



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 17, 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

OR98-1491

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 115716.

The Texas Department of Health (the "department") received a request for "any and all records or documents which relate to DePaul, Providence and Vernon Hospitals. . . . all complaints and investigations and responses to any and all complaints and/or investigations." In response to the request, you submit to this office for review the information which you assert is responsive. You indicate that information that is not marked or highlighted has already been released to the requestor. However, you claim that the "highlighted/marked" information is protected from required public disclosure by section 552.101 of the Government Code, in conjunction with various state statutes and regulations. We have considered the exception you claim and have reviewed the documents at issue.

You did not submit your request for a decision to this office within ten business days of receiving the request for information. Chapter 552 of the Government Code imposes a duty on a governmental body seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general within ten business days after the governmental body's receipt of the request for information. The time limitation found in section 552.301 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 within the time period prescribed by section 552.301, the requested information is presumed to be public.

*See Gov't Code § 552.302.* This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. *See, e.g.,* Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests).

In accordance with sections 552.301 and 552.302, the information at issue is presumed public. In some instances you have raised a compelling reason to overcome the presumption that information is public because most of the statutes and provisions of law you assert require that information be kept confidential. Section 552.101 protects information that is confidential by law. Because the presumption of openness is overcome by a showing that information is confidential by law, we must consider your section 552.101 claim. However, not all of the grounds you raise 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 a 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.

We have reviewed the other documents at issue and agree that some of the information 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 the information at issue. To the extent we disagree with your markings, we have tagged and bracketed/marked the submitted documents to show the types of information made confidential by statute and pursuant to common-law privacy requirements.

You submitted to this office certain 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, among other claimed exceptions. 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. of the South 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.

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.

We next consider the application of the claimed confidentiality statutes to the submitted records. Section 552.101 of the Government Code also exempts from disclosure information 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. The department should withhold the marked information which is subject to the MPA.

You also 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. The submitted marked records are confidential and should be withheld under chapter 611 of the Health and Safety Code.

In your brief to this office, you also stated that some information should be 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." 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. 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-the Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996). In this instance, we conclude that to extent the marked information constitutes “records and proceedings of a medical committee” subject to section 161.032(a), the information must be withheld.

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 accordingly, we have marked the submitted documents. These records therefore must be withheld in their entirety under section 552.101 of the Government Code.

Finally, you assert that some information is confidential and may not be disclosed pursuant to chapter 261 of the Family Code. Where a child is the victim of alleged or suspected abuse or neglect, section 261.201(a) of the Family Code may be applicable. 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.

Some of the requested information submitted to this office is related to incidents of alleged child abuse or neglect, and are records developed in an investigation under chapter 261 of the Family Code. These records are therefore confidential, and must be withheld in their entirety under section 552.101 of the Government Code. We have marked the information that must be withheld.

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 any questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Sam Haddad". The signature is written in a cursive style with a large, looping initial "S".

Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/rho

Ref: ID# 115716

Enclosures: Marked documents

cc: Ms. Kim Beyers, Paralegal  
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(w/o enclosures)