



**THE ATTORNEY GENERAL  
OF TEXAS**

January 18, 1988

**JIM MATTOX  
ATTORNEY GENERAL**

Robert Bernstein, M.D.  
Commissioner  
Texas Department of Health  
1100 West 49th Street  
Austin, Texas 78756

Open Records Decision No. 487

Re: Whether records concerning complaints about the transfer of patients between hospitals are excepted from disclosure under the Open Records Act, article 6252-17a, V.T.C.S. (RQ-1151)

Dear Dr. Bernstein:

You received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for information related to "patient-dumping," a term applied to the transfer of patients from one hospital to another on the basis that the patients cannot guarantee payment for medical care. In 1985, the Texas Legislature amended the Hospital Licensing Law to require the Texas Board of Health to adopt rules governing the transfer of patients. See V.T.C.S. art. 4437f, §5(b) (as amended by Acts 1985, 69th Leg., ch. 597, §1 at 4561 and ch. 931, art. 13, §1, at 6833). Section 5(b) of article 4437f requires hospitals to adopt a policy regarding patient transfers and to keep records of patient transfers. Pursuant to section 5(b) the Department of Health adopted rules regarding its investigation of complaints about patient transfers. See 25 T.A.C. §133.21, ch. 11. You ask about the availability to the public of information regarding your investigation of patient transfer complaints.

Under the Open Records Act, all information held by governmental bodies is public unless the information falls within one of the act's specific exceptions to disclosure. Section 3(a)(1) of the act protects

information deemed confidential by law, either Constitutional, statutory, or by judicial decision. (Emphasis added.)

You suggest that section 5.08 of the Texas Medical Practice Act, article 4495b, V.T.C.S., provides statutory authority to protect these complaint files under section 3(a)(1). Additionally, you suggest that, when a particular complaint involves a hospital participating in the federal medicare program, parts of the investigative file may be confidential under the requirements of Title XVIII of the Social Security Act in conjunction with section 3(a)(1).

You assert that each complaint file is confidential in its entirety under section 5.08(b) of article 4495b because the investigation reveals the medical treatment of a particular patient. Section 5.08(b) provides:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

Although the status of this provision in civil and criminal litigation is not entirely clear, the provision remains in effect for purposes of determining the availability to the public of medical records held by governmental bodies. Open Records Decision No. 482 (1987).

Several things about section 5.08(b) are relevant to your inquiry. The protection of section 5.08 for medical records includes records of diagnosis and treatment. Open Records Decision No. 324 (1982). The records must, however, be prepared by a physician or by someone under the supervision of a physician. Open Records Decision Nos. 370 (1983), 343 (1982). For example, when a hospital daily log is not prepared by a physician, section 5.08(b) does not apply. Open Records Decision No. 343. On the other hand, records of medical tests such as blood tests taken under the supervision of a physician fall within section 5.08(b). Open Records Decision No. 324.

In Open Records Decision No. 370, this office addressed a situation similar to the situation you present. In Decision No. 370, this office indicated that records prepared by emergency medical services personnel concerning the emergency transfer of patients are not protected by section 5.08(b), despite the fact that emergency medical services personnel might be in radio communication with a physician while providing the aid

described in the forms. The forms noted the patient's name, vital signs, and diagnosis; the transferring and receiving hospital; the reasons for the transfer; and the name of the doctor requesting the transfer. The decision reasoned that because this information does not constitute records of the identity, diagnosis, evaluation or treatment of a patient by a physician, the information may not be withheld under section 5.08(b). The decision noted, however, that some of the information contained in the records must be withheld under the common-law and constitutional privacy aspects of section 3(a)(1). See Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). You must withhold information related to, for example, a drug overdose, acute alcohol intoxication, obstetrical or gynecological illness, and severe emotional or mental distress. Open Records Decision Nos. 370 (1983), 262 (1980).

The information you submit for review raises questions under section 5.08(b) similar to those addressed in Open Records Decision No. 370. The information you submit comprises three categories: (1) the "Memorandum of Transfer," (2) an incomplete investigation file consisting of a 16-page "Report of Contact," and (3) a closed investigative file consisting of several letters, medical records prepared in the emergency room, portions of an emergency room register, and a "Hospital Transfer Complaint" form. You also submitted a copy of a particular hospital's patient transfer policy. You did not indicate whether this was submitted for informational purposes or for review. In any event, this policy statement clearly does not fall within section 5.08(b) and may not be withheld under section 3(a)(1) of the Open Records Act.

The "Memorandum of Transfer" contains very basic factual data about patient transfers. It includes the patient's name, address, sex, and age; information about the patient's next of kin; the names and addresses of the transferring and receiving hospitals; the date and time of arrival at each hospital; the type of vehicle used for the transfer; the names and signatures of the transferring and receiving physicians; and the names and signatures of the transferring and receiving hospitals' administrators. This information may not be automatically withheld under section 5.08(b) in conjunction with section 3(a)(1).

When a particular form identifies a patient and has been prepared by a physician acting as a physician or

by a person acting under a physician's direction, it must be withheld. On the other hand, if the physicians, either transferring or receiving, never examine the patient or review medical information about the patient collected under the physician's supervision, the forms may not be withheld. In other words, if the physicians sign the forms in a purely administrative role, the forms may not be withheld. It should be noted, however, that the patient-transfer laws are intended to require transferring hospitals to assume responsibility for the medical advisability of transferring a patient. The availability of particular forms depends on the facts in individual cases. In the two cases you present, this information is available from other records that do not fall within section 5.08(b).

