



**THE ATTORNEY GENERAL
OF TEXAS**

July 10, 1989

**JIM MATTOX
ATTORNEY GENERAL**

Mr. Mel Hazlewood
Office of General Counsel
The University of Texas System
201 W. 7th St.
Austin, Texas 78701

Dear Mr. Hazlewood:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 6000; this decision is OR89-195.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

The University of Texas Medical Branch received an Open Records Act request for photographs of two inmates of the Texas Department of Corrections who underwent cosmetic surgery at John Sealy Hospital. The university contends that section 3(a)(1) protects these photographs as information deemed confidential by statutory law, specifically the Texas Medical Practice Act, article 4495b, V.T.C.S. We agree.

Section 3(a)(1) excepts from disclosure

information deemed confidential by law,
either Constitutional, statutory, or by
judicial decision.

Article 4495b, the Medical Practice Act, section 5.08 states that

Communications between one licensed to practice medicine, relative to or in connection with any professional services as a physician to a patient, is confidential and privileged and may not be disclosed except as provided in this section.

Section 5.08(b) provides that

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.

The act then enumerates the exceptions to confidentiality or privilege both in a court or administrative proceedings context, see § 5.08(g), and in other situations. See § 5.08(h).

Medical records generated by a physician are not included within the ambit of public information. Attorney General Opinion MW-381 (1981). Although prisoners may have a right of access to their own records under article 4495b, a member of the public does not have access to such records protected by any right of privacy unless the right has been waived. Attorney General Opinion MW-381. See Open Records Decision No. 258 (1980).

Open Records Decision No. 324 (1982), in construing article 4495b, held that information concerning results of a city's voluntary lead screening program comprised records created by a physician and were thus confidential. In that decision, test results without identifying information had already been released. In the case of the photographs at issue here, such a limited release would of course not be possible, since the essence of the information requested - a photograph - identifies the individual inmates.

These prior decisions control the request presented to the university. The photographs in question are "records of the identity, diagnosis, evaluation or treatment of a patient." Art. 4495b, § 5.08(b). If the photographs are created or maintained by a physician or by someone under his direct supervision, see Cassingham v. Lutheran Sunburst Health Service, 748 S.W.2d 589 (Tex Civ. - San Antonio 1988, no writ), the photographs are deemed confidential by statute and thus excepted from disclosure under section 3(a)(1) of the Open Records Act.

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The university indicates that the requestor of this information asserts that the records of inmates are not protected information under either the Open Records act or the Texas Medical Practice Act because felons are not covered by the protections of either statute. We disagree. The Open Records Act, by its terms, applies to categories of information, not classes of persons. Nothing in the Act indicates it was intended to diminish rights already in existence, or to exclude from its coverage certain persons simply on the basis of their status as convicted felons. Nor do we find such an intention in the Medical Practice Act which specifically delineates the circumstances under which the disclosure of medical records is permitted without authorization from a patient. § 5.08(h). Nor does article 4495b exclude inmates from its definition of "patient." Section 5.08(m). Moreover, in Attorney General Opinion MW-381, it was held that an inmate may be permitted access to his own medical records under article 4495b. The civil disabilities imposed upon a felony conviction under Texas law are extremely limited and statutorily created. For example, felons are prohibited from voting, see Tex. Const. art VI, § 1, and are barred from serving on juries. Gov't Code 62.102. Some confusion may exist in the mind of the requestor concerning the applicability of article 4495b because it was partly repealed by the Court of Criminal Appeals, pursuant to its authority, but only insofar as it related to criminal proceedings. See V.T.C.S. art. 4495b; and Tex. R. of Crim. Evid. 509 (stating that there is no physician patient privilege in criminal proceedings). The request received by the university does not involve a criminal proceeding, but only a criminal, and thus Rule 509 and the limited repeal of article 4495b in the context of criminal proceedings are irrelevant.

In summary, the requested photographs are excepted from disclosure under section 3(a)(1) as they constitute information deemed confidential by law, article 4495b, section 5.08(b). Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR89-195.

Yours very truly,

*Open Government Section
of the Opinion Committee* *DN*

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of the Opinion Committee
Prepared by David A. Newton
Assistant Attorney General

DAN/bc

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cc: Steven Long
Feature Writer
Houston Chronicle
P. O. Box 4260
Houston, Texas 77210