not subject to section 552.022.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103 of the Government Code interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a). However, information accessed by the opposing party in the usual scope of employment is not considered to have been obtained by the opposing party to the anticipated litigation and thus, may be withheld under section 552.103. In this instance, some of the information at issue has been seen by the opposing party to the anticipated litigation. Further, some of the information at issue was seen outside her usual scope of employment with the university, and thus, may not be withheld under section 552.103. *Id.* Accordingly, the university may withhold the information we have marked under section 552.103 of the Government Code.³ We note the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We now turn to your remaining arguments for the information subject to section 552.022(a)(1) and that was seen by the opposing party. 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 that other statutes make confidential. Section 160.007 of the Occupations Code provides, in relevant part:

(a) Except as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.

Occ. Code § 160.007(a). "Medical peer review" is defined by the Medical Practice Act, subtitle B of title 3 of the Occupations Code, to mean "the evaluation of medical and health care services, including evaluation of the qualifications and professional conduct of professional health care practitioners and of patient care provided by those practitioners." *Id.* § 151.002(a)(7). A medical peer review committee is "a committee of a health care

³As our ruling for this information is dispositive, we need not address your remaining arguments against its release.

entity . . . or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services or the competence of physicians[.]” *Id.* § 151.002(a)(8). Section 161.032 of the Health and Safety Code further provides, in relevant 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, medical peer review committee, or compliance officer and records, information, or reports provided by a medical committee, medical peer review committee, or compliance officer to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under [the Act].

...

(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). For purposes of this confidentiality provision, a medical committee “includes any committee, including a joint committee, of . . . a university medical school or health science center[.]” *Id.* § 161.031(a)(3). Section 161.0315 provides that “[t]he governing body of a . . . university medical school or health science center . . . may form a medical peer review committee. . . or a medical committee . . . 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 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. *Jordan*, 701 S.W.2d at 647-48. This protection extends “to documents that have been prepared by or at the direction of the committee for committee purposes.” *Id.* 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 statutory predecessor to section 161.032 of the Health and Safety Code). We note section 161.032 does not make confidential “records made or maintained in the regular course of business by a hospital[.]” Health & Safety Code § 161.032(f); *see Memorial Hosp.—The Woodlands*, 927 S.W.2d at 10 (stating that reference to statutory

predecessor to section 160.007 in section 161.032 is clear signal that records should be accorded same treatment under both statutes in determining if they were made in ordinary course of business).

You state the university Residency Advisory Committee (the “RAC”) is a medical peer review committee and a medical committee tasked with “assessing the professional skill and care of medical residents” and monitoring the quality of patient care offered by medical residents for compliance with the accreditation standards of the Accreditation Council for Graduate Medical Education (“ACGME”) and university policy. You also state the RAC consists of university faculty members, including the university’s residency and fellowship training program directors. You indicate the RAC was formed by the university’s governing body. You explain the RAC reviews the university’s residency and fellowship training programs and evaluates performance by program participants to ensure the university’s residents are offering high quality health services. Based on your representations, we agree the RAC constitutes both a medical peer review committee and a medical committee. You also state the marked information was prepared by or for the RAC or were reviewed by the RAC for the purpose of fulfilling its committee functions. Based on your representations and our review, we find some of the remaining information at issue, which we have marked, is subject to section 160.007 of the Occupations Code and section 161.032 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 160.007 of the Occupations Code and section 161.032 of the Health and Safety Code.⁴ However, we find the university has failed to demonstrate the remaining information you have marked 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)). Thus, the remaining information does not constitute a record of a medical peer review for purposes of section 160.007 of the Occupations Code or a medical committee for purposes of section 161.032 of the Health and Safety Code, and it may not be withheld on those bases.

Section 552.101 of the Government Code also encompasses information protected by other statutes, such as the Family Medical Leave Act (the “FMLA”), section 2654 of title 29 of the United States Code. Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 provides:

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees’ family members, created for

⁴As our ruling for this information is dispositive, we need not address your remaining arguments against its release.

purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if the [Americans with Disabilities Act (the “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). You state the information you have marked consists of information created for the purpose of the FMLA. We find none of the release provisions of the FMLA apply to this information. Based on your representations, we conclude the university must withhold the information you have marked under section 552.101 in conjunction with the FMLA.⁵

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 demonstrated. *See id.* at 681-82. The type of information considered intimate and 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 some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 343 (1982), 455 (1987). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the university must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy.

⁵As our ruling for this information is dispositive, we need not address your remaining arguments against its release.

In summary, the university may withhold the information we have marked under section 552.103 of the Government Code. The university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 160.007 of the Occupations Code and section 161.032 of the Health and Safety Code. The university must withhold the information you have marked under section 552.101 in conjunction with the FMLA. The university must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy. As you raise no argument against disclosure of the remaining information, it 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,



Kirsten Brew
Assistant Attorney General
Open Records Division

KB/em

Ref: ID# 434942

Enc. Submitted documents

c: Requestor
(w/o enclosures)