



ATTORNEY GENERAL OF TEXAS
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April 16, 2007

Mr. Jeffrey S. Young
Associate General Counsel
Texas Tech University System
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OR2007-04185

Dear Mr. Young:

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# 275749.

The Texas Tech University Health Sciences Center (the "university") received a request for the following: 1) "[a]ll policies and procedures effective on August 4, 2002 related to the provision or denial of medical services to persons incarcerated at the Allred Unit of the Texas Department of Criminal Justice—Institutional Division" (the "department"); 2) "[a]ll policies and procedures effective on August 4, 2002 related to the maintenance, use, prescription, or disbursement of medications generally, or nitroglycerin specifically, for use by persons incarcerated at the Allred Unit of the [department]"; 3) "[a]ll notes, reports, statements, memoranda, or other documents relating to the physical health, medical status, or medical treatment of [the requestor's client] from January 1, 1990 to the [date of the request]"; 4) "[a]ll notes, reports, statements, memoranda, or other documents relating to any complaint, grievance, investigation, disciplinary action, or evaluation related to performance of [a named university employee's] employment duties, either at the Allred Unit or other places of employment"; and 5) "[a]ll documents related to the hierarchical structure or administrative organization of medical staff at the Allred Unit, including organization charts of the medical staff." You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.117, 552.134, and 552.147 of the Government Code.

We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note that a portion of the submitted information is subject to section 552.022(a)(1) of the Government Code, which provides in pertinent part as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Exhibit F consists of completed employee evaluations. Consequently, unless this information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law, it must be released to the requestor. The university does not raise section 552.108 for this information. Although the university raises section 552.103 of the Government Code, we note that section 552.103 is a discretionary exception to public disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally). Therefore, the university may not withhold Exhibit F pursuant to section 552.103 of the Government Code. Because information that is subject to section 552.022(a)(1) may be withheld under mandatory exceptions, we will consider the university's claims under sections 552.101, 552.117, 552.134, and 552.147 of the Government Code for Exhibit F along with the remaining information.

You note that Exhibit E includes medical records that are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code.² *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in part:

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.

²Section 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. This exception encompasses information that other statutes make confidential.

(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). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). We also have concluded that when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either 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). Medical records must be released on 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. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990).

We have marked the portions of Exhibit E that are confidential under the MPA. We note that the requestor represents the patient to whom that information pertains. Accordingly, the university must release that information to the requestor on receipt of the required written consent under sections 159.004 and 159.005 of the Occupations Code. In any event, the university must not release the information that is confidential under the MPA unless it has authorization under the MPA to do so.

The submitted information also contains records that are subject to chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) states that “[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.” Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *Id.* § 611.001(b). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the information that constitutes mental health records of the requestor's client, and that may

only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (1) contains 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). The types of information considered intimate and 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 that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). You state that “inmate grievances against a nurse most likely involve medical treatment.” We note, however, that the requestor represents the individual at issue in the submitted documents. Because the requestor is the authorized representative of the individual depicted in the submitted documents, the requestor has a right of access to the information that is otherwise confidential under common-law privacy. *See* Gov’t Code § 552.023(b) (governmental body may not deny access to person or person’s representative to whom information relates on grounds that information is considered confidential under privacy principles). Therefore, the university may not withhold any of the submitted information on the basis of common-law privacy.

You claim that some of the submitted information is excepted from disclosure under section 552.134 of the Government Code. This section relates to inmates of the department and provides in relevant part as follows:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the [department] is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov’t Code § 552.134(a). We note that section 552.134 applies only to “information obtained or maintained by” the Texas Department of Criminal Justice (the “TDCJ”). *See* Gov’t Code § 552.134(a). Section 552.134(d) states that the release of information subject to section 552.134(a) to an eligible entity, as defined by section 508.313(d) of the Government Code, for a purpose related to treatment is not considered a release of

information to the public and does not waive the protection of section 552.134 or other law.³ Additionally, we have previously held that the TDCJ has the discretion to transfer to another governmental body information subject to the statutory predecessor to section 552.134, and that the transferred information remains confidential in the hands of the receiving governmental body. *See* Open Records Decision No. 667 (2000) (TDCJ has discretion to release inmate's social security number made confidential by statutory predecessor to section 552.134 to voter registrar for purpose of maintaining accurate voter registration lists and transferred social security number remains confidential in possession of the voter registrar).

You state, and the submitted information reflects, that some of the submitted documents relate to inmates confined in a department facility. Furthermore, you state that the documents at issue were provided to the university by the department. Thus, we agree that section 552.134 is applicable to this information. We also find that section 552.029 is not applicable. Therefore, you must withhold Exhibit D and the remaining information in Exhibit E pursuant to section 552.134.

You also note that Exhibit F includes social security numbers. Section 552.147 of the *Government Code* provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Gov't Code* § 552.147. Therefore, the university may withhold the social security numbers in Exhibit F pursuant to section 552.147.⁴

We next address your argument under section 552.103 of the *Government Code* for the remaining information that is not subject to section 552.022 of the *Government Code*. Section 552.103 provides as follows:

(a) *Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.*

³Section 508.313(d) of the *Government Code* defines "eligible entity" to include "an organization to which inmates are referred for services by the department." *Gov't Code* § 508.313(d)(3).

⁴We note that section 552.147(b) of the *Government Code* authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. As our ruling under section 552.147 is dispositive, we do not reach your argument under section 552.117 of the *Government Code*.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated when the governmental body received the request, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

In this instance, you inform us, and provide documentation showing, that a university employee was sued by the requestor's client in her official capacity as a university employee prior to the university's receipt of the present request. Thus, we agree that the university was a party to litigation at the time it received the request. Furthermore, based on your representations and our review of the information at issue, we find that Exhibits G, H, and I relate to the pending litigation for purposes of section 552.103(a). We therefore conclude that the university may withhold Exhibits G, H, and I from disclosure pursuant to section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the university must withhold or release the documents that we have marked in Exhibit E pursuant to the MPA or sections 611.004 and 611.0045 of the Health and Safety Code. The information in Exhibit D and the remaining information in Exhibit E must be withheld under section 552.134 of the Government Code. The social security numbers in Exhibit F may be withheld under section 552.147 of the Government Code. The university may withhold the information in Exhibits G, H, and I under section 552.103 of the Government Code. The remaining information must be released to the requestor.

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).

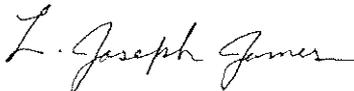
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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); *Texas 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 Office of the Attorney General 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. 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,



L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/eeg

Ref: ID# 275749

Enc. Submitted documents

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