



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 20, 1998

Ms. Linda Wiegman  
Supervising Attorney  
Office of General Counsel  
Texas Department of Health  
1100 West 49<sup>th</sup> Street  
Austin, Texas 78756-3199

OR98-0176

Dear Ms. Wiegman:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 110832.

The Texas Department of Health (the "department") submitted to this office requests for information from 76 requestors, seeking a variety of different information.<sup>1</sup> These requests were received by the department during a broad period of time, dating from December of 1996.<sup>2</sup> We note that some of the requestors seek information that is public, and that some of the requestors are seeking medical information that they appear to have a special right of access to. The department submitted to this office documents responsive to these various requests, although not in a timely manner. You assert that some of the information at issue is exempted from required public disclosure pursuant to section 552.101 of the Government Code in conjunction with various statutory provisions and common-law privacy.

We note initially that the Open Records Act imposes a duty on governmental bodies seeking an open records decision to submit the request for a decision to the attorney general *within ten business days after the governmental body's receipt of the request for information.* Gov't Code § 552.301. This time limitation is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). When a request for an open records decision is not made timely, the requested information is presumed to be public. *See*

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<sup>1</sup>Apparently, one of the requests was withdrawn. Thus, even though your letters and markings refer to 77 requests, only 76 are at issue in this ruling.

<sup>2</sup>Request No. 66 is dated December 5, 1996.

Gov't Code § 552.302. However, this presumption of openness can be overcome by a compelling demonstration that the information should not be made public, such as by a showing that the information is made confidential by law. Open Records Decision No. 150 (1977). The department did not timely seek a decision from this office concerning these various requests, but you assert that the information at issue is confidential by law.

We agree that in some cases you have shown a compelling reason to overcome the presumption that information is public because most of the exceptions you assert require that information be kept confidential. However, even though compelling reasons exist to overcome the presumption of openness, we believe that the department's unprecedented submission of 76 requests in an untimely manner is not in keeping with the spirit of the Open Records Act. Gov't Code §§ 552.001, .221 (requiring "prompt" production of information), .301 (requiring governmental body to seek attorney general decision within "reasonable time"). We strongly discourage this practice in the future.

Furthermore, not all of the exceptions you assert overcome the presumption that the information is public. You have marked information that you assert is protected from public disclosure pursuant to the "informer's privilege" as incorporated into section 552.101 of the Government Code. The informer's privilege aspect of section 552.101 allows the governmental body to withhold the identity of persons who report violations of the law to officials responsible for enforcing those laws. Although the privilege ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of enforcing particular laws. Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 285 (1981), 279 (1981); *see also* Open Records Decision No. 208 (1978).

In Open Records Decision No. 549 (1990) at 5, this office recognized that by protecting the informer's identity, the privilege protects the governmental body's interest in encouraging the flow of information to the government. Because this privilege exists to protect the governmental body's interest, it may be waived by the governmental body if the governmental body fails to timely seek a decision from this office. *Id.* at 6 (informer's privilege is waivable, whereas privacy rights of a third party are not). Because the department did not timely assert the informer's privilege, the information for which you assert the informer's privilege is public and may not be withheld from disclosure. Gov't Code § 552.302.

Some of the information you marked as confidential is information that is made public by statute. You submitted to this office statements of deficiencies and plans of correction on federal Form HCFA 2567. In accordance with federal regulations, the department must release the federal forms in their *entirety* provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals is disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 (1988) at 5. You have marked information on these forms as being protected under common-law privacy and various other statutes. However, because

federal law clearly provides for these forms to be released in their entirety once they have been de-identified and there has been an opportunity for the provider to review and comment on the information, none of the marked information may be withheld. *Id.* Thus, the department must make these federal forms public in compliance with federal law.

We have reviewed the other documents at issue and agree that some of the information at issue is made confidential by statute or common-law. Thus, you have shown a compelling reason to overcome the Government Code section 552.302 presumption that all of the information at issue is public. We address each of the confidentiality provisions that are applicable to information at issue. Please note that we have marked sample documents to show the types of information made confidential by statute and pursuant to common-law privacy requirements. These markings should be used as a guide in applying this open records letter ruling to the remaining documents. We suggest that the department maintain copies of these examples to assist it in responding to future requests for information.

