



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 3, 2012

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

OR2012-00410A

Dear Ms. Chatterjee:

This office issued Open Records Letter No. 2012-00410 (2012) on January 9, 2012 in error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for Open Records Letter No. 2012-00410. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")).

You ask whether certain information is subject to required public disclosure under the Act, chapter 552 of the Government Code. Your request was assigned ID# 440367 (UT OGC # 140156).

The University of Texas Medical Branch at Galveston ("UTMB") received a request for the requestor's personnel file. You state you have provided the requestor with the majority of the requested information. You claim a portion of the submitted information is not subject to the Act. Additionally, and in the alternative, you argue the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered your arguments and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments concerning disclosure of requested information).

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 "[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(2). We will assume, without deciding, UTMB is a covered entity. Section 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]." *Id.* 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 the information it encompasses confidential. Thus, we will consider your arguments against disclosure of the information at issue.

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, including section 164.007, which provides in part 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 (the "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.

Occ. Code § 164.007(c). The submitted information includes a License Application Form L (Physician Licensure Evaluation), which was received or gathered by the board. Upon review, we find UTMB must withhold the submitted License Application Form L under section 552.101 in conjunction with section 164.007 of the Occupations Code.¹

You contend the information you have marked in the remaining documents is confidential under section 552.101 in conjunction with section 181.006 of the Health and Safety Code. Thus, and assuming, as previously stated, UTMB is a covered entity, we must determine whether the marked information consists of protected health information. Section 181.001 of the Health and Safety Code states "[u]nless otherwise defined in this chapter, each term that is used in this chapter has the meaning assigned by the Health Insurance Portability and Accountability Act and Privacy Standards ["HIPAA"]." Health & Safety Code § 181.001(a). As chapter 181 of the Health and Safety Code does not define "protected health information," we turn to HIPAA's definition of the term. HIPAA defines "protected health information" as individually identifiable health information:

¹As our ruling is dispositive, we need not address UTMB's arguments against disclosure of this information.

(1) Except as provided in paragraph (2) of this definition[.]

(2) Protected health information excludes individually identifiable health information in:

...

(iii) Employment records held by a covered entity in its role as employer.

45 C.F.R. § 160.103. The information you seek to withhold under section 181.006 pertains to the requestor, an employee of UTMB, and her alleged mistreatment of patients of UTMB in the course of her employment. Thus, we find the information at issue consists of employment records held by UTMB as the requestor's employer. We therefore conclude the information you have marked is not confidential under section 181.006 of the Health and Safety Code and may not be withheld on that basis under section 552.101 of the Government Code.

Section 552.101 also encompasses the Medical Practice Act ("MPA"). Medical records are confidential under the MPA, subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-165.160. 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.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded 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). Upon review, we find the information you have marked does not constitute a medical record for purposes of the MPA, and it may not be withheld on that basis.

You also contend the marked information is confidential under section 552.101 in conjunction with common-law and constitutional privacy. Section 552.101 also encompasses common-law privacy, which protects information if it contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See Open Records Decision No. 455 (1987)* (prescription drugs, illnesses, operations, and physical handicaps). The information at issue pertains to the requestor's alleged mistreatment of a patient of UTMB. This office has determined common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. *See Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978); see also Open Records Decision No. 408 at 11 (1984)* (fact that allegations were found to be untrue could easily be released with the allegations themselves, mitigating harm). Nevertheless, the information at issue includes the identities of patients. We find the patients' identities are highly intimate or embarrassing and not a matter of legitimate public interest. We therefore conclude UTMB must withhold the information we have marked that identifies the patients under section 552.101 of the Government Code in conjunction with common-law privacy. UTMB may not withhold any of the remaining information on that basis.

Section 552.101 of the Government Code also encompasses constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See ORD 455 at 4.* The first type of constitutional privacy protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy balances an individual's privacy interests against the public's need to know information of public concern. *Id.* The scope of information protected by constitutional privacy is narrower than under common-law privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). We find you have not demonstrated how any portion of the remaining information at issue falls within the constitutional zones of privacy. Moreover, because the patients' identities must be withheld under common-law privacy, we find you have not demonstrated how any of the remaining information at issue implicates an individual's privacy interests for purposes of constitutional privacy. We therefore conclude UTMB may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with constitutional privacy.

In summary, UTMB must withhold the submitted License Application Form L under section 552.101 in conjunction with section 164.007 of the Occupations Code, and the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. UTMB must release the rest of the submitted 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, toll free, at (888) 672-6787.

Sincerely,



Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/bhf

Ref: ID# 440367

Enc. Submitted documents

c: Requestor
(w/o enclosures)