



DALLAS COUNTY

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OPINION COMMITTEE

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Honorable Greg Abbott
Attorney General of Texas
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I.D. # 043926

Dear General Abbott:

Our Office seeks your opinion, pursuant to Texas Government Code Chapter 402, on whether a County contracted medical provider for the County jail is required to disclose confidential health information of the offenders to their legal representative, the County Public Defender's Office.

I. BACKGROUND

As part of the plea bargaining, treatment placement, and trial processes and procedures, the special needs offenders' legal representatives need to have access to the offenders' medical and mental health information in order to make appropriate determination and recommendations on behalf of the offenders, including whether to release these offenders back into the community and whether to condition the offenders' probation with taking appropriate medications and/or treatment visits. Without such confidential health information, the defense attorneys are unable to discern any mental health issues pertaining to the offenders, which would affect competency, plea and trial decisions. The University of Texas Medical Branch ("UTMB"), a contracted medical service provider for Dallas County jail, has issued a draft interpretation regarding its duties to release protected health information ("PHI") under the Texas Health and Safety Code section 614.017, as amended by Senate Bill Number 519 ("SB 519"). UTMB has opined, inter alia, that it does not qualify as an "agency" within the purview of section 614.017, and consequently, has no duty under section 614.017 to release PHI. This restrictive view is at odds with the absolute need of the Dallas County Public Defender's Office ("Public Defender"), who is the legal representative of the Dallas County jail inmates, to possess information concerning its clients and its clients' competency.

II. PROPOSED QUESTION

Is UTMB required to disclose and share PHI of special needs offenders with those offenders' legal representative, the Public Defender, under chapter 614 of the Texas Health and Safety Code?

III. ANALYSIS

A) Applicable Law: Section 614.017 of the Texas Health and Safety Code

Section 614.017 of the Texas Health and Safety Code, as amended by SB 519, mandates the acceptance and disclosure of information, including medical and mental health information, pertaining to a *special needs offender*, by an *agency*, if such disclosure would serve the *purposes of chapter 614* of the Health and Safety Code, among which includes treatment purpose. Specifically section 614.017(a) states: “[a]n *agency shall*

- (1) accept information relating to a special needs offender that is sent to the agency to serve the purposes of this chapter regardless of whether other state law makes that information confidential; and
- (2) disclose information relating to a special needs offender, including information about the offender’s identity, needs, treatment, social, criminal, and vocational history, supervision status and compliance with conditions of supervision, and medical and mental health history, if the disclosure serves the purposes of this chapter.”

TEX. HEALTH & SAFETY CODE ANN. § 614.017(a) (Vernon 2003 & Supp. 2004) (emphasis added).

(1) *Special Needs Offender*

A “special needs offender” includes “an individual for whom criminal charges are pending or who after conviction or adjudication is in custody or under any form of criminal justice supervision.” TEX. HEALTH & SAFETY CODE ANN. § 614.017(c)(2). While “special needs offender” is not specifically defined in the Health and Safety Code, its functional equivalent is “offender with a medical or mental impairment.” These offenders include both juveniles and adults who are either arrested, charged, or incarcerated for criminal offenses and who have mental impairments or are elderly, physically disabled, terminally ill, or significantly ill. TEX. HEALTH & SAFETY CODE ANN. § 614.001(8). Mentally impaired offenders further include those offenders who are mentally retarded, mentally ill, or otherwise developmentally disabled. TEX. HEALTH & SAFETY CODE ANN. § 614.001(6).

As a result of the medical or mental impairment, the patients are not able to give consent to disclose their information, and just as unable to affirmatively deny the release of their information.

(2) *UTMB Is an “Agency” under Section 614.017*

(a) Definition of “Agency”

“Agency,” for purposes of section 614.017, is defined as (1) any one of the twenty-two enumerated entities or individuals, (2) a person with an agency relationship with one of the

enumerated entities or individuals, or (3) a person who contracts with one or more of the enumerated entities or individuals. TEX. HEALTH & SAFETY CODE ANN. § 614.017(c)(1).

(b) UTMB Has a Contractual Relationship with at Least One Enumerated "Agency"

An analysis of each option reveals that UTMB, through its contractual relationship with at least one, if not two, of the § 614.017 enumerated agencies, clearly qualifies as an agency under this third option. UTMB is, by its own definition, "a major academic health center dedicated to health science education, patient care, research, and community service." <http://www.utmb.edu/ia/facts.asp>. An examination of the section 614.017(c)(1) list reveals that UTMB does not fall directly within the ambit of any of the twenty-two listed agencies. An evaluation of the existing relationship among UTMB, the Dallas County jail and Dallas County Hospital District ("DCHD") reveal that the relationship is nothing more and nothing less than a multiparty contract ("Agreement") for remuneration. Agreement at 2, 11. All signing parties, including UTMB, are described by the Agreement itself as governmental entities. Agreement at 1. A further examination indicates that the Dallas County jail is one of the enumerated agencies listed in section 614.017. TEX. HEALTH & SAFETY CODE ANN. §§ 614.017(c)(1)(R), (S) (enumerating "local jails regulated by the Commission on Jail Standards"). In addition, the Dallas County Hospital District ("DCHD") is also one of the listed agencies under section 614.017. TEX. HEALTH & SAFETY CODE ANN. § 614.017(c)(1)(T) (enumerating "a hospital district").

