



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 27, 2012

Ms. Erin Higginbotham  
Denton, Navarro, Rocha & Bernal, P.C.  
2500 West William Cannon Drive, Suite 609  
Austin, Texas 78745

OR2012-02982

Dear Ms. Higginbotham:

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# 445095.

The Dallas County Hospital District d/b/a Parkland Health & Hospital System (the "district"), which you represent, received a request for all records pertaining to a named nurse anesthetist. You state you will release some information to the requestor. You also state you will redact certain information pursuant to sections 552.130 and 552.136 of the Government Code.<sup>1</sup> You claim that some of the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the representative of the requestor. *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should not be released).

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<sup>1</sup>On September 1, 2011, the Texas legislature amended sections 552.130 and 552.136 of the Government Code to allow a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) and section 552.136(b) without the necessity of seeking a decision from the attorney general. *See Gov't Code* §§ 552.130(c), .136(c). Thus, if a governmental body redacts such information, it must notify the requestor in accordance with sections 552.130(e) and 552.136(e). *See id.* §§ 552.130(d), (e), .136(d), (e).

<sup>2</sup>We note you failed to raise certain arguments under section 552.101 of the Government Code within the required fifteen-day deadline. *See Gov't Code* § 552.301(e). However, as section 552.101 is a mandatory exception, it provides a compelling reason to overcome the presumption of openness. *See id.* § 552.302. Therefore, we will consider the applicability of the additional arguments to the submitted information.

Initially, we note the requestor has excluded patient medical records and the named nurse anesthetist's social security number, personal banking information, phone numbers, and addresses, and relative information from the request. Accordingly, this information is not responsive to the present request. This ruling does not address the public availability of the submitted information that is not responsive to this request, and the district need not release that information to the requestor.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This exception encompasses information protected by other statutes, such as section 161.032 of the Health and Safety Code. Section 161.032 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 hospital [or] a medical organization [or] hospital district[.]" *Id.* § 161.031(a). Section 161.0315 provides in relevant part that "[t]he governing body of a hospital, medical organization [or] hospital district . . . 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 assert the information you have marked under section 161.032 constitutes confidential records of medical committees. You inform us the district’s board of managers (the “board”) is appointed by the Dallas County Commissioners Court to carry out fiduciary and statutory responsibilities in managing, controlling, and administering the district. You state the board provides authority to the district’s medical advisory council to maintain, through the medical staff bylaws, “a complete procedure for making recommendations . . . concerning staff appointments and reappointments, as well as granting, reduction, suspension, and revocation of clinical privileges based on the individual’s qualifications, experience, and current professional competence.” You explain that as part of the medical staff appointment and reappointment process delineated in the Medical Staff Bylaws, staff working the Medical Staff Services Office obtain all physician and Certified Registered Nurse Anesthetist demographic data and verifications of the physician’s or nurse’s education, training, work history, and references. The staff then completes the application and presents it to the Credentials Committee for review. If the Credentials Committee approves the application, it is recommended to the Medical Advisory Council and, ultimately, the board for final action. Based on your representations, we agree the Credentials Committee is a medical committee as defined by section 161.031 of the Health and Safety Code.

You state the some of information you have marked under section 161.032 consists of information related to the credentialing of the named nurse. You state the information was created and obtained by district staff exclusively in support of and to verify information provided on the nurse’s applications for appointment or reappointment to the district’s medical staff. You state these documents were created and collected on behalf of the Credentials Committee and used in evaluating the qualifications of the nurse at issue. Based on your representations and our review, we agree the information at issue consists of confidential records of a medical committee under section 161.032 of the Health and Safety Code. Accordingly, the district must withhold this information under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety.<sup>3</sup>

You also state one of the board’s responsibilities is “[t]o establish, support, and oversee a system-wide performance improvement program.” You inform us that, in furtherance of this duty, the board is responsible for the implementation and maintenance of the Performance Improvement Plan (“PIP”). Further, you state under the PIP, the board provides authority to medical staff to establish and support medical committees to carry out quality and performance improvement activities system-wide.

