



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 23, 2015

Ms. Melanie J. Rodney
Assistant County Attorney
Harris County Hospital District
252 Holly Hall, Suite 190
Houston, Texas 77054

OR2015-12354

Dear Ms. Rodney:

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# 568095 (CAO File No. 15HSP0209).

The Harris County Hospital District d/b/a Harris Health System (the "system") received a request for a specific report and information pertaining to a specified corrective action plan.¹ You state the system has released some information. You also state the system has redacted e-mail addresses subject to section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).² You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. Additionally, the system states release of this information may implicate the interests of the Baylor College of Medicine, FKP Architects, Halford Busby, Jenson Hughes, and Wylie Consulting Engineers. Accordingly, the system states, and provides documentation showing, it notified these third parties of the request for information and of their right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have

¹You state the system sought and received clarification of the request. *See* Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without requesting a decision from this office. *See* ORD 684.

received comments from Baylor College of Medicine. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have marked some of the submitted information as not responsive to the instant request. This ruling does not address the public availability of non-responsive information, and the system is not required to release non-responsive information in response to this request.

Next, you state some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-06676 (2015). In that ruling, we concluded the system must withhold the information at issue under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code. We have no indication of a change in the law, facts, or circumstances on which the previous ruling was based. Thus, with regard to the information you have marked, we conclude the system must continue to rely on Open Records Letter No. 2015-06676 as a previous determination and withhold the information you have marked in accordance with that ruling.³ *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure).

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 information made confidential by other statutes, such as section 160.007 of the Occupations Code and section 161.032 of the Health and Safety Code. Section 160.007 of the Occupations Code provides, in relevant 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). A medical peer review committee is “the governing board 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 addresses the broader category of medical committees and provides in relevant part:

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

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

...

(c) Records, information, or reports of a medical committee, medical peer review committee, or compliance officer and records, information, or reports provided by a medical committee, medical peer review committee, or compliance officer to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under [the Act].

...

(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). 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) (emphasis added).

The precise scope of the “medical committee” provision has been the subject of a number of judicial decisions. *See, e.g., Mem’l 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 “documents generated by the committee in order to conduct open and thorough review” are confidential. *Mem’l Hosp.*, 927 S.W.2d at 10; *Jordan*, 701 S.W.2d at 647-48; *Doctor’s Hosp. v. West*, 765 S.W.2d 812, 814 (Tex. App.—Houston [1st Dist.] 1988, no writ). This protection 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.*; *see also* Open Records Decision No. 591 (1991) (construing statutory predecessor to Health & Safety Code § 161.032). Additionally, we note section 161.032 does not make confidential “records made or maintained in the regular course of business by a hospital[.]” Health & Safety Code § 161.032(f); *see also Mem’l Hosp.*, 927 S.W.2d at 10 (stating reference to statutory predecessor to section 160.007 of the Occupations Code in section 161.032 is clear signal 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 Mem’l Hosp.*, 927 S.W.2d at 10 (discussing *Barnes*, 751 S.W.2d 493, and *Jordan*, 701 S.W.2d 644).

You assert some of the remaining information pertains to the system's Trauma Program/Performance Improvement and Patient Safety Committee, Community Health Program Executive Committee, Ambulatory Care Committee, Utilization Review Committee, Emergency Center Committee. We note these committees are "medical committees" under section 161.031. You also assert the system's Board of Managers Performance Improvement and Patient Safety Committee (the "BOM PIC") is a medical peer review committee and a medical committee which consists of at least three of the system's voting board members and operates under the written bylaws of the system. You state the BOM PIC is authorized to "evaluate the quality of medical and health care services or the competence of physicians, including the evaluation of the performance of those functions." You also state the BOM PIC is a medical peer review committee "when it is evaluating the competence of a [m]edical [s]taff member or the quality of medical and healthcare services provided by [the system]." You further state the BOM PIC meets in executive session to conduct medical peer review activities. Based on your representations, we agree the BOM PIC constitutes both a medical peer review committee and a medical committee. You state the information you have indicated was prepared by or for or at the behest of the above mentioned medical committees or medical peer review committee members for the purpose of fulfilling committee functions. Accordingly, we agree the information at issue consists of confidential records of a medical committee under section 161.032.

You also contend the information you have indicated consists of correspondence and information created by or exchanged between the system's compliance officer and his designee and system employees and members of the system's medical committees. You state the correspondence at issue was "received or maintained by a compliance officer that [was] created or maintained 'in the exercise of a proper function of the compliance officer as provided by the Office of Inspector General of the United States Department of Health and Human Services.'" Based on your representations and our review, we conclude the information you have indicated consists of records or information of a compliance officer that is subject to section 161.032. *Cf. Texarkana Mem'l Hosp., Inc. v. Jones*, 551 S.W.2d 33, 35 (Tex. 1977) (defining records made or maintained in regular course of business). Therefore, we conclude the system must withhold the information you have indicated under section 552.101 in conjunction with section 161.032 of the Health and Safety Code.⁴

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is

⁴As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the e-mail you have numbered as page 00648 reflects a communication involving system legal counsel made in furtherance of the rendition of professional legal services to the system. You further state the communication has been kept confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the system may withhold page 00648 under section 552.107(1) of the Government Code.

In summary, the system must continue to rely on Open Records Letter No. 2015-06676 as a previous determination and withhold the information you have marked in accordance with that ruling. The system must withhold the information you have indicated under section 552.101 in conjunction with section 161.032 of the Health and Safety Code. The system may withhold page 00648 under section 552.107(1) of the Government Code. The system must release the remaining responsive 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,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/bhf

Ref: ID# 568095

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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