



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 28, 2017

Ms. Cynthia Reyna
General Counsel
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025

OR2017-22275

Dear Ms. Reyna:

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# 678094 (ORR# 2017-65).

The State Office of Administrative Hearings ("SOAH") received a request for the audio recordings and transcripts pertaining to specified hearings. SOAH states it does not have some of the submitted information.¹ SOAH claims the submitted information is excepted

¹The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *See generally Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

from disclosure under section 552.101 of the Government Code.² We have considered the claimed exception 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 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 relevant part the following:

(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 subject to the MPA includes both medical records and information obtained from those 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 at 3-4 (1988), 370 at 2 (1983), 343 at 1 (1982). Upon review, we find

²We note SOAH informs us an administrative law judge ordered some of the submitted information to be confidential and sealed. However, in response to this office’s request for additional information under section 552.303 of the Government Code, SOAH informs us its governing statute, chapter 2003 of the Government Code, “does not include any provision that would grant SOAH the legal authority to designate information as ‘confidential by law’ for purposes of the [Act] by rule or other means.” *See generally* Open Records Decision Nos. 594 at 2-3 (1991) (city ordinance cannot operate to make information confidential when not excepted by Act), 263(1981) (city ordinance may not conflict with Act). *See also Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976) (agency rule may not make information confidential in circumvention of Act); *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982) (local ordinance conflicting with or inconsistent with state legislation not permissible). SOAH also explains, if an administrative law judge orders information to be sealed, “it is still the underlying statute, rather than the administrative law judge’s order, that exerts the force of law and ultimately determines whether information is subject to disclosure under the [Act].” *See* Gov’t Code § 552.303(c) (attorney general may give written notice to governmental body that additional information is necessary to render decision).

some of the submitted information, which we have marked, constitutes medical records. Accordingly, SOAH must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA.³ However, we find SOAH has not established any of the remaining information consists of records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. Thus, the remaining information is not confidential under the MPA, and SOAH may not withhold it under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code, which provides in part as follows:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining “patient” and “professional”). Upon review, we find some of the remaining information, which we have marked, consists of mental health records that are subject to chapter 611 of the Health and Safety Code. Therefore, SOAH must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.⁴

Section 552.101 of the Government Code also encompasses section 181.006 of the Health and Safety Code, which provides the following:

[F]or a covered entity that is a governmental unit, an individual’s protected health information:

(1) includes any information that reflects that an individual received health care from the covered entity; and

(2) is not public information and is not subject to disclosure under [the Act].

Id. § 181.006. Section 181.001(b)(2)(A) defines “covered entity” to include any person who

³As our ruling is dispositive, we do not address the other arguments of SOAH to withhold this information.

⁴As our ruling is dispositive, we do not address SOAH’s arguments to withhold this information.

(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). SOAH does not assert it is a covered entity for purposes of section 181.006 of the Health and Safety Code. Thus, we find SOAH has failed to demonstrate any of the remaining information is subject to section 181.006 of the Health and Safety Code, and may not withhold it under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 467.007 of the Health and Safety Code, which reads, in part, as follows:

(a) Any information, report, or record that an approved peer assistance program or a licensing or disciplinary authority receives, gathers, or maintains under this chapter is confidential. Except as prescribed by Subsection (b) or by Section 467.005(c), a person may not disclose that information, report, or record without written approval of the impaired professional or other interested person.

(b) Information that is confidential under Subsection (a) may be disclosed:

(1) at a disciplinary hearing before a licensing or disciplinary authority in which the authority considers taking disciplinary action against an impaired professional whom the authority has referred to a peer assistance program under Section 467.006(a) or (b)[.]

Id. § 467.007(a), (b)(1). SOAH indicates some of the information at issue was disclosed at a disciplinary hearing pursuant to section 467.007(b)(1). However, SOAH does not assert this information is confidential under section 467.007(a), and we note, by its terms, section 467.007 only applies to information received, gathered, or maintained by an approved peer assistance program or a licensing or disciplinary authority. In this instance, the information at issue is maintained by SOAH. Accordingly, upon review, we find none of the remaining information is confidential under section 467.007(a) of the Health and Safety Code, and SOAH may not withhold any of it under section 552.101 of the Government Code on that ground.

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 some of the remaining information, which we have marked, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, SOAH must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we conclude the remaining information is not confidential under common-law privacy, and SOAH may not withhold it under section 552.101 on that ground.

The remaining information contains e-mail addresses of members of the public. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).⁵ Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). We are unable to determine if the e-mail addresses in the remaining information fall within the scope of subsection 552.137(c). Accordingly, we must rule conditionally. To the extent the e-mail addresses in the remaining information are not excluded by section 552.137(c) of the Government Code, SOAH must withhold them under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. To the extent the e-mail addresses at issue are excluded by section 552.137(c), SOAH may not withhold them under section 552.137.

In summary, SOAH must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA, section 611.002 of the Health and Safety Code, and common-law privacy. To the extent the e-mail addresses in the remaining information are not excluded by section 552.137(c) of the Government Code, SOAH must

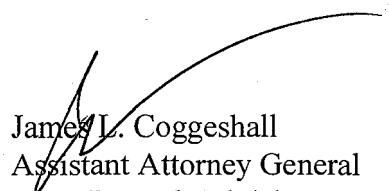
⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).

withhold them under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. SOAH 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/bw

Ref: ID# 678094 (ORR# 2017-65)

Enc. Submitted documents

c: Requestor
(w/o enclosures)