



DAN MORALES
ATTORNEY GENERAL

Office of the Attorney General
State of Texas

September 5, 1991

R. Kent Phillips
Assistant Attorney General
Medicaid Fraud Control Unit
P.O. Box 12548
Austin, Texas 78711-2548

OR91-381

Dear Mr. Phillips:

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# 12967.

You have received a request for "copies of all documents and information relating to any investigation of Campbell Care of North Dallas, Inc., Campbell-White & Associates, Inc. and/or Garland Convalescent Center." In addition, you received a request for copies of documents relating to the death or investigation of the death of Bryant Stephens. You maintain a file which corresponds to the content of the request. This file contains:

1. [Texas Department of Health] TDH report which also includes...[as attachments various hand-written notes] a letter to Jim Mattox... a letter of complaint to Texas Department of Human Services (DHS) Adult Protective Services, DHS Intake Report by Adult Protective Services, and Death Certificate.
2. [Medicaid Fraud Control Unit] MFCU Intra-Office Memorandum
3. MFCU Abuse Complaint.

Information deemed confidential by a statutory or constitutional provision or

a judicial decision is excepted from required public disclosure by section 3(a)(1) of the Open Records Act. You contend that the TDH report and accompanying attachments are confidential pursuant to section 242.127 of the Health & Safety Code. Section 242.127 of chapter 242 provides:

A report, record, or working paper used or developed in an investigation made under this subchapter [Subchapter E: Reports of Abuse and Neglect] is confidential and may be disclosed only for purposes consistent with the rules adopted by the board or the designated agency.

Health & Safety Code § 242.127. You advise that the requested report and its attachments were developed as part of an investigation into the alleged abuse and neglect of a patient conducted pursuant to Subchapter E of chapter 242. Required public disclosure of the report and accompanying attachments would not be consistent with regulations adopted by TDH. See 25 T.A.C. § 145.88(i). Given that information, we agree that section 242.127 applies, and thus, that section 3(a)(1) excepts both the report and the accompanying attachments from required public disclosure. Since section 242.127 applies to the report and all of the attachments, we need not address the applicability of other statutes or exceptions you discussed in your letter to this office.

You claim that the MFCU Intra-Office Memorandum and MFCU complaint form are protected from release under section 3(a)(11). Section 3(a)(11) provides that interagency or intra-agency memorandums or letters not available by law to a party in litigation are excepted from disclosure. Section 3(a)(11) excepts memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policy-making or deliberative process. Open Records Decision No. 462 (1987). Facts and written observations of facts, however, do not constitute advice, opinion, or recommendation. Where such information is severable from advice, opinion, or recommendation, such information is not excepted by section 3(a)(11). Open Records Decision No. 582 (1990). The intra-office memorandum dated May 15, 1990, contains advice, opinion, and recommendation, and factual information that is not severable from the information excepted under section 3(a)(11). Thus, all of the memorandum may be withheld pursuant to section 3(a)(11). The MFCU Abuse Complaint, however, includes advice, opinion, and recommendation and severable factual information. We have

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marked in yellow the severable factual information, which must be disclosed. The remainder of the complaint may be withheld under section 3(a)(11).

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 OR91-381.

Yours very truly,



Celeste A. Baker
Assistant Attorney General
Opinion Committee

CAB/GCK/lb

Ref.: ID# 12967

Enclosure: documents

cc: Mr. William T. Herrscher
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