



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 5, 1997

Ms. Christine T. Rodriquez
Legal and Compliance, MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR97-1302

Dear Ms. Rodriquez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 106244.

The Texas Department of Insurance (the "department") received a request for "all consumer complaints between January 1, 1992 and March 7, 1997, filed with Texas Department of Insurance regarding Kaiser Permanente Health Maintenance Organization or any of its subsidiaries operating in Texas." You state that the department will release some of the requested information to the requestor, including the names of the complainants. You claim, however, that the medically related information in the records may be excepted from disclosure by section 552.101 of the Government Code. You raise six statutes that may apply and also claim that the information is protected by a right of privacy. We have considered the arguments that you raise and have reviewed the documents at issue.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. After examining the documents, we do not believe that four of the statutes that you raise protect any of the information at issue. None of the documents constitute protected communications under these statutes. Nor were these records created or maintained by the person specifically enumerated by the statutes. Health & Safety Code § 611.002(a) (mental health records); Health & Safety Code § 773.091(a), (b) (emergency medical services records). Additionally, we do not believe that section 81.046 of the Health and Safety Code applies to the information in the requested records. The records do not appear to be records of a health authority as provided by the statute. Health & Safety Code §§ 81.003(2) (defining health authority), 046(a), (b); Open Records Decision No. 577 (1990) at 2 (section 81.046 applies to information in possession of health authorities). Furthermore, we do not believe that the information is protected by the Americans with Disabilities Act. *See* 29 C.F.R. § 1630.14; Open Records Decision No. 641 (1996).

Two of the statutes you raise, however, protect a portion of the information within the requested records. First, section 81.103 of the Health and Safety Code makes certain test result information confidential. Section 81.103(a) provides:

A test result is confidential. A person that possesses or has knowledge of a test result may not release or disclose the test result or allow the test result to become known except as provided by this section.

None of the statutory release provisions appear to apply in this situation. Health & Safety Code § 81.103(b). "Test results" are defined as:

any statement that indicates that an identifiable individual has or has not been tested for AIDS or HIV infection, antibodies to HIV, or infection with any other probable causative agent of AIDS, including a statement or assertion that the individual is positive, negative, at risk, or has or does not have a certain level of antigen or antibody.

Health & Safety Code § 81.101(5). The commission, must therefore, withhold any information that would reveal test result information as stated in section 81.101.

The Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes, protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). The documents submitted to this office include one medical record, access to which is governed by provisions outside the Open Records Act. Open Records Decision No. 598 (1991). The MPA provides for both confidentiality of medical records and certain statutory access requirements. *Id.* at 2. The medical records submitted to this office for review may only be released as provided by the MPA.

Finally, you argue that much of the requested information is protected by a right to privacy. Section 552.101 of the Government Code also encompasses common-law and constitutional privacy. Common-law privacy excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

The constitutional right to privacy protects two interests. Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 (1992) at 4. The zones of privacy

recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 (1987) at 5-7 (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and information concerning the intimate relations between individuals and their family members. *See* Open Records Decision No. 470 (1987). After reviewing the submitted information, we believe that some of the information must be withheld by a right of privacy. We have marked the information that must be withheld under section 552.101.

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 upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 106244

Enclosures: Submitted documents

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(w/o enclosures)