



June 27, 2002

Mr. Monty Waters
Assistant General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2002-3518

Dear Mr.:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164983.

The Texas Department of Health (the "department") received a request for information regarding the outbreak of staphylococcus infections at the Department of Public Safety academy. You inform us that the department has released certain responsive information to the requestor, but claim that the remaining requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with various statutes. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Initially, we note that section 552.301(b) provides that "[t]he governmental body must ask for the attorney general's decision and state the exceptions that apply . . . not later than the 10th business day after the date of receiving the written request [for information]." You acknowledge that the department failed to timely request a decision from this office. Section 552.302 provides that "[i]f a governmental body does not request an attorney general decision as provided by Section 552.301 . . . the information requested in writing is presumed

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.” The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or that third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). As you raise section 552.101 of the Government Code, we will address your arguments against disclosure.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception encompasses statutory confidentiality provisions. The Medical Practice Act (the “MPA”) is codified at subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the Occupations Code 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 . . . 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). The MPA also includes provisions that govern the disclosure of information that the MPA encompasses. *See id.* §§ 159.003, .004, .005, .006. This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991) (construing statutory predecessor). We also have concluded that when a file is created as the result of a hospital stay, all of the documents in the file relating to diagnosis and treatment constitute physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990).

You assert that the MPA is applicable to portions of the submitted documents. You inform this office that the department received these documents under section 159.004(1) of the MPA, which permits the disclosure of confidential information to “a governmental agency, if the disclosure is required or authorized by law[.]” You also inform us that “[t]he marked requested documents are copies of actual records or information taken from medical records[.]” Based on your representations and our review of the records in question, we have marked the documents that are governed by the MPA. The department may release this information only if the MPA permits the department to do so.

You claim that other responsive information is confidential under section 81.046 of the Health and Safety Code. Chapter 81 of the Health and Safety Code codifies the Communicable

Disease Prevention and Control Act. *See* Health and Safety Code § 81.001. Section 81.046 provides in relevant part:

(a) Reports, records, and information furnished to a health authority or the department 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 Chapter 552, Government Code, and may not be released or made public on subpoena or otherwise except as provided by Subsections (c) and (d).

Id. § 81.046(a)-(b). In Open Records Decision No. 577 (1990), this office concluded that 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 section 81.046 applies.

You represent to this office that the submitted records “were either furnished to [the department] or were created/gathered by [the department] and relate to cases or suspected cases of diseases or health conditions[.]” You also state that the submitted documents do not fall within the exceptions for release as outlined in section 81.046. Based on your representations and our review of the information at issue, we agree that the remaining information falls within the scope of section 81.046 of the Health and Safety Code and that none of the statute’s permissive release provisions appears to apply. *See id.* § 81.046(c). The department must therefore withhold this information, which we have marked, under section 552.101 of the Government Code.

In summary, some of the submitted information is governed by the Medical Practice Act. The department may release that information only if the MPA permits the department to do so. The remainder of the submitted information is confidential under section 81.046 of the Health and Safety Code and must be withheld under section 552.101 of the Government Code.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 164983

Enc. Submitted documents

c: Mr. Thomas Williams
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Austin, Texas 78701
(w/o enclosures)