You submitted to this office State of Texas forms of statements of deficiencies and plans of correction. You have marked information on these forms as being protected under common-law privacy. Because the state forms at issue do not contain any personally identifying information, release of these forms does not implicate common-law privacy. You have redacted other records to withhold identifying information about patients on the basis of common-law privacy.

Information must be withheld from public disclosure on the basis of privacy when the information is (1) 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information the supreme court considered intimate and embarrassing in *Industrial Foundation* included information such as that relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. In Open Records Decision No. 262 (1980), this office stated that information about a patient's injury or illness might be protected under common-law privacy if such injury or illness relates to drug overdoses, acute alcohol intoxication, gynecological or obstetrical illnesses, convulsions and seizures, or emotional and mental distress. *See also* Open Records Decision No. 539 (1990) at 5 (information concerning emotional state may be protected by common-law privacy). We agree that, based on the types of illness, treatment, and symptoms revealed, some of the provided records must be de-identified on the basis of common-law privacy.

Some of the information at issue contains private details about individuals' finances, credit sources, and medical payment plans. In Open Records Decision No. 373 (1983) at 3, we stated:

In our opinion, all financial information relating to an individual -- including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history -- ordinarily satisfies the first requirement of common-law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

We agree that the identity of the individuals to whom the private financial information relates must be withheld from disclosure, and have marked samples to show what type of information must be withheld.

However, not all of the records at issue implicate the common-law privacy of patients or other private individuals. Additionally, some of the patients whose names you have redacted on the basis of common-law privacy are deceased. An individual's right of common-law privacy is a personal right that does not extend past that individual's own death. Attorney General Opinion H-917 (1976); Open Records Decision No. 272 (1981) at 1. When the patient's right of privacy is the only privacy interest at stake, and that patient is deceased, the information at issue is not protected from disclosure.

Section 552.101 of the Government Code also excepts from disclosure information that that is made confidential by statute. Section 5.08 of V.T.C.S. article 4495b, the Medical Practice Act (the "MPA"), provides:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(3) requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 (1990) at 7. Thus, access to the medical records at issue is not governed by chapter 552 of the Government Code, but rather provisions of the MPA. Open Records Decision No. 598 (1991). Information that is subject to the MPA includes both medical records and information obtained from those medical records. See V.T.C.S. art. 4495b § 5.08(a), (b), (c), (j); Open Records Decision No. 598 (1991).

Thus, unless the access provisions of the MPA provide for release of the records, both the medical records and the information in other records that was obtained from the medical records, is confidential. We note, however, that some of the requestors appear to be entitled to access to medical records and medical information under the MPA. See V.T.C.S. art. 4495b § 5.08(h), (j) (k) (medical records subject to release to person bearing written consent of patient or personal representative if patient is deceased). We have marked sample information that you may use as a guide.

Some of the information at issue is protected under section 773.091 of the Health and Safety Code (the Emergency Medical Services Act), which provides in part:

(b) Records of the identity, evaluation or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

....

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services. . . .

Section 773.091 provides that the department may not release the identity of patients, or their treatment and evaluation information from EMS records, but also that the department may not withhold information about the illness or injury, the patient's age, sex, occupation, and city of residence. We have marked samples to show the type of EMS information that must be withheld from disclosure. See Open Records Decision No. 598 (1991).<sup>3</sup>

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<sup>3</sup>Open Records Decision No. 598 (1991) addresses a release of records under the Medical Practice Act, article 4495b, V.T.C.S. The opinion notes section 773.091 of the Health and Safety Code, and states:

Section 773.091 thus provides for the same confidentiality, exceptions to confidentiality, and requirements for release of the information at issue as does section 5.08 of the Medical Practice Act, without conflicting with the provisions of that act. . . . Our analysis under the Medical Practice Act is therefore equally applicable to a consideration of the issue under the Health and Safety Code provisions.

