



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 9, 2009

Ms. Neera Chatterjee
Public Information Coordinator
University of Texas
201 West Seventh Street
Austin, Texas 78701-2902

OR2009-17447

Dear Ms. Chatterjee:

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# 362222.

The University of Texas Health Science Center at Houston (the "university") received a request for a copy of the requestor's client's student record, e-mails to and from two specified e-mail addresses, all e-mails containing the requestor's client's name, and any reports, correspondence, or memoranda that reference the requestor's client during a specified time period.¹ You state that the university will release some of the information responsive to the request. You also state you will redact home telephone numbers, home addresses, and family member information under section 552.024 of the Government Code.² You claim that some of the submitted information is not subject to the Act. In addition, you claim that the submitted information is excepted from disclosure under sections 552.101,

¹We note the university sought and received clarification from the requestor regarding the request. See Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request). We also note the requestor has excluded from her request "records protected by attorney/client privilege." Accordingly, any such information is not responsive to the present request. The university need not release non-responsive information and this ruling will not address it.

²See Gov't Code § 552.024(c) (if employee or official or former employee or official chooses not to allow public access to his or her personal information, the governmental body may redact the information without the necessity of requesting a decision from this office).

552.103, and 552.137 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.³ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we address your argument that portions of the submitted information are not subject to the Act. You contend that pursuant to section 181.006 of the Health and Safety Code the information you have marked is not subject to the Act. Section 181.006 states that “[f]or a covered entity that is a governmental unit, an individual’s protected health information . . . is not public information and is not subject to disclosure under [the Act].” Health & Safety Code § 181.006. We will assume, without deciding, the university is a covered entity and the information is protected health information. Subsection 181.006(2) does not remove protected health information from the Act’s application, but rather states this information is “not public information and is not subject to disclosure under [the Act].” We interpret this to mean a covered entity’s protected health information is subject to the Act’s application. Furthermore, this statute, when demonstrated to be applicable, makes confidential the information it covers. Thus, we will consider your arguments for this information, as well as for the remaining information.

Next, the requestor argues that she has a right of access to some of the responsive information pursuant to the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C § 1232g. *Open Records Decision No. 634 at 5 (1995)*. We note that the United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student’s consent, unredacted, personally identifiable information contained in education records for the purposes of our review in the open records ruling process under the Act.⁴ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). Portions of the documents you have submitted to this office appear to be redacted and unredacted education records. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to the information at issue. Such determinations under FERPA must be made by the educational authority in possession of the education records. We must note, however, that

³We assume that the “representative sample” of information 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.

⁴A copy of this letter may be found on the Office of the Attorney General’s website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

the requestor, as an attorney representing a student whose education records are at issue, may have a right of access to some of the submitted records, and that right prevails over a claim under section 552.103 of the Government Code. *See* Open Records Decision No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to Gov't Code Section 552.103); *see also Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (holding FERPA prevails over inconsistent provision of state law). However, because we can make no determinations under FERPA, we will address your claimed exceptions under the Act.

The requestor also contends that she was not properly notified of the university's request for a ruling from this office as required by section 552.301(d)(2) of the Government Code. Section 552.301(d)(2) states:

(d) A governmental body that requests an attorney general decision [under the Act] must provide to the requestor within a reasonable time but not later than the 10th business day after the date of receiving the requestor's written request:

...

(2) a copy of the governmental body's written communication to the attorney general asking for the decision[.]

Gov't Code § 552.301(d)(2). Pursuant to section 552.302, a governmental body's failure to timely provide the requestor with a copy of its written communication to this office results in the presumption that the information is public. *Id.* § 552.302. The university states that it received the written request for information on September 1, 2009. The university sought clarification of the request on September 2, 2009. *See id.* § 552.222 (providing governmental body may ask requestor to clarify request if information requested is unclear). Thus, the ten-business-day time period to request a decision from this office under section 552.301(b) was tolled on the date the university sought clarification of the request from the requestor. *See* Open Records Decision No. 663 at 5 (1999) (clarification does not trigger new ten-business-day time interval, but merely tolls ten-business-day deadline during clarification or narrowing process, which resumes upon receipt of clarified or narrowed response). The university received the requestor's clarification on September 4, 2009. Further, the university states that it was closed on September 7, 2009 for the Labor Day Holiday. Thus, the university was required to request a ruling from this office and provide the requestor with a copy of its written communication to this office by September 18, 2009. The university's request for a ruling from this office, which was copied to the requestor, was dated September 18, 2009 and received by this office on the same date. *See id.* § 552.308(a) (prescribing standards for timeliness of action by United States mail, common or contract carrier, or interagency mail). This office is unable to resolve disputes of fact in the open

records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990). Based on the submitted information and the university's representations, we find the university complied with the procedural requirements of section 552.301 in requesting this ruling. Accordingly, we will address the university's arguments against disclosure.

