



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 28, 1998

Mr. Michael G. Young
Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-2065

Dear Mr. Young:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 117697.

The Department of Health (the "department") received requests for complaints filed against a named midwife and also for all complaints filed against midwives from 1995 to the present. The requestor also seeks information concerning the department's investigations into the complaints. You submitted to this office information that was marked as to the portions the department seeks to withhold, and labeled with the applicable exceptions. You assert that all or portions of the documents may be withheld from disclosure pursuant to the informer's aspect of section 552.101 of the Government Code, and also section 552.103 of the Government Code. Additionally, you have marked information as confidential under the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes, and on the basis of the patients' and other individuals' privacy interests.

To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental entity must meet both prongs of this test for information to be excepted under section 552.103(a). Based upon the information provided to this office, we agree that the department has shown the applicability of section 552.103 to the information marked as protected under section 552.103.¹ However, we note that some of the records that you have marked as generally protected under section 552.103 are medical records.

¹ We note that the applicability of section 552.103(a) generally ends once the litigation has concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

Access to medical records is governed by the MPA. Sections 5.08(b) and (c) of article 4495b of Vernon's Texas Civil Statutes provide:

(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)(1) provides for release of medical records upon the patient's written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Section 5.08(j)(3) also requires that any subsequent release of medical records be consistent with the purposes for which the city police department obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We agree that certain records are medical records protected from disclosure under the MPA, and have so indicated on the records. We will address the other information at issue that is not protected in its entirety under section 552.103 or the MPA.

You have marked information that you consider to be excepted from disclosure as protected by common-law or constitutional privacy under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Information must be withheld from public disclosure under a common-law right 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); Open Records Decision No. 611 at 1 (1992). The type of information the supreme court considered intimate and embarrassing in *Industrial Foundation* included information relating to pregnancy. In Open Records Decision No. 262 (1980), this office concluded that information about a patient's injury or illness might be protected under common-law privacy if such injury or illness relates to certain types of conditions, such as gynecological or obstetrical illnesses or extreme emotional and mental distress.

We agree that, based on the type of information in the records, these patients have a privacy interest in the information. We believe that their privacy interests will be adequately protected by redacting all identifying information in the remaining records. In

some of the files, redaction of the patients' name will be sufficient to protect the privacy of these individuals. In other files, there appears to be more identifying information at issue, such as addresses, telephone numbers, identity of family members, and intimate identifying details that must be redacted. We also note that 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 at 1 (1981). Thus, a common-law right of privacy would not generally protect records of an individual who is deceased.² We have tabbed the documents as a guide for the redaction.

You also seek to withhold the identities of individuals, other than patients or their family members, who filed complaints. You assert that these informants' identities are protected under section 552.101. Texas courts have recognized the informer's privilege, see *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928), and it is a well-established exception under chapter 552. Open Records Decision No. 549 at 4 (1990). In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies the informer's privilege:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. [Citations omitted.] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

We note that some of the complaints appear to have been made by department or law enforcement officials as part of their official duties. The rationale behind the informer's privilege is inapplicable when the complaint is made in an official capacity. We have marked these documents. We also note that the privilege excepts an informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision Nos. 549 at 5 (1990). The exception is inapplicable if the identity of the informer is known to the subject of the communication. Open Records Decision No. 202 (1978). We have marked a document in which the informer's identity appears to be known to the subject of the communication. The other complaints for which you have affirmatively asserted the informer's privilege may be de-identified to protect the informants. We have so marked the documents. The information at issue otherwise must be disclosed.

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

²In some instances the listed names of deceased family members must be redacted in order to protect the privacy interests of a patient.

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# 117697

Enclosures: Marked documents

cc: Ms. Emma Perez-Trevino
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 (w/o enclosures)