You explain one such committee is the Quality Improvement Committee. You state the purpose of this committee is to identify incidents involving patient care, evaluate their causes and severity, and make recommendations on how to remedy the situation and reduce the likelihood of reoccurrence. Based on your representations, we agree the Quality

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure.

Improvement Committee is a medical committee as defined by section 161.031 of the Health and Safety Code.

You explain the remaining information you have marked under section 161.032 consists of reports and supporting information pertaining to incidents involving patient care and includes the evaluation of the events reported, review of relevant medical reports and other reports, and recommendations for how to prevent such events in the future. You state the information at issue was not prepared in the regular course of business but was gathered for inclusion in periodic reports to the Quality Improvement Committee. Based on your representations and our review, we find the remaining information you have marked under section 161.032 of the Health and Safety Code consists of confidential records of a medical committee. Accordingly, the district must withhold this information under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.<sup>4</sup>

Section 552.101 of the Government Code also encompasses section 467.007 of the Health and Safety Code. Section 467.007 provides:

(a) Any information, report, or record that an approved peer assistance program or a licensing or disciplinary authority receives, gathers, or maintains under this chapter is confidential. Except as prescribed by Subsection (b) or by Section 467.005(c), a person may not disclose that information, report, or record without written approval of the impaired professional or other interested person. An order entered by a licensing or disciplinary authority may be confidential only if the licensee subject to the order agrees to the order and there is no previous or pending action, complaint, or investigation concerning the licensee involving malpractice, injury, or harm to any member of the public. It is the intent of the legislature to encourage impaired professionals to seek treatment for their impairments.

(b) Information that is confidential under Subsection (a) may be disclosed:

(1) at a disciplinary hearing before a licensing or disciplinary authority in which the authority considers taking disciplinary action against an impaired professional whom the authority has referred to a peer assistance program under Section 467.006(a) or (b);

(2) at an appeal from a disciplinary action or order imposed by a licensing or disciplinary authority;

(3) to qualified personnel for bona fide research or educational purposes only after information that would identify a person is removed;

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(4) to health care personnel to whom an approved peer assistance program or a licensing or disciplinary authority has referred the impaired professional; or

(5) to other health care personnel to the extent necessary to meet a health care emergency.

Health & Safety Code § 467.007. You contend that the information you have marked is subject to section 467.007. By its terms, section 467.007 only applies to information received, gathered, or maintained by an approved peer assistance program or a licensing or disciplinary authority. However, the information at issue is maintained by the district. Therefore, we conclude section 467.007 does not make the information at issue confidential in this instance. Consequently, the district may not withhold this information under section 552.101 of the Government Code in conjunction with section 467.007 of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. The MPA is applicable to medical records. *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

*Id.* § 159.002(a)-(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 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 agree most of the information you have marked

constitutes medical records subject to the MPA. However, the remaining information you have marked does not consist of medical records subject to the MPA. Accordingly, unless the district receives written consent for release of the records that complies with sections 159.004 and 159.005 of the MPA, with the exception of the information marked for release, the district must withhold the medical records you have marked pursuant to section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 of the Government Code 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. The type of information considered intimate or 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 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). This office has also found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, 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), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (common-law privacy protects assets and income source information). However, this office also has found a legitimate public interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 542 at 5 (1990), 470 at 4 (public has legitimate interest in job qualifications and performance of public employees); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate concern to the public. The district must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have not demonstrated any of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the district may not withhold any of the remaining information at issue under section 552.101 of the Government Code on that basis.

Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court has recently considered the applicability of

section 552.102, and has held section 552.102(a) exempts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 348 (Tex. 2010). Accordingly, the district must withhold the named nurse's date of birth, which you have marked, under section 552.102 of the Government Code.

In summary, the district must withhold (1) the information you have marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code, (2) the medical records you have marked, with the exception of the information we have marked for release, pursuant to section 552.101 of the Government Code in conjunction with the MPA, unless the district receives written consent for release of the records that complies with sections 159.004 and 159.005 of the MPA, (3) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, and (4) the information you have marked under section 552.102 of the Government Code. 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](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,



Nneka Kanu  
Assistant Attorney General  
Open Records Division

NK/em

Ref: ID# 445095

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)