



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 16, 1997

Ms. Linda Wiegman  
General Counsel  
Texas Department of Health  
1100 West 49th Street  
Austin, Texas 78756-3199

OR97-1134

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 35711.

The Texas Board of Marriage and Family Therapists and the Texas State Board of Examiners of Professional Counselors through the Texas Department of Health (the "department") received requests for records pertaining to particular licensees subject to the jurisdiction of these boards. You inform us that you have released some of the records to the requestor. However, you claim that the submitted information is excepted from disclosure under section 552.101 in conjunction with V.T.C.S. article 4495b, section 5.08(b) and Health and Safety Code section 611.002, as well as sections 552.103, and 552.110 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.301 of the Government Code provides that a governmental body must ask the attorney general for a decision as to whether requested documents must be disclosed not later than the tenth calendar day after the date of receiving the written request. The department received the written requests for information on June 30, 1995 and July 11, 1995. You did not request a decision from this office until September 7, 1995, more than ten days after the requestor's written requests. Therefore, we conclude that the department failed to meet its ten-day deadline for requesting an opinion from this office.

When a governmental body fails to request a decision within ten days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. *See id.* Normally,

a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 (1977) at 2.

In this instance, you have not presented this office with a compelling demonstration as to why the requested information should be withheld pursuant to section 552.103. We therefore deem your claimed exception to required public disclosure as being waived. We note, however, that some of the information at issue must be withheld from public disclosure pursuant to section 552.101 of the Government Code. Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including the common-law right to privacy. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. In Open Records Decision No. 262 (1980), we said that medical information might raise a claim of common-law privacy if it relates to a "drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures or emotional/mental distress." The following types of information also are excepted from required public disclosure under common-law privacy: personal financial information, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and identities of victims of sexual abuse or the detailed description of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983). We have marked the information that must be withheld based on common-law privacy under section 552.101.<sup>1</sup>

In addition, the submitted documents include documents that are confidential by statute. Communications between a patient and a professional and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional are confidential. Health & Safety Code § 611.002(a). We have marked the records that you must withhold under section 611.002 of the Health and Safety Code.<sup>2</sup>

Lastly, we note that the documents include an affidavit. If the affidavit was filed with the court, it is a public document and must be disclosed. *See Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57-58 (Tex. 1992). If the affidavit was not filed with the court, it must be released to the extent marked. The affidavit contains information that must be withheld under common-law privacy, and we have marked the document accordingly.

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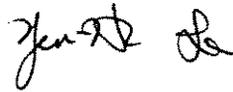
<sup>1</sup>Because records labeled as number 30 must be withheld under section 552.101, we need not address your section 552.110 claim.

<sup>2</sup>You have raised V.T.C.S. article 4495b, section 5.08(b) and Health and Safety Code section 611.002 as grounds for withholding certain records. We have concluded that some of the records must be withheld under section 611.002. Records numbered 7, 14, 24, 29, and 32 are not confidential under either of these statutes because they are not medical records created or maintained by a physician, V.T.C.S. art. 4495b, § 5.08(b), or mental health records created or maintained by a mental health professional, Health & Safety Code § 611.002.

In the absence of a demonstration that the remaining information is confidential by law or that other compelling reasons exist as to why the information should not be made public, you must release the information. *See also* Gov't Code § 552.352 (distribution of confidential information is criminal offense).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/rho

Ref.: ID# 35711

Enclosures: Marked documents

cc: Mr. Anthony M. Guerino  
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(w/o enclosures)

