



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 21, 2019

Ms. Melanie J. Rodney
Assistant County Attorney
Harris County
2525 Holly Hall, Suite 190
Houston, Texas 77054

OR2019-07871

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# 755872 (HCA File No. 19HSP0014).

The Harris County Hospital District d/b/a Harris Health System (the "system") received a request for specified e-mails pertaining to a named individual, the requestor, and the requestor's company.¹ The system claims some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.117, and 552.137 of the Government

¹The system states, and provides documentation showing, it sought and received clarifications of the information requested. *See* Gov't Code § 552.222 (providing 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 a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Further, the system states it sent the requestor an estimates of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). The system informs us it received the required deposit on January 4, 2019. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

Code.² Additionally, the system states, and provides documentation showing, it has notified the named individual and the company that represents him, Perseus Strategies, LLC (“Perseus”), of their right to submit comments to this office as to why some of the submitted information should not be released. *See* Gov’t Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from Perseus and the requestor. *See id.* We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Perseus argues some of the submitted information is not responsive to the request for information. However, we note the Act requires a governmental body to make a good-faith effort to relate a request to information the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). Because the system has submitted the information at issue for our review, we find the system has made a good-faith effort to submit information that is responsive to the request, and we will address the arguments against disclosure of this information.

Next, Perseus notes it marked some of the information at issue as “confidential” when the information was submitted to the system. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See id.* § 552.107(1). 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 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

²We note the system did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See* Gov’t Code § 552.301(b), (e). Nonetheless, as sections 552.101, 552.107, 552.117, and 552.137 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will consider their applicability to the submitted information. *See id.* §§ 552.007, .302, .352.

apply when an attorney or representative is 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 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 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).

The system states Exhibits F and G consist of communications involving attorneys for the system and system employees that were made in furtherance of the rendition of professional legal services to the system. The system states these communications were intended to be, and have remained, confidential. Based on the system’s representations and our review, we find the system has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the system may generally withhold Exhibits F and G under section 552.107(1) of the Government Code.³ We note, however, some of these e-mail strings include an e-mail received from a non-privileged party. Furthermore, if the e-mail received from the non-privileged party is removed from the e-mail strings and stands alone, it is responsive to the request for information. Therefore, if the non-privileged e-mail, which we have marked, is maintained by the system separate and apart from the otherwise privileged e-mail strings in which it appears, then the system may not withhold the non-privileged e-mail under section 552.107(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

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

Code § 552.101. Section 552.101 encompasses information made confidential by other statutes. Section 161.032 of the Health and Safety Code addresses a broad category of medical committees and provides, in relevant part:

(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].

...

(e) The records, information, and reports received or maintained by a compliance officer retain the protection provided by this section only if the records, information, or reports are received, 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.

(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(c), (e), (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); see also *Jordan*, 701 S. W.2d at 648 (court found privilege extends to minutes of committee meetings, correspondence between members relating to deliberation process, and any final committee product).

The system informs us the Harris Health Quality Governance Council [(the “QGC”)], which operates as a medical committee, “provides executive committee oversight for Harris Health’s Quality Program [(the “program”)] with the purpose of supporting and facilitating the continual improvement of quality health care.” The system states the information at issue was compiled and created as part of an investigation within the purview of the program conducted at the direction of the QGC. Based on the system’s representations and our review, we agree the information at issue consists of confidential records of a medical peer review committee under 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 Exhibits H-1, H-2, and H-3 under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.⁴

Additionally, the system and Perseus assert portions of the remaining information are confidential under section 161.032. However, upon review, we find the system and Perseus have failed to demonstrate any of the remaining information consists of records, information, or reports of or reports provided by a medical committee, medical peer review committee, or compliance officer purposes of section 161.032. See Health & Safety Code § 161.031. Accordingly, the system may not withhold any of the remaining information under section 552.101 on that basis.

Perseus claims some of the remaining information is subject to section 552.108(a)(1) of the Government Code. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” *Id.* § 552.108(a)(1). A governmental body

⁴As our ruling is dispositive, we need not address the system’s remaining arguments against disclosure for this information.

claiming section 552.108(a)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987). Where a governmental body has custody of information relating to a pending case of another law enforcement agency, the custodian of records may withhold the information if it provides this office with a demonstration the information relates to a pending criminal case and a representation from the law enforcement agency that it wishes to have the information withheld. Perseus informs us some of the remaining information relates to an investigation being conducted by a law enforcement agency. However, Perseus has not provided a representation from a law enforcement agency, nor has a law enforcement agency provided a representation to this office, stating it wishes to withhold the information at issue. Therefore, the system may not withhold any of the information at issue under section 552.108(a)(1) of the Government Code.

Section 552.101 of the Government Code also encompasses information made confidential by chapter 611 of the Health and Safety Code. Section 611.002 pertains to mental health records and provides, in pertinent part,

(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”). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See id.* §§ 611.004, .0045; *see also* Open Records Decision No. 565 (1990). Upon review, we find some of the remaining information consists of mental health records that are subject to chapter 611. Accordingly, the system must withhold the mental health records we have marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.⁵

⁵As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). The Third Court of Appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *See Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). Upon review, we find portions of the remaining information satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the system and Perseus have not demonstrated any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, the system may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. The system states the employees at issue timely requested confidentiality of their cellular telephone numbers under section 552.024. The system also states the cellular telephone service is not paid for by a

governmental body. Therefore, the system must withhold the information it marked under section 552.117(a)(1) of the Government Code.

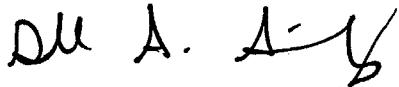
Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* 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). Some of the e-mail addresses at issue are not excluded by subsection (c). Therefore, the system must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. However, upon review, the personal e-mail address within the remaining information at issue, which is located within an e-mail communicating official business of the system, belongs to a system employee. Thus, the system may not withhold the information at issue on the basis of section 552.137. *See Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov’t Code § 552.137(a)).

In summary, the system may generally withhold Exhibits F and G under section 552.107(1) of the Government Code; however, if the non-privileged e-mail, which we have marked, is maintained by the system separate and apart from the otherwise privileged e-mail strings in which it appears, then the system may not withhold the non-privileged e-mail under section 552.107(1). The system must withhold Exhibits H-1, H-2, and H-3 under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code. The system must withhold the mental health records we have marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code. The system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The system must withhold the information it marked under section 552.117(a)(1) of the Government Code. The system must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The system 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,

A handwritten signature in black ink, appearing to read "Gerald A. Arismendez". The signature is written in a cursive style with a large initial "G" and "A".

Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/mo

Ref: ID# 755872

Enc. Submitted documents

c: Requestor
(w/o enclosures)