



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 25, 1994

Mr. Burton F. Raiford
Commissioner
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR94-392

Dear Mr. Raiford:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 25537.

The Department of Human Services (the "department") has received a request for "all of the documents, notes, memoranda, typed forms, printed forms, and all other documents in your possession or in your files concerning [Bayou Glen-Town Park, a nursing facility], from January 1, 1989[,] to the present."¹ You state that the department will release to the requestor all information that is public under title 40 of the Texas Administrative Code sections 90.216 and 90.323. You further state that the department will release information pertaining to abuse and neglect investigations that it conducted pursuant to sections 242.121 through 242.134 of the Health and Safety Code at the Bayou Glen-Town Park nursing facility. We understand that you will release deidentified copies of the investigation reports only. Attached to the investigation reports are various documents, including nurses' notes, medical records of the nursing facility and hospitals, doctors' orders, and handwritten witness statements. You believe that the attachments to

¹The requestor is not a resident of the Bayou Glen-Town Park nursing facility, nor does he identify himself as a representative of a resident of that nursing facility. He does not have a letter signed by a resident authorizing release of records concerning that resident. Additionally, you do not present any evidence that the requestor represents a resident of the Bayou Glen-Town Park nursing facility. Consequently, we assume that the requestor is acting in his own behalf or in behalf of someone who is not a resident of the Bayou Glen-Town Park nursing facility. We do not consider in this letter whether a resident may review the report, records, or working papers of an investigation into alleged abuse or neglect at the nursing facility at which the resident lives and which involved the resident in some way. Cf. Gov't Code § 552.023(a); Open Records Decision No. 507 (1988).

the investigation reports are confidential pursuant to section 552.101 of the Government Code, in conjunction with various statutes, the doctrine of common-law privacy, and the informer's privilege.²

At the outset, we note that, although you have sent samples of investigation reports, none of them appear to pertain to the Bayou Glen-Town Park nursing facility. Section 552.303 of the Government Code requires a governmental body, when it requests the decision of the attorney general as to the availability of particular information under the Open Records Act, to supply the attorney general with the specific information requested. Failure to supply the requested information to the attorney general results in a presumption that the information is public. See Open Records Decision No. 195 (1978) at 2.

The governmental body may overcome the presumption by showing that the information is confidential or that an exception designed to protect the interest of a third party is applicable. Cf. Open Records Decision No. 552 (1990) at 1. Section 552.101, which you have raised, pertains to confidential information. We will, therefore, proceed to consider your request for an open records decision, although we are limited in our ability to discuss specific information.

Section 552.101 of the Government Code excepts from required public disclosure under chapter 552 information "confidential by law, either constitutional, statutory, or by judicial decision." Chapter 242, subchapter E of the Health and Safety Code provides for the department to investigate reports of abuse and neglect that allegedly has occurred at an institution³ such as a nursing home. See Health & Safety Code §§ 242.122(a)

²You specifically claim that Human Resources Code §§ 12.003, 21.012, 42 U.S.C. § 1396a(a)(7), and 42 C.F.R. §§ 431.300 - .307 apply to information concerning medicaid recipients. See also Open Records Decision No. 166 (1977) at 2. You believe that medical records may be confidential under § 5.08 of the Medical Practice Act, V.T.C.S. art. 4495b, and an individual's common-law right of privacy. Additionally, you believe that the informer's privilege protects witness statements. See generally Open Records Decision No. 515 (1988) (discussing informer's privilege).

³For purposes of chapter 242 of the Health and Safety Code, the term "institution" includes:

(A) an establishment that:

(i) furnishes, in one or more facilities, food and shelter to four or more persons who are unrelated to the proprietor of the establishment; and

(ii) provides minor treatment under the direction and supervision of a physician licensed by the Texas State Board of Medical Examiners, or other services that meet some need beyond the basic provision of food, shelter, and laundry.

(requiring person with cause to believe that abuse or neglect adversely has affected resident's physical or mental health or welfare to report such abuse or neglect), 242.123 (listing required contents of report of abuse or neglect), 242.125 (providing for processing of reports), 242.126 (requiring department thoroughly and promptly to investigate report of abuse or neglect).

