



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 8, 2013

Mr. C. David Richardson
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2013-07666

Dear Mr. Richardson:

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# 486721 (DSHS File No. 21366).

The Texas Department of State Health Services (the "department") received a request for all complaints against freestanding emergency medical rooms during a specified time period. 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. You state the submitted information is confidential under section 552.101 in conjunction with section 131.62 of title 25 of the Texas Administrative Code, which pertains to complaints against freestanding emergency medical care facilities. Section 131.62(b) provides, in pertinent part, as follows:

(b) All licensed facilities are required to provide the patient and his/her guardian at time of admission a written statement identifying the department as the responsible agency for facility complaint investigations. The statement shall inform persons to direct complaints to the [department]. This information must also be prominently and conspicuously posted for display in an area of the facility that is readily available to patients, families and visitors. . . . All complaints are confidential.

25 T.A.C. § 131.62(b). You seek to withhold the submitted information because it relates to complaint information regarding freestanding emergency medical care facilities. You state in accordance with section 254.101, the department adopted section 131.62 of title 25 of the Texas Administrative Code. *See* 25 T.A.C. § 131.62. Section 254.101 states, “[t]he executive commissioner [of the Health and Human Services Commission] shall adopt rules necessary to implement [chapter 254], including requirements for the issuance, renewal, denial, suspension, and revocation of a license to operate a [freestanding emergency medical care] facility.” Health & Safety Code § 254.101. However, we note a governmental body may not promulgate a rule that designates information as being confidential, so as to bring the information within the scope of section 552.101 of the Government Code, unless the governmental body has been given specific statutory authority to do so. *See* Open Records Decision Nos. 594 at 3 (1991) (requiring statutory authority before governmental body may deem information confidential), 484 at 2 (1987) (governmental bodies may not by rule or contract render information confidential for purposes of Act); *see also Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976); *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982). Upon review, we find section 254.101 does not provide the department with specific statutory authority to promulgate a rule that makes complaints against freestanding emergency medical care facilities confidential for the purposes of the Act. Therefore, we conclude the department may not withhold the submitted information under section 552.101 in conjunction with section 131.62(b) of title 25 of the Texas Administrative Code.

Section 552.101 also encompasses information made confidential by statute, such as the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides, in relevant 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 subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. 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). Upon review, we find the information we have marked constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician. Accordingly, the department must withhold the marked medical record under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information (1) containing 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 satisfied. *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 public 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 personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we conclude the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.137 of the Government Code excepts 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). *See* Gov’t Code § 552.137(a)-(c). Upon review, the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the department must withhold under section 552.101 of the Government Code the information we have marked in conjunction with the MPA and in conjunction with common-law privacy. The department must withhold the e-mail addresses we have marked under section 552.137 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, 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,



David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/dls

Ref: ID# 486721

Enc. Submitted documents

c: Requestor
(w/o enclosures)