(c) UTMB is "a Person" within the Definition of Section 614.017

The next question therefore becomes whether UTMB is "a person" that has either an agency or contractual relationship with an enumerated agency. To contend that UTMB, a legal entity, is not a person would seem foreign to both our legal concept of "person" and to our jurisprudence. Clearly, under the Government Code, UTMB, a self-described governmental entity, would qualify as a person. See TEX. GOV'T CODE ANN. §§ 311.005(2) (defining "person" as, among other things, a "corporation, organization, government or governmental subdivision..."); 312.011(1) (defining "person" to include a corporation). Moreover, while "person" is not exactly denominated by Title 7, it would appear that as a whole the Health and Safety Code certainly contemplates that a legal entity such a UTMB would be a person. See, e.g., TEX. HEALTH & SAFETY CODE ANN. §§ 141.002(3) (defining person as "an individual, partnership, corporation, association, or organization"); 195.004(e) (defining person as "an individual, corporation, or association"); 241.003 (defining person as an "individual, firm, partnership, corporation, association ...other similar representatives of those entities").

The clear answer to the question is that UTMB is a person who qualifies as a section 614.017 agency by virtual of its contractual relationship with not only one enumerated agency, DCHD, but also with Dallas County, on behalf of its jail.

(3) *The Public Defender Is also an "Agency" under Section 614.017*

An attorney, such as the Public Defender, is clearly contemplated as both a recipient-agency

and, when necessary, a disseminator-agency of information relating to the special needs offenders. The Public Defender is an agency enumerated in section 614.017 because it is charged with the task of providing legal representation and services to indigent defendants accused of a crime or juvenile offense. TEX. HEALTH & SAFETY CODE ANN. § 614.017(c)(1)(V) (stating “an attorney who is appointed or retained to represent a special needs offender” is one of the agencies who “shall” accept and disclose information relating to a special needs offender, including information about the “medical and mental health history” of the offender); *see also* TEX. CODE CRIM. PROC. ANN. art. 26.044 (Vernon 1989 & Supp. 2004) (tasking the public defender to provide legal representation and services to indigent defendants accused of a crime or juvenile offense).

(4) *The Necessary Role of the Public Defender in Carrying Out the Treatment Purpose of Texas Health and Safety Code Chapter 614*

The purposes of chapter 614 of the Texas Health and Safety Code are to rehabilitate, treat and educate the special needs offenders. Chapter 614, captioned “Texas Correctional Office on Offenders with Medical Impairments” (“TCOMI”), tasks TCOMI with, in relevant part, the following duties:

- 1) determine the status of offenders with medical or mental impairments in the state criminal justice system;
- 2) identify needed services for offenders with medical or mental impairments;
- 3) develop a plan for meeting the treatment, rehabilitative, and educational needs of offenders with medical or mental impairments that includes a case management system and the development of community-based alternatives to incarceration;
- 4) cooperate in coordinating procedures of represented agencies for the orderly provision of services for offenders with medical or mental impairments;

TEX. HEALTH & SAFETY CODE ANN. § 614.007.

Part and parcel of TCOMI’s treatment mandate is the necessary acceptance and disclosure of information.¹ The disclosure of information for overall treatment purpose is largely embodied in section 614.017, as amended by SB 519. Section 614.017 notably does not stand alone in setting forth the information sharing duty for treatment purpose; rather, it is accompanied by a sister section, section 614.016, which contemplates more precise action. This section contemplates that TCOMI along with “the Commission on Law Enforcement Officer Standards and

¹ Of particular import, in reflecting upon TCOMI’s mandate, is section 614.008’s contemplation of a “Community-Based Diversion Program for Offenders with Medical or Mental Impairments.” This section ideally “divert[s] from the state criminal justice system offenders with mental impairments.” TEX. HEALTH & SAFETY CODE ANN. § 614.008(a). It thus appears that TCOMI, and chapter 614, have as their common purpose not simply the rehabilitation of inmates but rather their rehabilitation in a non-penal context where possible.

Education,” and “the Commission on Jail Standards” adopt a memorandum that, among other things, sets forth a method for “developing procedures for the exchange of information relating to offenders who are mentally impaired...for use in the continuity of care and services program.” TEX. HEALTH & SAFETY CODE ANN. § 614.017(b)(2).

The use and disclosure of the special needs offenders’ PHI to their legal representative to assist in the appropriate placement of these individuals for their care and further the treatment mandate of chapter 614 is clear. To argue against such treatment use and disclosure would interfere with a patient’s essential medical treatment and would be beyond the scope of any confidentiality laws. Even the Privacy Rule under the Health Insurance Portability and Accountability Act (HIPAA) of 1996 authorizes the use and disclosure of PHI for treatment purposes. 45 C.F.R. § 164.512.

