



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 15, 2015

Ms. Cynthia Tynan
Attorney and Public Information Coordinator
Office of the General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR2015-26313

Dear Ms. Tynan:

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# 590731 (OGC# 164694).

The University of Texas Southwestern Medical Center (the "university") received a request for (1) the requestor's client's personnel file, (2) all documents created, reviewed, and used in the decision to terminate the requestor's client, and (3) all patient records which reflect or record the facts or incidents which were the basis for terminating the requestor's client. The university states it has released some of the requested information. The university claims some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception the university claims and reviewed the submitted representative sample of information.¹

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

¹We assume 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 those records contain substantially different types of information than that submitted to this office.

statute, such as the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant 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.

Occ. Code § 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. 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 the university has marked constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician. Accordingly, the university must withhold the marked medical records under section 552.101 of the Government Code in conjunction with the MPA.²

Section 552.101 of the Government Code also encompasses section 303.006 of the Occupations Code. Chapter 303 of the Occupations Code addresses the peer review of nurses. Section 303.006 protects all communications made to a nursing peer review committee and makes the committee proceedings confidential. Occ. Code § 303.006. Information protected by section 303.006 may be released only as provided in section 303.007. The university informs us the information it has marked consists of materials that were created at the request of a nursing peer review committee. Thus, we find the information at issue is confidential under section 303.006 of the Occupations Code. The university states the provisions of section 303.007 do not apply to the information at issue.

²As our ruling is dispositive, we need not address the university's remaining arguments against disclosure of this information.

Therefore, the university must withhold the information it has marked under section 552.101 of the Government Code in conjunction with section 303.006 of the Occupations Code.³

Section 552.101 of the Government Code also encompasses section 181.006 of the Health and Safety Code. 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(2). Section 181.001(b)(2)(A) defines “covered entity,” in part, as any person who:

(A) for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site[.]

Id. § 181.001(b)(2)(A). The university asserts it is a covered entity for purposes of section 181.006 of the Health and Safety Code. However, in order to determine whether the university is a covered entity, we must address whether the university engages in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. Section 181.001 states that “[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”].” *Id.* § 181.001(a). Accordingly, as chapter 181 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 that is transmitted or maintained in electronic media or any other form or medium. *See* 45 C.F.R. § 160.103. HIPAA defines “individually identifiable health information” as information that is a subset of health information, including demographic information collected from an individual, and:

- (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and

³As our ruling is dispositive, we need not address the university’s remaining argument against disclosure of this information.

- (i) That identifies the individual; or
- (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

Id. The remaining information was created by the university as a health care provider and relates to the provision of health care to a named individual. Upon review, we find the information the university has marked consists of protected health information for purposes of section 181.006 of the Health and Safety Code. The university indicates the university collects and stores this information for the purpose of providing health care-related services. Therefore, with respect to this information, the university is a health care entity that is in the practice of collecting, using, and storing protected health information, and is a covered entity for purposes of section 181.006 of the Health and Safety Code. Accordingly, the university must withhold the information it has marked under section 552.101 of the Government Code in conjunction with section 181.006 of the Health and Safety Code.⁴

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). Upon review, we find the university has failed to demonstrate any of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Thus, the university may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the university must withhold the information it has marked under section 552.101 of the Government Code in conjunction with the MPA, section 303.006 of the Occupations Code, section 181.006 of the Health and Safety Code. The university 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.

⁴As our ruling is dispositive, we need not address the university's remaining argument against disclosure of this information.

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,



David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/bhf

Ref: ID# 590731

Enc. Submitted documents

c: Requestor
(w/o enclosures)