



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 16, 2012

Ms. Cara Leahy White
For City of Euless
Taylor Olson Adkins Sralla Elam, L.L.P.
6000 Western Place, Suite 200
Fort Worth, Texas 76107-4654

OR2012-03914

Dear Ms. White:

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# 447902.

The City of Euless (the "city"), which you represent, received a request for information concerning the medical condition of a named city employee. Initially, you ask whether the submitted information is responsive to the request. In the alternative, you claim the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments to this office stating why the information at issue should or should not be released).

Initially, we consider whether the submitted information is responsive to the request. As you acknowledge, a governmental body must make a good-faith effort to relate a request to information it holds. *See* Open Records Decision No. 561 at 8 (1990). In this case, you have submitted information for our review and raised exceptions to disclosure for this information. Accordingly, we consider the city to have made a good-faith effort to identify the information responsive to the request, and we will address the applicability of the claimed exceptions to the submitted information.

Next, we understand the requestor to assert the city's request for a ruling is invalid because it was made by an attorney, and the requestor has no record the city has made this attorney its agent for purposes of requesting rulings from this office under the Act. Section 552.301 of the Government Code provides, in part:

[a] governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the exceptions under Subchapter C must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

See Gov't Code, § 552.301(a); *see also* 7 TEX. JUR. 3d *Attorneys at Law* § 143 (attorney presumed to have authority to act for client attorney professes to represent). We note section 552.301 does not require a governmental body to request a ruling from this office through an agent that has been specifically designated to request such a ruling. The request for a ruling at issue was submitted by an attorney who states she represents the city and is submitting the request for a ruling on behalf of the city. Accordingly, we find the city's request for a ruling complies with the requirements of section 552.301 of the Government Code.

Next, we address the requestor's contention that the city may not withhold information that was previously the subject of court testimony. This office has previously noted that "what information can or cannot be introduced during a trial and what information can or cannot be released to the public under the [predecessor to the Public Information] Act are two entirely different issues." Open Records Decision No. 416 at 7 (1984) (predecessor statute); *cf. Cornyn v. City of Garland*, 994 S.W.2d 258, 265 (Tex. App.—Austin 1999, no pet.) (alleged prior disclosure of information in course of discovery did not foreclose possibility of raising litigation exception in response to subsequent request); Open Records Decision No. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor). Furthermore, section 552.007 of the Government Code provides if a governmental body receives a request for information it has previously voluntarily released to a member of the public, it may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). The city raises sections 552.101 and 552.102, which make information confidential. Thus, even if we assumed the requestor were correct in his assertion the submitted information was previously released, such a situation would not prevent the city from now asserting the information is confidential by law. Accordingly, we will consider the city's claimed exceptions.

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. *See* Occ. Code §§ 151.001–165.160. 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.

Id. § 159.002(b)–(c). This office has concluded 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). 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). Upon review, we find the information we have marked consists of medical records subject to the MPA. Accordingly, the city must withhold this information under section 552.101 of the Government Code, unless the requestor provides the proper consent for release required by the MPA. The remaining information does not consist of medical records subject to the MPA, and the city may not withhold it under section 552.101 of the Government Code on that basis.

We note the remaining information contains information that is subject to protection under section 552.101 of the Government Code in conjunction with 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 certain kinds of medical information or information indicating disabilities or specific illnesses are protected by 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 find the information we have marked is highly intimate and embarrassing and of no legitimate public concern. Accordingly, the city must

withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

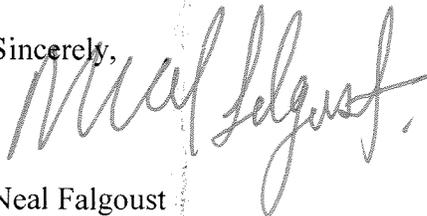
You raise section 552.102 of the Government Code in conjunction with the doctrine of common-law privacy. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549–51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the Third Court of Appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The court then considered the applicability of section 552.102(a) and held it exempts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Id.* at 347–48. Upon review, we find none of the remaining information is excepted under section 552.102(a) of the Government Code, and it may not be withheld on that basis.

In summary, the city must withhold the medical records we marked under section 552.101 of the Government Code in conjunction with the MPA, unless the requestor provides the proper consent for release required by the MPA. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. 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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/ag

Ref: ID# 447902

Enc. Submitted documents

c: Requestor
(w/o enclosures)