



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 26, 2009

Ms. Lori W. Hanson
Clark, Thomas & Winters, P.C.
2632 Broadway, Suite 401 S
San Antonio, Texas 78215

OR2009-12048

Dear Ms. Hanson:

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# 354093.

Guadalupe Regional Medical Center (the "medical center"), which you represent, received a request for records concerning hospital privileges, credentials and disciplinary actions for a specific doctor in connection with the medical center. You state you have released some information to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Although you assert the attorney-client privilege and the work product privilege under section 552.022 of the Government Code, section 552.022 lists eighteen categories of information that are expressly public and may not be withheld unless confidential under other law. *See* Gov't Code § 552.022. Thus, section 552.022 is not an exception to disclosure. The proper exception to raise for the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107. Similarly, the proper exception to raise for the work product privilege for information not subject to section 552.022 is section 552.111. *See* Open Records Decision No. 676 at 6 (2002). Thus, we will consider your arguments under these exceptions.

²We 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.

Initially, we note that the submitted information contains medical records, including records pertaining to the individual represented by the requestor. Section 552.101 of the Government Code exempts 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, such as the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. 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.

(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.

Occ. Code § 159.002(a)-(c). 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). Medical 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, *See* Occ. Code §§ 159.004, .005. After the death of a patient, medical records may be released only on the signed written consent of the deceased individual's personal representative. *See id.* § 159.005(a)(5). 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 medical records that the medical center must withhold under the MPA, unless the medical center receives written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA. However, we find that you have failed to demonstrate how any of the remaining information constitutes a medical record for purposes of the MPA. Therefore, the remaining information is not confidential under the MPA, and no portion of it may be withheld under section 552.101 of the Government Code on this basis.

You raise section 552.103 of the Government Code for a portion of the remaining information. 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.

...

(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 medical center 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 is pending or reasonably anticipated on the date 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 medical center must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), chapter 101 of the Civil Practice and Remedies Code, or an applicable municipal ordinance. If a governmental body does not make this representation, the claim letter is a factor that this office will consider in determining whether a governmental body has established that litigation is reasonably anticipated based on the totality of the circumstances.

You claim the medical center reasonably anticipates litigation relating to the subject of the present request. You state that the requestor is a legal investigator for an attorney representing a client in a medical negligence claim against the medical center. You inform

us that the medical center has received a notice of claim letter regarding an allegation of negligent credentialing against the medical center. You further state that this letter complied with both the Texas Tort Claims Act notice requirements and the Texas Civil Practice and Remedies Code filing provisions regarding medical negligence cases. You also inform us the statute of limitations for this personal injury claim has not expired. Based on your representations, we agree that litigation was reasonably anticipated on the date the request was received. Furthermore, we find that the information at issue relates to the anticipated litigation for purposes of section 552.103(a). Accordingly, the medical center may withhold the information we have marked under section 552.103 of the Government Code.³

We note, however, that once information has been obtained by all parties to the anticipated 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). Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No.350 (1982).

Next, we understand you to raise section 552.101 of the Government Code in conjunction with section 11137 of title 42 of the United States Code.⁴ Section 11137 relates to mandatory reports to the National Practitioner's Data Bank ("NPDB") required by section 11131 of title 42 of the United States Code. Section 11131(a) of title 42 of the United States Code provides that an "entity (including an insurance company) which makes payment under a policy of insurance, self-insurance, or otherwise in settlement (or partial settlement) of, or in satisfaction of a judgment in, a medical malpractice action or claim shall report, in accordance with section 11134 of this title, information respecting the payment and circumstances thereof." 42 U.S.C. § 11131(a). In addition, section 11137(b)(1) of title 42 of the United States Code provides:

Information reported under this subchapter is considered confidential and shall not be disclosed (other than to the physician or practitioner involved) except with respect to professional review activity, as necessary to carry out subsections (b) and (c) of section 11135 of this title (as specified in regulations by the Secretary), or in accordance with regulations of the Secretary promulgated pursuant to subsection (a) of this section. Nothing in this subsection shall prevent the disclosure of such information by a party which is otherwise authorized, under applicable State law, to make such disclosure. Information reported under this subchapter that is in a form that

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

⁴Although you refer to section 1111 of title 42 of the United States Code, we understand you to raise section 11137 of title 42 of the United States Code, as this is the proper exception for your assertion.

does not permit the identification of any particular health care entity, physician, other health care practitioner, or patient shall not be considered confidential.

