



THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

November 14, 1989

Mr. Bob Dickson
Executive Director
Texas Commission on Alcohol
and Drug Abuse
1705 Guadalupe
Austin, Texas 78701-1214

Dear Mr. Dickson:

While reviewing old files recently, this office discovered that some time ago, on behalf of the Texas Commission on Alcohol and Drug Abuse (the commission), you requested two decisions on whether records relating to investigations of complaints against alcohol and drug abuse centers were subject to public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request letters were assigned ID#s 1777 and 2424. This decision is OR89-373.

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. Attorney General Opinion H-436 (1974). The act places on the custodian of records the burden of proving that records are excepted from public disclosure. Id. 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 commission was created in 1985 as a result of a task force study of the changes needed in the certification and licensure of substance abuse treatment centers and in commitment procedures for substance abusers. Among its other duties, the commission licenses facilities that treat alcohol or drug dependent persons. V.T.C.S. art. 5561c-2, § 1.14(a)(9). In the licensing process, the commission receives and investigates complaints about treatment facilities. Id. § 1.13. The open records requests received

by the commission relate to two different treatment facilities.

One of the requests relates to the Oaks Recovery Center at Denton (the Oaks). The Oaks applied to the commission for a license. As a part of the commission's routine licensing inspections and because of written complaints received by the commission against the program at the Oaks, the commission conducted an investigation of the Oaks. The Texas Department of Human Services (TDHS), in response to a request for assistance by the commission, conducted its own investigation relating to child abuse allegations at the Oaks. Upon conclusion of the investigations, the commission denied the Oaks' request for a license. Consequently, the Oaks requested a reconsideration hearing from the executive director. The denial of the license was upheld, followed by a final hearing before a hearing examiner. The license was not granted. The Oaks subsequently filed a civil suit against Jane Maxwell, the commission's principal investigator during the Oaks' licensing proceedings, for her actions as the commission's agent during the investigation. That litigation has now been resolved.

The other request relates to the commission's investigation of another facility regulated by the commission, Kids of El Paso (KEP). The commission conducted an investigation and prepared a final report which was provided to the facility, with a copy of the report placed in the commission's licensing files. Although the facility is not operating at this time, the requestor, the El Paso Herald-Post, stated that it still wants the requested information.

The information requested about those two facilities includes:

- (1) the commission's rules and policies pertaining to admission to the program,
- (2) copies of complaints against the facilities,
- (3) allegations actually investigated by the commission, and
- (4) the commission's investigation files and findings.

In addition to complainants' letters, the commission's investigative files include notes investigators made during telephone calls to complainants and witnesses; tape recordings of conversations with the facilities' clients, former clients, parents of clients, and other individuals; information submitted to commission investigators by the facilities under investigation that include patients'

treatment records; correspondence between the commission and facilities and between the commission and complainants; and the commission's findings, orders, and decisions. You claim that section 3(a)(1) of the Open Records Act, in conjunction with other specific statutes, and sections 3(a)(3), 3(a)(7), and/or 3(a)(11) of the Open Records Act protect the information from required public disclosure.

Section 3(a)(3), the litigation exception, applies to certain information related to pending or anticipated litigation. Open Records Decision No. 478 (1987). Because the litigation involving the Oaks Recovery Center has been resolved, this exception no longer applies.

Additionally, the exceptions to the Open Records Act do not protect information expressly deemed public by a specific statute. See Open Records Decision Nos. 146 (1976); 43 (1974); see also Open Records Decision No. 221 (1979). In this regard, section 1.13 of article 5561c-2, V.T.C.S., provides:

(a) The commission shall prepare information of public interest describing the functions of the commission and describing the commission's procedures by which complaints are filed with and resolved by the commission. The commission shall make the information available to the general public and appropriate state agencies.

(b) The commission shall adopt rules establishing methods by which consumers and service recipients can be notified of the name, mailing address, and telephone number of the commission for the purpose of directing complaints to the commission. The commission may provide for such notification through inclusion of the information:

(1) on each registration form, application, or written contract for services of a person or entity regulated or authorized by this Act;

(2) on a sign that is prominently displayed in the place of business of each person or entity regulated or authorized by this Act; or

(3) in a bill for service provided by a person or entity regulated or authorized by this Act.

(c) If a written complaint is filed with the commission relating to a license or

entity regulated by the commission, the commission, at least as frequently as quarterly and until final disposition of the complaint, shall notify the parties to the complaint of the status of the complaint unless notice would jeopardize an undercover investigation.

