



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 17, 2013

Ms. Thao La
Senior Attorney
Legal Affairs
Parkland Health & Hospital System
5201 Harry Hines Boulevard
Dallas, Texas 75235

OR2013-08289

Dear Ms. La:

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# 487580 (DCHD# 13-44).

The Dallas County Hospital District d/b/a Parkland Health & Hospital System (the "district") received five requests from the same requestor for certain information, including policies and procedures, pertaining to all nursing staff for specified time periods; certain other district policies and procedures; and certain information referenced in the requestor's client's corrective action.¹ You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹We note the district sought and received clarification of some of the requests. *See* Gov't Code §552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

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, you contend the requestor states she has a right of access to some of the requested information pursuant to a district policy. You argue since the district policy does not give the requestor access to the requested information at issue, there is no information responsive to that portion of the request. In the alternative, you have submitted records which the district deems responsive. In responding to a request for information under the Act, a governmental body is not required to answer factual questions, conduct legal research, or disclose information that did not exist at the time the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). We note a governmental body has a duty to make a good-faith effort to relate a request for information to information that the governmental body holds. *See* Open Records Decision No. 561 at 8-9 (1990). Because you have submitted the information for our review and raised exceptions to disclosure for the information, we find the district has made a good-faith effort to submit information that is responsive to the request at issue.

Next, we note the requestor excludes any details about a patient or the specific nature of any patient safety violation. Accordingly, any such information is not responsive to the instant requests for information. This ruling does not address the public availability of non-responsive information, and the district need not release such information in response to the request.

Next, we note some of the responsive information is subject to section 552.022 of the Government Code, which provides in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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; [and]

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]

Gov't Code § 552.022(a)(1), (2). In this instance, the responsive information contains a completed investigation that is subject to section 552.022(a)(1) and must be released unless it is excepted under section 552.108 or made confidential under the Act or other law. The responsive information also contains the name, sex, ethnicity, salary, and title information of district employees subject to section 552.022(a)(2) that must be released unless made confidential under the Act or other law. Although you assert this information is excepted from disclosure under section 552.103 of the Government Code, this exception is discretionary and does not make information confidential under the Act. *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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district may not withhold the information subject to section 552.022 under section 552.103 of the Government Code. However, we note section 552.101 of the Government Code makes information confidential under the Act for purposes of section 552.022. Therefore, we will consider the applicability of this exception to the information subject to section 552.022, as well as your arguments for the remaining responsive information.

Next, we address your claim under section 552.103 of the Government Code for the responsive information not subject to section 552.022, as it is potentially the most encompassing of the exceptions you claim. Section 552.103 provides in relevant part 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). A 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 on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *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 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 argue the district anticipated litigation on the day it received the instant requests for information from the requestor because she represents a former employee in an appeal of her termination. However, as stated above, the fact that a party has hired an attorney who makes a request for information is insufficient to show that litigation is reasonably anticipated. *Id.* You also do not explain how the appeal process constitutes litigation of a judicial or quasi-judicial nature for purposes of section 552.103. *See generally* Open Records Decision No. 301 (1982) (discussing meaning of “litigation” under predecessor to section 552.103). Further, you have not demonstrated the requestor has taken any objective steps toward filing suit prior to the district’s receipt of the requests. Thus, we find you have failed to establish the district reasonably anticipated litigation when it received the requests for information. Thus, the district may not withhold the responsive information under section 552.103.

Section 552.101 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 161.032 of the Health and Safety Code, which 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.

Health & Safety Code § 161.032(a), (c). A “medical committee” is any committee, including a joint committee of a hospital, medical organization, university medical school or health science center, health maintenance organization, extended care facility, a hospital district, or a hospital authority. *See id.* § 161.031(a). The term also encompasses “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).

The precise scope of the “medical committee” provision has been the subject of a number of judicial decisions. *See Memorial Hosp.-The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996); *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988); *Jordan v. Fourth Supreme*

Judicial Dist., 701 S.W.2d 644 (Tex. 1986). These cases establish that “documents generated by the committee in order to conduct open and thorough review” are confidential, and the “privilege extends to documents that have been prepared by or at the direction of the committee for committee purposes.” *Jordan*, 701 S.W.2d at 647–48. Protection does not extend to documents “gratuitously submitted to a committee” or “created without committee impetus and purpose.” *Id.* at 648; *see also* Open Records Decision No. 591 (1991) (construing, among other things, statutory predecessor to section 161.032). We note section 161.032 does not make confidential “records made or maintained in the regular course of business by a . . . university medical center or health science center [.]” Health & Safety Code § 161.032(f); *see McCown*, 927 S.W.2d at 10 (stating that reference to statutory predecessor to Occ. Code § 160.007 in Health and Safety Code § 161.032 is clear signal that records should be accorded same treatment under both statutes in determining if they were made in ordinary course of business). The phrase “records made or maintained in the regular course of business” has been construed to mean records that are neither created nor obtained in connection with a medical committee’s deliberative proceedings. *See McCown*, 927 S.W.2d at 9–10 (discussing *Barnes*, 751 S.W.2d 493, and *Jordan*, 701 S.W.2d 644).

You inform us the district’s Board of Managers (the “board”) is appointed by the Dallas County Commissioners Court with the responsibility of managing, controlling, and administering the district. You state in furtherance of this duty, the board maintains overall responsibility for the implementation and maintenance of the Performance Improvement Plan (the “PIP”). Further you state that, under the PIP, the board provides authority to medical staff to establish and support medical committees to carry out quality and performance improvement activities system-wide. You explain the district’s Patient Safety and Risk Department (the “department”) is organized under this structure to carry out the duties of the district’s board.

You state Exhibit C-1 consists of information used by the department and the district’s Quality Committee (the “committee”) in order to implement the steps necessary to improve the quality of care in district facilities. You state this information was prepared and collected in a sequence of activity wholly within the purview of duly established medical committees. You also state this information was “not prepared in the regular course of business, but reflect[s] the deliberative process of identifying incidents involving patient care, evaluating their causes and severity, and making recommendations on how to remedy the situation and reduce the likelihood of recurrence.” Based on your representations and our review, we conclude the district must withhold Exhibit C-1 under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.

Section 552.101 also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-168.202. 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 that is 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 agree the district must withhold Exhibit C-5 under section 552.101 of the Government Code in conjunction with the MPA.³

Section 552.101 of the Government Code also encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. This office has found some kinds of medical information or information indicating disabilities or specific illnesses is 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). Furthermore, in *Morales v. Ellen*, the court determined the identities of witnesses to and victims of sexual harassment in the workplace are highly intimate and embarrassing and not of legitimate public interest. *See* 840 S.W.3d 519 (Tex. App. – El Paso 1992, writ denied). You raise common-law privacy for Exhibit C-4. We note the requestor excludes any details about a patient or the specific nature of any patient safety violation. Accordingly, we find no portion of the responsive information in Exhibit C-4 is highly intimate or embarrassing and not of legitimate public interest. Thus, no portion of the responsive information in Exhibit C-4 may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

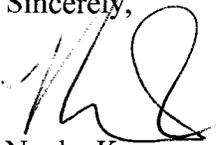
³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

In summary, the district must withhold Exhibit C-1 under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code and Exhibit C-5 under section 552.101 of the Government Code in conjunction with the MPA. The remaining responsive information must be released.

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,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/bhf

Ref: ID# 487580

Enc. Submitted documents

c: Requestor
(w/o enclosures)