Id. § 11137(b)(1). Further, section 11137(b)(2) prescribes a civil monetary penalty for a violation of section 11137(b)(1). *See* 42 U.S.C. § 11137(b)(2). Additionally, section 60.13 of title 45 of the Code of Federal Regulations provides in part:

Information reported to the Data Bank is considered confidential and shall not be disclosed outside the Department of Health and Human Services, except as specified in § 60.10, § 60.11 and § 60.14. Persons and entities which receive information from the Data Bank either directly or from another party must use it solely with respect to the purpose for which it was provided. Nothing in this paragraph shall prevent the disclosure of information by a party which is authorized under applicable State law to make such disclosure.

45 C.F.R. § 60.13(a). The remaining information includes NPDB medical malpractice payment reports and adverse action reports. We understand these reports were reported by the appropriate entities pursuant to section 11131. You do not indicate that there is any applicable law, regulation, or exception that authorizes the release of the reports in this instance. Therefore, we assume that none exists. Given that assumption, we conclude that the NPDB information, which we have marked, must be withheld under section 552.101 of the Government Code in conjunction with section 11137 of title 42 of the United States Code and section 60.13(a) of title 45 of the Code of Federal Regulations.

You assert section 164.007 of the Occupations Code as a basis for withholding the remaining information.⁵ Section 552.101 also encompasses section 164.007 of the Occupations Code. Section 164.007(c) of the Occupations Code provides as follows:

Each complaint, adverse report, investigation file, other investigation report, and other investigative information in the possession of or received or gathered by the [Texas Medical Board] or its employees or agents relating to a license holder, an application for license, or a criminal investigation or proceeding is privileged and confidential and is not subject to discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or its employees or agents involved in discipline of a license holder. For purposes of this subsection, investigative information includes information relating to the identity of, and a report made by, a physician performing or supervising compliance monitoring for the board.

⁵Although you raise section 167.007 of the Occupations Code, we understand you to raise section 164.007 of the Occupations Code, as this is the proper exception for your assertion.

Occ. Code § 164.007(c). By its terms, section 164.007(c) makes information confidential when in the possession of the Texas Medical Board (the "board"), its employees, or agents. In this instance, the medical center possesses the information at issue. Subsections (d), (f), and (h) specify to whom the board may provide license holder information. *Id.* § 164.007(d) (board shall provide license holder with access to information), (f) (board may disclose information to appropriate licensing authority of another state or medical peer review committee), (h) (board shall provide information relevant to criminal investigation to investigating agency). In this case, however, the remaining information consists of communications between the board and the medical center and a subpoena duces tecum from the board, all of which are in the possession of the medical center. Although section 164.007 of the Occupations Code provides that confidential information in the possession of the board may be transferred in certain circumstances, you do not inform us, nor is it apparent from our review of the submitted information, that the medical center received this information from the board pursuant to any of the release provisions in section 164.007. *See* Occ. Code § 164.007(d), (f)-(h). *See also* 22 TAC § 179.3 (enumerating entities and persons to whom confidential complaint information may be released). Further, you do not assert, and the submitted documents do not reflect, that the medical center is holding these documents as an agent of the board. Accordingly, we conclude that section 164.007(c) does not make the information at issue confidential in this instance, and the communications between the board and the medical center and the subpoena duces tecum from the board may not be withheld on this basis.

You further assert the remaining information is subject to common-law privacy. 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 reasonably 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. 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. In addition, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we agree that portions of the remaining information constitute highly intimate or embarrassing information of no legitimate public interest. Therefore, the medical center must withhold this information, which we have marked, under section 552.101 in conjunction with common-law privacy. However, the remaining information is not highly intimate or embarrassing information that is of no legitimate interest to the public; therefore the medical center may not withhold any of the remaining information on this basis.

Finally, you also raise section 552.111 of the Government Code. Section 552.111 excepts from public disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

The remaining information consists of communications between the board and the medical center and a subpoena duces tecum from the board, all of which concern a medical center staff member. Upon review, we find the remaining information pertains to a routine personnel matter that does not rise to the level of policymaking. Accordingly, the medical center may not withhold the remaining information under section 552.111 and the deliberative process privilege.

In summary, the medical center may only release the medical records, which we have marked, in accordance with the MPA. The medical center may withhold the information we have marked under section 552.103 of the Government Code. The medical center must withhold the NPDB information we have marked under section 552.101 in conjunction with section 11137 of title 42 of the United States Code and section 60.13(a) of title 45 of the Code of Federal Regulations. The medical center must withhold the information we have

marked under section 552.101 in conjunction with common-law privacy. The medical center must release the remaining information.

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.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/eeg

Ref: ID# 354093

Enc. Submitted documents

c: Requestor
(w/o enclosures)