(d) The commission shall keep an information file about each complaint filed with the commission relating to a licensee or entity funded by or regulated by the commission. (Emphasis added.)

We believe that this provision places an affirmative duty on the commission to make public general information about complaints against facilities. The provision also grants complainants a special right of access to information about the status of their complaints. Id. § 1.13(c). On the other hand, subsection (d) of section 1.13 does not require that the commission make public the names of complainants. Another statute makes certain types of complaints confidential. V.T.C.S. art. 5561cc, § 13(e).

Section 3(a)(1) of the Open Records Act protects "information deemed confidential by law," including statutory law. See, e.g., Hutchins v. Texas Rehabilitation Comm'n, 544 S.W. 2d 802, 803 (Tex. Civ. App. - Austin 1976, no writ). Subsection (e) of section 13 of article 5561cc, V.T.C.S., protects information about reports of neglect and/or abuse at licensed facilities. Subsection (e) provides:

(e) All records made by the commission during its investigation are confidential and may not be disclosed except on court order, or on written consent and request by the person under investigation or that person's authorized attorney. However, on written request by an authorized representative of a state or federal agency, the commission may make its licensure and investigatory records available to the agency if the agency agrees not to disclose information that could identify a client in violation of law. (Emphasis added.)

The primary purpose of subsection (e) is to protect records in accord with federal provisions that apply to the commission.

The commission also asserts that the requested information that contains names of clients under the care of specific facilities has been deemed confidential by federal law pursuant to Title 42 of the Code of Federal Regulations, Part II (the federal regulations relating to the confidentiality of alcohol and drug abuse client records). Section 2.13 of Title 42 prohibits a state from compelling disclosure of information protected by the regulations. The commission correctly points out that it is bound by three federal acts, and the regulations promulgated under those acts, because it receives and administers federal funds granted for alcohol and drug abuse prevention services. 42 CFR § 2.12 Under the federal regulations, the commission is authorized to obtain specific client information because of its regulatory role. The commission, however, is not free to disclose this information unless the disclosure falls under certain limited exceptions. The regulations allow for verification of the quality of treatment outside the centers, while maintaining the confidentiality of files of those who are being treated, or have been treated, and those who have been denied treatment at drug and alcohol rehabilitation centers.

Consequently, in light of subsection 13(e) of article 5561cc and the federal regulations that apply to the commission, the commission should not release its records about its investigation of claims of abuse or neglect, including copies of complaints that identify patients; tape recordings of interviews with the facilities' clients, former clients, or parents of clients; or any information in other documents that identifies clients. In light of section 1.13 of article 5561c-2, however, the commission must make public the fact that a complaint has been lodged against a facility, along with the commission's rules and procedures for handling complaints.

Additionally, the commission must release its correspondence with and orders to regulated facilities when the correspondence or orders constitute a finding, holding, or directive, whether formal or informal, regarding a regulated facility. The names of clients, that appear in such correspondence and orders must be deleted. Section 4(a)(3) of article 6252-13a, V.T.C.S., the Administrative Procedure and Texas Register Act (APTRA), expressly makes public "all final orders, decisions, and opinions" of administrative agencies. See also V.T.C.S. art. 6252-17a, § 6(12).

This ruling should serve as general guidance on the availability of the main categories of information at issue.

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If the commission is unsure as to whether specific information would reveal the identity of a patient or former patient at a treatment facility, the information should be submitted to this office for review.

With regard to the applicability of the other exceptions you claim, i.e. sections 3(a)(7) and 3(a)(11), the commission, as indicated, has the burden of showing which exceptions apply and why. You did not accompany your letter with copies or representative copies of the information requested, nor did you mark the information to show which exceptions apply to specific portions of the documents. It is clear that all of the exception(s) you claim do not apply to all of the information at issue. Your burden under section 7(a) is to request a decision on whether specific information is within specific exceptions. A bare claim that an exception applies with no explanation of why it applies will not suffice. Attorney General Opinion H-436 (1974). Consequently, this office cannot rule that your claims regarding the applicability of sections 3(a)(7) and 3(a)(11) to interagency correspondence are valid.

Please submit copies of the documents with markings to correlate with the specific exception(s) you claim, or otherwise explain how the exceptions you claim apply to specific documents or portions thereof. You have 10 days from receipt of this letter in which to submit the documents at issue. Otherwise, the information must be released.

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 OR89-373.

Yours very truly,

*Open Government Section
of the Opinion Committee* 
Open Government Section
of the Opinion Committee
Prepared by Jennifer S. Riggs
Chief, Open Government Section

JSR/le

Ref.: ID# 2424
ID# 1777

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