You contend that some of the records at issue are confidential under chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

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.

Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. See Open Records Decision No. 565 (1990). We agree that these types of records are confidential unless provided in compliance with sections 611.004 and 611.0045. We have marked samples to show the type of information that is protected.

You assert that some of the documents are excepted from disclosure pursuant to section 81.046 of the Health and Safety Code, which provides, in part:

- (a) Reports, records, and information furnished to a health authority or the department that relate to cases or suspected cases of diseases or health conditions are confidential and may be used only for the purposes of this chapter
- (b) Reports, records, and information relating to cases or suspected cases of diseases or health conditions are not public information

This office has marked examples of information covered by this provision.

You marked some information as being excepted from disclosure pursuant to section 161.032(a) of the Health and Safety Code, which provides that "records and proceedings of a medical committee are confidential and are not subject to court subpoena." Section 161.031 of the Health and Safety Code defines medical committee as follows:

- (a) In this subchapter, "medical committee" includes any committee, including a joint committee, of:
  - (1) a hospital;
  - (2) a medical organization;
  - (3) a university medical school or health science center;

(4) a health maintenance organization licensed under the Texas Health Maintenance Organization Act (Chapter 20A, Vernon's Texas Insurance Code), including an independent practice association or other physician association whose committee or joint committee is a condition of contract with the health maintenance organization; or

(5) an extended care facility.

(b) The term includes a committee appointed ad hoc to conduct a specific investigation or established under state or federal law or rule or under the bylaws or rules of the organization or institution.

Both section 5.06 of V.T.C.S. article 4495b, and 161.032(a) of the Health and Safety Code contain provisions making certain types of information confidential. Section 5.06(g) states that, "except as otherwise provided by this Act, all proceedings and records of a medical peer review committee are confidential, and all communications made to a medical peer review committee are privileged."

However, neither section 5.06 nor section 161.032(a) make confidential "records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, or extended care facility." Health & Safety Code § 161.032(b); *see also Memorial Hospital-theWoodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996) ("The reference to section 5.06 in section 161.032 is a clear signal that records should be accorded the same treatment under both statutes in determining if they were made 'in the regular course of business.'") In *Barnes v. Whittington*, 751 S.W.2d 493, 496 (Tex. 1988), the Texas Supreme Court indicated that "routinely accumulated information" unless submitted or created in connection with a committee's deliberative process, does not constitute confidential committee records. In *Jordan v. Court of Appeals for Fourth Supreme Judicial District*, 701 S.W.2d 644, 648 (Tex. 1985) the court stated that records "gratuitously submitted to a committee or which have been created without committee impetus and purpose are not protected."<sup>4</sup> *See Memorial Hospital-theWoodlands v. McCown*, 927 S.W.2d 1, 9-10 (Tex. 1996) (discussion concerning business records and review of holdings in *Barnes* and *Jordan*).

Our review indicates that certain marked information includes the records and proceedings of a medical committee created in connection with the committee's deliberative process. *Barnes v. Whittington*, 751 S.W.2d 493, 496 (Tex. 1988). This information is confidential. However, some of the records you marked as protected under section 161.031 are not confidential committee records. We have marked sample documents so indicating.

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<sup>4</sup>*Barnes* and *Jordan* both relied upon the predecessor statute to 161.032 of the Health & Safety Code.

You assert that some marked information is confidential and may not be disclosed pursuant to chapter 261 of the Family Code. Subsection (a) of section 261.201 of the Family Code provides:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with . . . [the Family] code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under . . . chapter [261 of the Family Code] and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under . . . chapter [261 of the Family Code] or in providing services as a result of an investigation.

The department has adopted rules concerning access to this type of information. Texas Administrative Code title 25, section 1.207 provides:

(a) The allegation and the reports, records, communications and working papers used or developed in the investigative process, including the resulting final report regarding abuse, neglect, or exploitation, are confidential and may be disclosed only as provided in the Family Code, § 261.201, or the Human Resources Code, § 48.101 and § 48.038(f) and (g), and pursuant to [this section]:

(b) Information discussed during deliberations of abuse, neglect, and exploitation investigations may not be discussed outside the purview of those deliberations.