B) Texas Occupations Code Sections 159.003 and 159.004

(1) *Confidentiality Privilege of Sections 159.003 and 159.004 Is Not Applicable*

UTMB inappropriately relied on the specific restrictions set forth by Texas Occupations Code sections 159.003 and 159.004 as to when a patient’s information may be released without the patient’s consent. UTMB failed to realize that the confidentiality privilege of chapter 159 is limited by § 159.002(e), “[t]he physician [or UTMB] may claim the privilege of confidentiality only on behalf of the patient.” By claiming the confidentiality privilege against the patients’ own legal representative, the Public Defender, UTMB is not claiming such privilege “on behalf of the patients” by any reasonable standard. Furthermore, UTMB’s authority to claim the privilege of confidentiality is only “presumed in the absence of evidence to the contrary.” TEX. OCC. CODE ANN. § 159.002(e). UTMB has no “presumed” authority to claim such privilege of confidentiality on behalf of the special needs offenders when there is substantive evidence to the contrary indicating that the use and disclosure of such PHI is in the best interest of these offenders, pursuant to chapter 614 of the Texas Health and Safety Code.

(2) *Occupations Code Sections 159.003 and 159.004 Support Disclosure under Health and Safety Code Section 614.017*

Even assuming that UTMB may appropriately presume authority to claim the chapter 159 confidentiality against the special needs offenders’ legal representative, sections 159.003 and 159.004 seem to also support the disclosure of PHI to the Public Defender. The exceptions to the confidentiality privilege under section 159.003 apply to court and administrative proceedings, and specifically contemplate proceedings of criminal prosecutions in which the patient is a defendant. *Id.* § 159.003(a)(10). This exception, however, is not strictly implicated in the situation at hand, because the Public Defender seeks the patient’s PHI for its own use, rather than for any specific court or administrative proceedings, to determine its client’s, or the patient’s, competency. Additionally, obtaining records under this section is a less than desirable process because this section requires that the court must make an in camera determination as to the relevancy of such records.

Section 159.004, though, appears to be better designed for the particular situation of a Public Defender seeking PHI for use outside of direct court proceedings. Section 159.004 sets forth an exception to the rule of confidentiality in situations “other than a court or administrative proceeding.” *Id.* § 159.004. Moreover, it sets forth a precise exception to the confidentiality privilege and contemplates disclosure to “a governmental agency, if the disclosure is required or authorized by law.” *Id.* § 159.004(1). It is plain on its face that the Public Defender falls within the ambit of “a governmental agency,” as the Dallas County Public Defender is a county funded Office tasked with defending the indigent public at large. TEX. CODE CRIM. PROC. ANN. art. 26.044. Furthermore, as set forth above, disclosure of PHI to the Public Defender is “required [and] authorized by law,” or specifically, section 614.017 of the Texas Health and Safety Code. Consequently, UTMB, assuming that it does have the authority to claim this confidentiality privilege against the Public Defender, can not avoid its obligations under section 614.017 by relying on chapter 159 of the Texas Occupations Code given the terms of section 159.004.

C) Contractual Terms and Obligations

UTMB not only has to disclose the requested information by law but also by contractual obligations. Due to the special relationships among the parties, Dallas County, and not the special needs offenders, is the entity with the authority to enter into a contractual relationship with UTMB to provide medical services for the special needs offenders, who are in the custody of Dallas County. Consequently, Dallas County, in its role as the offenders’ custodian, has just as much right, if not greater right than UTMB, to assert any confidentiality privilege on behalf of the offenders, or to assert County’s authority to use and disclose the special needs offenders’ health information. Furthermore, while the Agreement requires UTMB to “document treatment and medical findings,” and to maintain those records, the Agreement also clearly states that the “County shall maintain ownership of all records.” Agreement at 5-6. Thus special needs offenders’ medical records are owned by the County and not by UTMB, and certainly not by the special needs offenders who are in the custody of Dallas County.

IV. SUMMARY

The disclosure of the special needs offenders’ PHI to their legal representative is authorized and necessary. First, UTMB is mandated to disclose medical and mental health information relating to the special needs offenders to the Public Defender, and the Public Defender is mandated to accept the said information, because both are agencies within the definitions of section 614.017, and because the disclosure would further the treatment purpose of chapter 614. Second, the confidentiality privilege in chapter 159 of the Texas Occupations Code may only be claimed on behalf of the patients and certainly not against the patients’ own legal representative. In any event the exceptions to the confidentiality privilege as set forth in Texas Occupations Code sections 159.003 and 159.004 support the disclosure mandated under Section 614.017 of the Health and Safety Code. Finally, in addition to the statutory mandate for disclosure, UTMB is also under contractual obligations to disclose the information. The medical records contractually belong to Dallas County, who engaged the medical services of UTMB on behalf of the offenders in the custody of Dallas County.

Thank-you for your attention to this matter. Our Office looks forward to your response.

Sincerely,

Bill Hill
Criminal District Attorney
Dallas County, Texas



By: Thao La
Assistant District Attorney

Attachments: Agreement among County, DCHD, and UTMB
UTMB's draft opinion