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ATTORNEY GENERAL OF TEXAS

May 27, 2015

Mr. Timothy E. Bray
Deputy General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2015-10324

Dear Mr. Bray:

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# 564961 (DSHS File No. 24159-2015).

The Texas Department of State Health Services (the "department") received a request for all records related to a specified complaint. The department states it has provided or will provide information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.115 of the Government Code. We understand you to also claim the release of the submitted information may affect the interests of the Texas Medical Board (the "board"). Accordingly, we understand you have notified the board of the instant request and of the board's right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why the information should or should not be released). We have received comments from the board. We have considered the submitted arguments and reviewed the submitted information.

The department and the board assert some of the information at issue is confidential under section 164.007 of the Occupations Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This exception encompasses information that is made confidential by other statutes, such as section 164.007(c) of the Occupations Code. Section 164.007(c) provides the following:

Each complaint, adverse report, investigation file, other investigation report,
and other investigative information in the possession of or received or

gathered by 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). Section 164.007(c) is applicable to investigatory records compiled by the board during an investigation of a license holder. The board explains the information at issue is contained in the board's investigation file regarding a physician licensed by the board. The board further explains the investigation file consists of information gathered by the board as well as information submitted to the board by the licensed physician and her counsel during the course of the board's investigation. We have no indication the disclosure provisions in section 164.007 apply to the requestor. *Id.* § 164.007(d), (f), (h). By its terms, section 164.007(c) makes information confidential when in the possession of the board, its employees, or agents. Thus, we conclude the information at issue is confidential under section 164.007(c) in the hands of the board. In this instance, the information at issue is in the hands of the department. However, the board asserts the information at issue remains confidential in the hands of the department because it was forwarded by the board to the department pursuant to section 774.002 of the Government Code.

Section 774.002 of the Government Code provides a duty for health care regulatory agencies to exchange information in certain instances. Section 774.002 states, in relevant part:

(a) A health care regulatory agency that, in the course of an audit, review, investigation, or examination of a complaint, obtains information pertaining to the complaint that it believes may be grounds for another health care regulatory agency to conduct an investigation of or institute a disciplinary proceeding against a health care provider shall forward the information and any subsequently obtained information or final determination regarding the health care provider to the other health care regulatory agency.

(b) Information that may be grounds for investigative or disciplinary action by another health care regulatory agency includes information:

(1) that relates to a violation of a rule or statute enforced by the other health care regulatory agency; or

(2) that, in good faith belief of the agency obtaining the information, is likely to lead to the discovery of a violation of a rule or statute enforced by the other health care regulatory agency.

(c) Information forwarded by a health care regulatory agency under this section that is privileged or confidential retains its privileged or confidential nature following the receipt by another health care regulatory agency. The privilege or confidentiality extends to any agency communication concerning the information forwarded, regardless of the form, manner, or content of the communication.

Gov't Code § 774.002(a)-(c). The board states, and we agree, the board and the department are health care regulatory agencies as defined by section 774.001 of the Government Code. *See id.* § 774.001(2) (defining "health care regulatory agency" for purposes of chapter 774 of the Government Code); *see also* Occ. Code § 101.002 (listing entities which appoint members to Health Professions Council). As discussed above, the board explains it investigated a physician licensed by the board, who is a health care provider for the purposes of section 774.002. Gov't Code § 774.001(1) (defining "health care provider" as a person issued a license by a health care regulatory agency); *see also* Occ. Code §§ 151.002(13) (defining "practicing medicine"), 155.001 (requiring license to practice medicine), .002 (the board issues license to practice medicine). The board states, and provides a Memorandum of Understanding between the board and the department showing, it forwarded the information at issue to the department "pursuant to the authority granted by, and in compliance with, the provisions of Chapter 774 of the Texas Government Code." The board explains it forwarded the information once the board obtained information it "in good faith determine[d] may be grounds for [the department] to conduct an investigation . . . which may lead to [the department's] discovery of a statute or rule violation made by a . . . Professional and/or Entity [regulated by the department]." The board explains, and the submitted information reflects, the information at issue relates to an investigation by the department of a licensed midwife. We find a licensed midwife is a health care provider for the purposes of section 774.002. *See* Gov't Code § 774.001(1); *see also* Occ. Code §§ 203.002(4) (defining "department" for purposes of ch. 203), .251 (the department issues midwifery license under ch. 203). Based upon these representations and our review of the submitted information, we find the board forwarded the information at issue to the department pursuant to section 774.002(a). Thus, in accordance with section 774.002(c), the confidential information the board forwarded pursuant to section 774.002(a) retains its confidential nature upon receipt by the department. *See* Gov't Code § 774.002(c). Accordingly, we conclude the department must withhold the information it received from the board pursuant to section 774.002 of the Government Code under section 552.101 of the Government Code in conjunction with section 164.007(c) of the Occupations Code.¹

