



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 19, 2016

Mr. Jonathan Miles
Open Records Attorney
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2016-08792

Dear Mr. Miles:

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# 606437.

The Texas Health and Human Services Commission (the "commission") received a request for all documentation relating to a specified investigation. You state you will release some information to the requestor. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

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 protected by other statutes, including section 531.1021 of the Government Code, which provides, in relevant part, the following:

(g) All information and materials subpoenaed or compiled by the [commission's Office of Inspector General ("OIG")] in connection with an audit or investigation or by the office of the attorney general in connection with a Medicaid fraud investigation are confidential and not subject to disclosure under [the Act], and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the [OIG] or the attorney general or their employees or agents involved in the audit or investigation conducted by the [OIG] or the attorney general, except

that this information may be disclosed to the state auditor's office, law enforcement agencies, and other entities as permitted by other law.

(h) A person who receives information under Subsection (g) may disclose the information only in accordance with Subsection (g) and in a manner that is consistent with the authorized purpose for which the person first received the information.

Id. § 531.1021(g), (h). You assert the submitted information is confidential under section 531.1021(g). Section 531.1021 is located in subchapter C of chapter 531 of the Government Code, titled "Medicaid and Other Health and Human Services Fraud, Abuse, or Overcharges." Section 531.102, also found in subchapter C, further specifies the OIG "is responsible for the investigation of fraud and abuse in the provision of health and human services[.]" *Id.* § 531.102(a). Thus, subchapter C addresses the responsibilities of the OIG in conducting investigations of Medicaid and other health and human services fraud and abuse. Therefore, section 531.1021 applies only to audits and investigations of Medicaid and other health and human services fraud and abuse. Upon review, we find the submitted information relates to an internal personnel investigation into the alleged misconduct of an employee. We find this information is not related to Medicaid or other health and human services fraud, abuse, or overcharges. Therefore, the commission may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 531.1021(g) of the Government Code.

Section 552.101 of the Government Code also encompasses the Family and Medical Leave Act (the "FMLA"). *See* 29 U.S.C. §§ 2601 *et seq.* Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states:

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files. If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA shall be maintained in accordance with the confidentiality requirements of Title II of GINA (*see* 29 C.F.R. 1635.9), which permit such information to be disclosed consistent with the requirements of FMLA. If the [Americans with Disabilities Act (the "ADA"), as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;

(2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and

(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). Upon review, we find the information we have marked is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find none of the release provisions of the FMLA apply to this information. Accordingly, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the FMLA.

Section 552.101 of the Government Code also encompasses the ADA. *See* 42 U.S.C. § 12101 *et seq.* Title I of the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a "fitness for duty examination" conducted to determine whether an employee is still able to perform the essential functions of his or her job is to be treated as a confidential medical record as well. *See* 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Federal regulations define "disability" for the purposes of the ADA as "(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 29 C.F.R. § 1630.2(g). The regulations further provide that physical or mental impairment means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. *See id.* § 1630.2(h). Upon review, we find the information we have marked is confidential under the ADA and the commission must withhold such information under section 552.101 of the Government Code.

Section 552.101 also encompasses information made confidential by 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 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 at 1 (1990). This office has also 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 we have marked constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by someone under the supervision of a physician. Accordingly, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA.

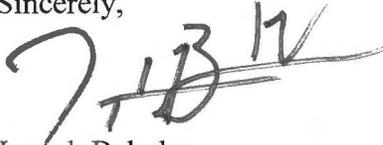
In summary, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the FMLA, the ADA, and the MPA. The commission must release the remaining information to this requestor.¹

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.

¹We note the requestor has a right of access to some of the information being released in this instance. *See* Gov't Code § 552.023(a) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Thus, if the commission receives another request for this same information from a different requestor, the commission must again seek a ruling from this office.

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,

A handwritten signature in black ink, appearing to read 'JB' with a large flourish extending to the right.

Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 606437

Enc. Submitted documents

c: Requestor
(w/o enclosures)