



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 12, 2013

Mr. Ken Bost
Director
Brazos County Health Department
201 North Texas Avenue
Bryan, Texas 77803

OR2013-14000

Dear Mr. Bost:

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# 495971.

The Brazos County Health Department (the "department") received a request for information pertaining to a specified E. Coli outbreak in Brazos County. You state the department released some of the requested information. 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.

Initially, you state the department relies upon a previous determination issued by our office in Open Records Letter No. 2010-18849 (2010) as the basis for withholding the requested information. In that ruling, we determined, in part, the Texas Department of State Health Services may withhold information subject to section 81.046 of the Health and Safety Code without the necessity of requesting a decision from this office. We note Open Records Letter No. 2010-18849 only applies to the Department of State Health Services. Accordingly, Open Records Letter No. 2010-18849 does not authorize the department to withhold information subject to section 81.046 without requesting a ruling from this office. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling,

ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Thus, the department may not rely on Open Records Letter No. 2010-18849 as a basis for withholding any of 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. Section 552.101 encompasses section 81.046 of the Health and Safety Code, which provides in part:

(a) Reports, records, and information received from any source, including from a federal agency or from another state, furnished to a public health district, a health authority, a local health department, or the [Texas Department of State Health Services] that relate to cases or suspected cases of diseases or health conditions are confidential and may be used only for the purposes of this chapter.

(b) Reports, records, and information relating to cases or suspected cases of diseases or health conditions are not public information under [the Act], and may not be released or made public on subpoena or otherwise except as provided by Subsections (c), (d), and (f).

(c) Medical or epidemiological information may be released:

...

(2) with the consent of each person identified in the information[.]

Health & Safety Code § 81.046(a), (b), (c)(2). In Open Records Decision No. 577 (1990), this office concluded any information acquired or created during an investigation under chapter 81 of the Health and Safety Code is confidential and may not be released unless an exception set out in the statute applies. *See* ORD 577; Health & Safety Code § 81.046(b)-(d), (f). You indicate the submitted information was gathered or created by the department during an investigation of an E. Coli outbreak. Based on your representations and our review, we agree the submitted information is subject to section 81.046. The exceptions to confidentiality in subsections 81.046(d) and 81.046(f) are not applicable in this instance.

However, the requestor is the legal representative of certain individuals identified in the information at issue and is asking for the information on their behalf. *See* Health & Safety Code § 81.046(c)(2). In Open Records Decision No. 577, this office concluded section 81.046(c)(2), when read together with the statutory predecessor to section 552.023 of the Government Code, requires a county health department to release to a requestor any medical or epidemiological information it has concerning an individual who has consented

to the release. ORD 577 at 3. Therefore, if the health department receives consent from the requestor's clients under section 81.046(c)(2), then the requestor generally has a right of access under that section to the medical or epidemiological information pertaining to his clients, and that information must generally be released to him pursuant to section 552.101 of the Government Code in conjunction with section 81.046(c)(2) of the Health and Safety Code. In that case, the department must withhold the remaining information under section 552.101 in conjunction with section 81.046. If the department does not receive consent under section 81.046(c), then it must withhold the submitted information in its entirety under section 552.101 in conjunction with section 81.046.

To the extent the requestor's clients provide consent under section 81.046(c)(2), we note some of the submitted information consists of medical records of the requestor's clients that are subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 552.101 also encompasses the MPA, and 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.

Occ. Code § 159.002(a)-(b). Information that is 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). We have also found 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 the submitted information contains the medical records of the requestor's clients. Accordingly, the department must generally withhold this information under section 552.101 in conjunction with the MPA.

However, the medical records subject to the MPA also contain medical or epidemiological information subject to the release provision of section 81.046(c)(2) of the Health and Safety Code. Thus, if the department receives consent under section 81.046(c)(2), then there is a conflict between the release provided by section 81.046(c)(2) and the confidentiality of the medical records under the MPA. Where information falls within both a general and a

specific statutory provision, the specific provision prevails over the general provision, unless the general provision was enacted later and there is clear evidence that the legislature intended the general provision to prevail. *See* Gov't Code § 311.026 (where general statutory provision conflicts with specific provision, specific provision prevails as exception to general provision); *Cuellar v. State*, 521 S.W.2d 277 (Tex. Crim. App. 1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones). The MPA is a more specific statute than section 81.046 because the MPA applies specifically to medical records, while section 81.046 applies generally to all records created as part of an investigation into cases of diseases or health conditions. Although the release provisions in section 81.046 were later enacted, we have no indication the legislature intended section 81.046 to prevail over the MPA.¹ Therefore, to the extent the department receives consent under section 81.046(c)(2), the department must withhold the marked medical records under section 552.101 in conjunction with the MPA.²

In summary, if the department does not receive consent under section 81.046(c)(2), then it must withhold the submitted information in its entirety under section 552.101 in conjunction with section 81.046. If the department does receive consent under section 81.046(c)(2), then the department must withhold the marked medical records under section 552.101 in conjunction with the MPA. The remaining medical or epidemiological information pertaining to the requestor's clients must be released to him under section 552.101 of the Government Code in conjunction with section 81.046(c)(2). Further, in that case, any remaining information must be withheld under section 552.101 in conjunction with section 81.046(b).

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.texasattorneygeneral.gov/open_orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

¹*See* Act of August 5, 1981, 67th Leg., 1st C.S., ch. 1, § 1, 1981 Tex. Gen. Laws 1, 31 (enacting MPA); Act of June 2, 1987, 70th Leg., R.S., ch. 543, § 10, 1987 Tex. Gen. Laws 2176, 2180-81 (enacting statutory predecessor to Health & Safety Code § 81.046(c)(2)).

²This ruling does not affect an individual's right of access to a patient's medical records from the physician who provided treatment under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 159.004-.006; *cf. Abbott v. Tex. State Bd. of Pharmacy*, 391 S.W.3d 253 (Tex. App.—Austin 2012, no pet.) (MPA does not provide patient general right of access to his or her medical records from governmental body responding to request for information under Public Information Act).

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Megan G. Holloway". The signature is written in a cursive style with a large, looping "y" at the end.

Megan G. Holloway
Assistant Attorney General
Open Records Division

MGH/dls

Ref: ID# 495971

Enc. Submitted documents

c: Requestor
(w/o enclosures)