Next, we next note that the remaining information includes information that is subject to section 552.022 of the Government Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under the Act unless they are expressly confidential under other law. Gov't Code § 552.022(a). The information that you submitted to us for review contains completed student evaluations, which fall into one of the categories of information made expressly public by section 552.022. *See id.* § 552.022(a)(1). Section 552.022(a)(1) states that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it is excepted under section 552.108 of the Government Code or is expressly confidential under other law. *Id.* Although you raise section 552.103 of the Government Code for this information, this section is a discretionary exception that protects a governmental body's interest 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 (2000) (discretionary exceptions generally). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the university may not withhold the information subject to section 552.022 under section 552.103 of the Government Code. You also raise section 552.101 of the Government Code for the information at issue. Because information subject to section 552.022 may be withheld under section 552.101, we will consider your arguments for this exception with respect to the information subject to section 552.022, along with your remaining arguments for the information that is not subject to section 552.022.

Section 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. Section 552.101 encompasses section 160.007 of the Occupations Code, which provides in part:

- (a) Except as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.

Occ. Code § 160.007(a). Medical peer review is defined by the Medical Practice Act (the "MPA"), found at subtitle B of title 3 of the Occupations Code, to mean "the evaluation of medical and health care services, including evaluation of the qualifications and professional conduct of professional health care practitioners and of patient care provided by those practitioners." *Id.* § 151.002(a)(7). A medical peer review committee is "a committee of a

health care entity . . . or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services[.]” *Id.* § 151.002(a)(8).

Section 161.032 of the Health and Safety Code provides in part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

...

(c) Records, information, or reports of a medical committee . . . and records, information, or reports provided by a medical committee . . . to the governing body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code.

...

(f) This section and Subchapter A, Chapter 160, Occupations Code, do not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility.

Health & Safety Code §§ 161.032(a), (c), (f). Section 161.031(a) defines a “medical committee” as “any committee . . . of (3) a university medical school or health science center[.]” *Id.* § 161.031(a)(3). Section 161.031(b) provides that the “term includes a committee appointed ad hoc to conduct a specific investigation or established under state or federal law or rule or under the bylaws or rules of the organization or institution.” *Id.* § 161.031(b). Section 161.0315 provides in relevant part that “[t]he governing body of a hospital [or] university medical school or health science center . . . may form a medical peer review committee, as defined by Section 151.002, Occupations Code, or a medical committee, as defined by Section 161.031, to evaluate medical and health care services[.]” *Id.* § 161.0315(a).

You state the information at issue constitutes records of the university’s dental student evaluation and promotion committee as well as an ad hoc appeals committee, which are authorized by university bylaws and charged with evaluating and rendering professional judgments regarding students who are in training to become professional health care practitioners. You also state the information at issue was created as part of a medical peer inquiry and was submitted to, and used by, the medical committees charged with dental student evaluations and promotions. Upon review, we agree the information we have marked consists of confidential records of a medical peer review committee under section 161.032

of the Health and Safety Code and section 160.007 of the Occupations Code. Accordingly, the university must withhold this information pursuant to section 552.101 of the Government Code.⁵

Section 552.101 also encompasses section 258.102 of the Occupations Code, which provides in pertinent part:

(a) The following information is privileged and may not be disclosed except as provided by this subchapter:

(1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and

(2) a dental record.

Occ. Code § 258.102(a). A “dental record” means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *See id.* § 258.101(1). Information that is privileged under chapter 258 of the Occupations Code may be disclosed only under certain specified circumstances. *See id.* § 258.104 (consent to disclosure); *see also id.* §§ 258.105, .106, .107 (exceptions to privilege). A person who receives information that is privileged under section 258.102 of the Occupations Code may disclose that information to another person only to the extent that disclosure is consistent with the purpose for which the information was obtained. *See id.* § 258.108. We agree that the information you have marked constitutes dental records that are privileged under section 258.102 of the Occupations Code. The dental records may only be released in accordance with chapter 258 of the Occupations Code.⁶

Next, we address your argument under section 552.103 of the Government Code for the remaining information. Section 552.103 provides, in part:

(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.

...

⁵As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(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 is pending or reasonably anticipated, 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 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.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You state that on August 13, 2009 the requestor filed a complaint with the United States Department of Education Office for Civil Rights (the “OCR”). In addition, you have submitted correspondence from the requestor, received prior to the present request for information, wherein the requestor threatens litigation against the university on behalf of her client. Based on your representations and our review of the submitted documentation, we conclude you have shown that litigation was reasonably anticipated at the time the university received the present request. We also find that the university has demonstrated the remaining information is related to the anticipated litigation for purposes of section 552.103(a). Therefore, section 552.103 is generally applicable to the remaining information.⁷

⁷As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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

In summary, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 160.007 of the Occupations Code. The marked dental records may only be released in accordance with chapter 258 of the Occupations Code. The university may withhold the remaining information under section 552.103 of the Government Code.

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, toll free, at (888) 672-6787.

Sincerely,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/rl

Ref: ID# 362222

Enc. Submitted documents

c: Requestor
(w/o enclosures)