(c) The completed investigative report and related documents may be released to governmental agencies as described in this [section].

(d) The completed investigative report and related documents may be released by court order.

(e) The completed investigative report and related documents may be released to the victim or the victim's parent or guardian if the victim is a minor if there is no ongoing criminal investigation. Any information which might reveal the identity of the reporter, any other patients or

clients of the facility or any other person whose life or safety might be endangered by the disclosure must be blacked out or de-identified.

(f) The investigative report and related documents shall not be available to the public.

(g) The completed investigative report and related documents shall be released to the adoptive parents or prospective adoptive parents of a child who was the subject of an investigation or an adult who was the subject of an investigation as a child. Any information which might reveal the identity of the reporter, the biological parents or any other person whose identity is confidential shall be blacked out or de-identified.

We have marked the documents that must be withheld under chapter 261 as investigation records, except as provided by departmental rule.

You also assert that some of the information at issue is excepted from disclosure pursuant to section 48.101 of the Human Resources Code. Section 48.101(a) makes the following information confidential:

- (1) a report of abuse, neglect, or exploitation made under this chapter
- (2) the identity of the person making the report; and
- (3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

We agree that some of the submitted information is made confidential in its entirety under section 48.101(a) of the Human Resources Code, and have so indicated in the sample marked documents. However, we note that section 48.101(d) provides:

The department or investigating state agency by rule shall provide for the release on request to a person who is the subject of a report of abuse, neglect, or exploitation or to that person's legal representative of otherwise confidential information relating to that report. The department or investigating state agency shall edit the information before release to protect the confidentiality of information relating to the reporter's identity and to protect any other individual whose safety or welfare may be endangered by disclosure.

We have marked some information that must be released pursuant to section 48.101(d) and Texas Administrative Code title 25, section 1.207, cited previously.

You have marked some documents as being protected from disclosure under sections 142.009 and 142.004 of the Health and Safety Code. Section 142.004 provides that certain information must be provided to the department by an applicant for a license to provide home health care, hospice care, or personal assistance services. Section 142.004(d) provides that "[I]nformation received by the department relating to the competence and financial resources of the applicant is confidential and may not be disclosed to the public." To the extent that you have identified documents as being provided to the department under section 142.004, and they relate to the applicant's competence and financial resources, these records are confidential.

Section 142.009(c) authorizes the department to conduct investigations of complaints regarding the provision of home health, hospice, or personal assistance services. Section 142.009(d) provides as follows:

The reports, records, and working papers used or developed in an investigation made under [section 142.009 of the Health and Safety Code] are confidential and may not be released or made public except:

- (1) to a state or federal agency;
- (2) to federal, state, or local law enforcement personnel;
- (3) with the consent of each person identified in the information released;
- (4) in civil or criminal litigation matters or licensing proceedings as otherwise allowed by law or judicial rule; or
- (5) on a form developed by the department that identifies any deficiencies without identifying a person, other than the home and community support services agency.

We have marked a sample of information that is confidential under section 42.009(d).<sup>5</sup>

Included in the submitted information were social security numbers of employees of private entities. You marked this information, obtained by the department, as being confidential. If these social security numbers were obtained or are maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990, we agree

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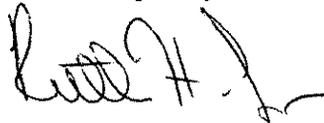
<sup>5</sup>It is our understanding that you do not seek to withhold, under this provision, the de-identified state forms regarding deficiencies and corrections.

that the social security numbers are confidential pursuant to section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. Open Records Decision No. 622 (1994).

Finally, we note that you seek a "prior determination" from this office regarding the types of documents submitted. Section 552.301(a) provides that a governmental body must seek a decision from this office regarding whether information falls within an exception, unless there has been a previous determination. We decline to issue such a determination at this time.

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,



Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref.: ID# 110832

Enclosures: Sample marked documents; additional documents submitted will be sent via courier

cc: All 76 requestors have been provided a copy of this ruling either by mail or by facsimile.