



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 14, 2005

Ms. Cynthia Villarreal-Reyna
Section Chief, Agency Counsel
Legal and Compliance, Mail Code 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2005-05223

Dear Ms. Villarreal-Reyna:

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# 226205.

The Texas Department of Insurance (the "department") received a request for information concerning possible complaints against three named physicians. You inform us that some of the requested information is being withheld from disclosure in accordance with a previous determination issued to the department in Open Records Letter No. 2001-4777 (2001) (identifying information regarding enrollees in health plans). *See also* Open Records Decision No. 673 at 7-9 (2001) (delineating elements of second type of previous determination under Gov't Code § 552.301(a)). We have marked some additional information that must also be withheld in accordance with Open Records Letter No. 2001-4777. To the extent that other portions of the submitted information are not otherwise excepted from disclosure pursuant to this previous determination, you claim that these portions are excepted from disclosure under section 552.101 in conjunction with the doctrine of common law privacy. You also claim that portions of the submitted information are excepted from disclosure under section 552.101 in conjunction with the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, as well as under section 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address your statement that some of the requested information is being withheld from disclosure in accordance with a previous determination issued to the department in Open Records Letter No. 95-1536 (1995). In that ruling, this office determined that information acquired by the department that is relevant to an inquiry by the insurance fraud unit that the commissioner deems confidential is excepted from disclosure under section 552.101 in conjunction with section 5(a) of article 1.10D of the Insurance Code. Specifically, in Open Records Letter No. 95-1536, we concluded that the department must withhold information pursuant to article 1.10D when the following three requirements are met: (1) the information was acquired by the department or reveals information that was acquired by the department; (2) the information is relevant to an inquiry by the insurance fraud unit; and (3) the commissioner decides the information must remain confidential for any of the reasons listed in the statute. We further concluded that, when all of these requirements are met, the department need not refer the matter to this office for a decision. Effective April 1, 2005, section 5(a) of article 1.10D of the Insurance Code was recodified as section 701.151 of the Insurance Code. *See* Act of June 21, 2003, 78th Leg., R.S. ch. 1274, § 2, 2003 Tex. Gen. Laws 3746. Section 701.151 now contains the language addressed by this office in Open Records Letter No. 95-1536. Section 701.151 states in pertinent part:

(a) Information or material acquired by the department that is relevant to an investigation by the insurance fraud unit is not a public record for the period the commissioner considers reasonably necessary to:

- (1) complete the investigation;
- (2) protect the person under investigation from unwarranted injury;
or
- (3) serve the public interest.

(b) The information or material is not subject to a subpoena by another governmental entity, other than a grand jury subpoena, until:

- (1) the information or material is released for public inspection by the commissioner; or
- (2) after notice and a hearing a district court determines that obeying the subpoena would not jeopardize the public interest and any investigation by the commissioner.

Ins. Code § 701.151(a), (b). As with its predecessor, under section 701.151 of the Insurance Code, the legislature has determined that the decision of the Commissioner of Insurance (the "commissioner") controls the release of the information that is relevant to an inquiry by the department's Insurance Fraud Unit. We believe the department must continue to withhold

information from required disclosure pursuant to section 701.151 when the following three requirements are met: (1) the information was acquired by the department or reveals information that was acquired by the department; (2) the information is relevant to an inquiry by the insurance fraud unit; and (3) the commissioner decides the information must remain confidential for any of the reasons listed in the statute. *See* Open Records Decision No. 608 (1992). Thus, when all of these requirements are met, the department need not refer the matter to this office for a decision. *See* Gov't Code § 552.301; *Houston Chronicle Publishing Co. v. Mattox*, 767 S.W.2d 695 (Tex. 1989). The department may now rely on this letter as a previous determination that information acquired by the department relevant to an inquiry by the Insurance Fraud Unit and deemed confidential by the commissioner is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 701.151 of the Insurance Code.¹

Next, we note and you acknowledge that the department has not complied with the procedural requirements of section 552.301 of the Governmental Code in requesting this ruling. *See* Gov't Code § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because the application of sections 552.101 and 552.136 can provide compelling reasons for overcoming the presumption of openness, we consider whether any of the submitted information must be withheld under these sections.

Next, we note that you have submitted information related to only one of the three physicians whose information is sought by the requestor. Further, you have not indicated that information concerning the other two named physicians does not exist or that you wish to withhold any such information from disclosure. Therefore, to the extent information responsive to this aspect of the request existed on the date the department received the instant request, we assume that you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

¹Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes.

You assert that some of the submitted information is excepted under section 552.101 in conjunction with the MPA, subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part as follows:

(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). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). 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). We have further found that 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).

Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Such records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004,.005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). We have reviewed the documents at issue and find that some are medical records. Therefore, the department must withhold the marked documents unless the department receives valid consent under the MPA for their release. The remaining documents you seek to withhold under the MPA may not be withheld on that basis, but do contain enrollee information subject to the previous determination that must be withheld.

Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov't Code § 552.136. The department must, therefore, withhold the insurance policy numbers you have marked pursuant to section 552.136. We have marked an additional policy number

that must also be withheld under section 552.136. However, we find that you have failed to establish that any of the remaining information you have marked constitutes access device numbers for purposes of section 552.136. Therefore, these numbers may not be withheld on that basis.

In summary, the department may rely on our previous determination issued to the department in Open Records Letter No. 2001-4777 (2001) with respect to information addressed in that ruling. The documents we have marked may only be released in accordance with the MPA. The department must withhold the insurance policy numbers you have marked and that we have marked pursuant to section 552.136. The remaining information must be released. As our ruling is dispositive, we need not consider your remaining arguments against disclosure.

As previously noted, the department may now rely on this letter as a previous determination that information acquired by the department relevant to an inquiry by the Insurance Fraud Unit and deemed confidential by the commissioner is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 701.151 of the Insurance Code. The remainder of this letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, the remainder of 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. Dep't of Pub. 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,



Cary Grace
Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID# 226205

Enc. Submitted documents

c: Ms. Leticia Melendez
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(w/o enclosures)