Section 242.127 of the Health and Safety Code provides confidentiality for "[a] report, record, or working paper used or developed in an investigation made under this subchapter . . . [Such report, record, or working paper] may be disclosed only for purposes consistent with the rules adopted by the . . . designated agency." This office has stated that the statutory predecessor to section 242.127, V.T.C.S. art. 4442c, § 16(h), *repealed by Acts 1989, 71st Leg., ch. 678, § 13(1), at 2230, 3165*, in conjunction with the statutory predecessor to section 552.101 of the Government Code, "protects from required public disclosure the department's reports, records, and working papers used or developed in an investigation of abuse or neglect." Attorney General Opinion JM-1048 (1989) at 5.

In accordance with section 242.127, the department has promulgated title 40 Texas Administrative Code, section 90.216, which pertains generally to investigations of abuse, neglect, and exploitation in all nursing facilities⁴ and related institutions. Section 90.216 provides in pertinent part as follows:

(a) Confidentiality. All reports, records, and working papers used or developed by the [department] in an investigation are confidential, and may be released to the public only as provided below.

(1) Completed written investigation reports are open to the public, provided the report is deidentified. . . .⁵ [Footnote added.]

⁴In the context of title 40 of the Texas Administrative Code, chapter 90 the term "nursing facility" indicates "an establishment that provides food, shelter, and nursing care to four or more persons who are unrelated to the owner of the establishment and that provides minor treatment under the direction and supervision of a physician licensed by the Texas State Board of Medical Examiners, or other services that meet some need beyond the basic provision of food, shelter, or laundry. A nursing facility may be a building, which may consist of one or more floors or one or more units, or may be a distinct part of a hospital." 40 T.A.C. §§ 90.2(b), 90.3; *cf. supra* note 3 (quoting definition of "institution" in Health & Safety Code ch. 242).

⁵We assume for purposes of this open records letter that 40 T.A.C. § 90.216(a)(1) is consistent with § 242.127 of the Health and Safety Code.

See also 40 T.A.C. § 90.323(e)(1), (2), (3), and (5) (providing confidentiality for records maintained by "the bureau," including reports of abuse and neglect and information identifying resident, complainant, or informant).

We do not find, in chapter 242 of the Health and Safety Code nor in the department's rules, a definition of "report, record, or working paper used or developed in an investigation." We note, however, that in the course of its investigation, the department must determine

- (1) the nature, extent, and cause of the abuse or neglect;
- (2) the identity of the person responsible for the abuse or neglect;
- (3) the names and conditions of the other residents;
- (4) an evaluation of the persons responsible for the care of the residents;
- (5) the adequacy of the institution environment; and
- (6) any other information required by the department.

Health & Safety Code § 242.126(c). The investigator also must visit the resident's institution and must interview the resident. *Id.* § 242.126(d).

Given the breadth of the required investigation, we believe the legislature, when it enacted the statutory predecessor to section 242.127, *see* Acts 1977, 65th Leg., 1st C.S., ch. 2, § 9, at 49, 54; *see also* Acts 1953, 53d Leg., ch. 413, § 13, at 1005, 1008, envisioned that an investigator inquiring into allegations of abuse or neglect at a nursing facility would assemble notes of interviews with witnesses, residents, and staff members; copies of relevant medical records, nurses' notes, and doctors' orders; and copies of other related documents regarding the alleged abuse or neglect or the residents and staff members allegedly involved. By providing confidentiality for any "report, record, or working paper used or developed in an investigation made under this subchapter," we believe the legislature intended to protect all information that is related to an investigation of alleged abuse and neglect at a nursing facility and that a department investigator accumulates or creates during the course of the investigation. This includes documentation attached to a completed investigation report.

Consequently, we conclude that section 552.101 of the Government Code, in conjunction with section 242.127 of the Health and Safety Code, requires the department to withhold attachments to investigation reports created pursuant to chapter 242 of the Health and Safety Code. Because case law and prior published open records decisions

resolve your request, we are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Kimberly K. Oltrogge
Assistant Attorney General
Open Government Section

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Ref.: ID# 25537

Enclosures: Submitted documents

cc: Mr. Louis M. Lippman
Louis M. Lippman and Associates
5 Post Oak Park, Suite 1840
4400 Post Oak Parkway
Houston, Texas 77027-3413
(w/o enclosures)