Section 552.101 of the Government Code also encompasses information protected by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which provides in relevant part:

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(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). 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). We have also found when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990). Section 159.001 of the MPA defines “patient” as a person who consults with or is seen by a physician to receive medical care. *See id.* § 159.001(3). Under this definition, a deceased person cannot be a patient under section 159.002 of the MPA. *See* ORDs 487, 370, 343. Thus, the MPA is applicable only to records related to a person who was alive at the time of diagnosis, evaluation, or treatment to which the records pertain. Upon review, we find the information we marked under the MPA consists of medical records. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA. Additionally, we have marked documents created at the direction of a licensed midwife. The department must only withhold these documents if they were created under the supervision of a physician. If the documents created at the direction the licensed midwife were not created under the supervision of a physician, the documents are not subject to the MPA and the department may not withhold them under section 552.101 on that basis. Furthermore, we find none of the remaining information at issue constitutes medical records subject to the MPA. Therefore, none of the remaining information at issue may be withheld under section 552.101 on the basis of the MPA.

Section 552.101 also encompasses laws that make criminal history record information (“CHRI”) confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. Title 28,

part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10-12. Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See Gov’t Code § 411.083.*

Section 411.122 of the Government Code authorizes the department’s professional licensing boards to obtain from DPS CHRI that relates to a person who is a holder of a license issued by the department. *See id.* § 411.122. However, the department may not release CHRI except as provided by chapter 411. *See id.* §§ 411.083, .084(c) (agency may not confirm existence or nonexistence of CHRI to any person not eligible to receive the information). Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See ORD 565.* Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. You state the information you have marked consists of CHRI obtained from DPS regarding a licensee. Upon review, we agree the information you have marked consists of confidential CHRI obtained by the department from DPS regarding a licensee. Therefore, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code.

Section 552.101 of the Government Code also encompasses section 773.091 of the Health and Safety Code, which provides in relevant part:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

...

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(b), (g). Except for the information specified in section 773.091(g), emergency medical service (“EMS”) records are deemed confidential under section 773.091. *See id.* §§ 773.003(8) (defining “emergency medical services” for the purposes of chapter 773 of the Health and Safety Code). Upon review, we find

section 773.091 is applicable to portions of the remaining information. Thus, with the exception of the information subject to section 773.091(g), the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code. However, we find you have failed to demonstrate the remaining information at issue is subject to section 773.091(b) of the Health and Safety Code. Thus, the department may not withhold any of the remaining information at issue under section 552.101 of the Government Code on that basis.

Section 552.115 of the Government Code provides, in pertinent part,

(a) A birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from [required disclosure], except that:

...

(2) a death record is public information and available to the public on and after the 25th anniversary of the date of death as shown on the record filed with the bureau of vital statistics or local registration official[.]

Gov't Code § 552.115(a)(2). You have submitted a death certificate as responsive to the present request. We note the 25th anniversary of the date of death has not yet occurred. However, we are unable to determine if the submitted death certificate was maintained by the department's bureau of vital statistics.² Accordingly, to the extent the death certificate was maintained by the department's bureau of vital statistics, the department must withhold the submitted death certificate under section 552.115 of the Government Code. To the extent the death certificate was not maintained by the department's bureau of vital statistics, the department may not withhold the submitted death certificate under section 552.115 of the Government Code.

In summary, the department must withhold the information it has received from the board pursuant to section 774.002 of the Government Code under section 552.101 of the Government Code in conjunction with section 164.007(c) of the Occupations Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA. To the extent the additional information we have marked under section 552.101 of the Government Code in conjunction with the MPA was created under the supervision of a physician, the department must withhold the information on that basis. The department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code. With the exception of the information subject to

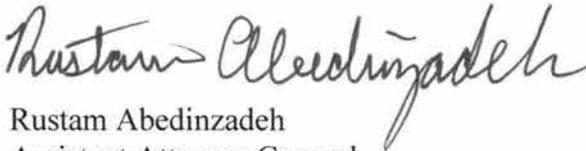
²Act of Sept. 1, 2003, 78th Leg., R.S., ch. 198, § 1.01, 2003 Tex. Gen. Laws 611 (providing, among other things, that the Texas Department of Health is part of the department).

section 773.091(g) of the Health and Safety Code, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code. To the extent the death certificate was maintained by the department's bureau of vital statistics, the department must withhold the submitted death certificate under section 552.115 of the Government Code. The department 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Rustam Abedinzadeh
Assistant Attorney General
Open Records Division

RA/dls

Ref: ID# 564961

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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