The incomplete investigation file consisting of a 16-page "Report of Contact" contains some information that may be withheld as medical records under section 5.08(b). You assert that this file may be withheld in its entirety because it relates to an incomplete investigation. You note that section 6 of the Open Records Act requires the disclosure of certain reports "upon completion" and suggest that this means only "upon completion." It is now well-established that section 6 does not limit the meaning of other sections of the Open Records Act. See Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177 (Tex. Civ. App. - Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 460 (1987). Section 3 of the act indicates all information held by governmental bodies must be released unless the information falls within one of the act's specific exceptions to disclosure. See Open Records Decision No. 321 (1982).

Some of the information in the 16-page report may be withheld under section 5.08(b) in conjunction with section 3(a)(1). The patient's name, the fact that the patient was transferred from one hospital to another, and the fact that the patient subsequently died may not be withheld as medical records under section 5.08(b). All of the information on pages 8, 9, 10, and 11 of the report may be withheld under section 5.08(b). Although these pages contain some factual information that does not constitute a medical record under section 5.08(b), the information is inextricably intertwined with records of a summary of the diagnosis and treatment of the patient by physicians and those medical personnel under the physician's supervision. Pages 12, 13, and 14 also contain some medical information that must be withheld. This information is marked on the copies of the documents you submitted for review.

The third category of information at issue here, the closed investigative file, also contains information that may be withheld under section 5.08(b). This file contains complaint letters submitted to the Texas Department of Health about a particular patient transfer, letters from the department to the complaining hospital and to the hospital subject to the complaint, letters of explanation to the department from the hospital subject to the complaint, a "Hospital Transfer Complaint" form, a medical record prepared in the emergency room, and an emergency room register or log. Portions of the letters and the complaint form contain detailed descriptions of the diagnosis and treatment of the patient by physicians. This information is marked for your information and may be withheld under section 5.08(b) in conjunction with section 3(a)(1) of the Open Records Act. The medical record prepared in the emergency room may be withheld in its entirety. The emergency room register may not be withheld in its entirety, but certain portions of it must be deleted to protect privacy interests. See Open Records Decision No. 343 (1982). These portions have been marked for your information.

You also ask about the availability of this same type of information when the information involves a hospital participating in the federal medicare program under Title XVIII of the Social Security Act. Participation in this program requires compliance with certain federal regulations that, in turn, require compliance with certain state licensing requirements. See 42 C.F.R. §405.1220. As indicated, the Texas Department of Health's patient transfer regulations are part of the Texas Hospital Licensing Law, article 4437f, V.T.C.S. Thus, the department prepares information about compliance with both the federal act and the state act.

Subsection (b)(1) of section 401.126 of Title 42 of the Code of Federal Regulations provides:

Reports described in sections 1106 (d) and (e) of the Social Security Act shall not be disclosed, except in accordance with the provisions of section 1106 (d) and (e). Sections 1106 (d) and (e) provide for public inspection of certain official reports dealing with the operation of the health programs established by titles XVIII and XIX of the Social Security Act (Medicare and Medicaid), but require that program validation survey reports and other formal

evaluations of providers of services shall not identify individual patients, individual health care practitioners, or other individuals. Section 1106(e) further requires that none of the reports shall be made public until the contractor or provider whose performance is being evaluated has had a reasonable opportunity to review that report and to offer comments.<sup>1</sup> See §401.133(b) and (c). (Emphasis added.)

Subsections (b) and (c) of section 401.133 reiterate that statements of deficiencies and reports on providers of services prepared by state agencies shall be made available to the public provided that no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed. Consequently, with regard to hospitals or other facilities that participate in the medicare program, you must also delete the identities of these individuals and withhold the information under section 3(a)(1) of the Open Records Act.

#### S U M M A R Y

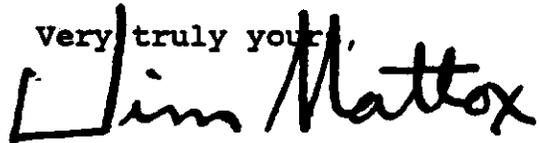
The Texas Department of Health received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for information about the department's investigation of complaints about the transfer of patients from one hospital to another. Section 5.08(b) of the Texas Medical Practice Act, article 4495b, V.T.C.S., in conjunction with section 3(a)(1) of the Open Records Act, protects from required disclosure records of the identity, diagnosis, evaluation, or treatment of patients when those records are prepared by a physician or by someone under a physician's supervision. Portions of the documents the department submitted for review must be withheld under section 5.08(b) in conjunction with section 3(a)(1).

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1. Neither of the files you submit consist of or include reports of your evaluation of a facility; rather they consist of complaints and facilities' response to the complaints.

Some portions of the documents must also be withheld under the constitutional and common-law privacy aspects of section 3(a)(1). Additionally, with regard to hospitals that participate in the federal medicare program, the department must also delete all information identifying individual patients, physicians or other medical practitioners, and other individuals.

Very truly yours,

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive style with a large, stylized "J" and "M".

J I M M A T T O X  
Attorney General of Texas

MARY KELLER  
First Assistant Attorney General

LOU MCCREARY  
Executive Assistant Attorney General

JUDGE ZOLLIE STEAKLEY  
Special Assistant Attorney General

RICK GILPIN  
Chairman, Opinion Committee

Prepared by Jennifer Riggs  
Assistant Attorney General