



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 25, 1998

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

OR98-2307

Dear Mr. McClendon:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 118304.

The Texas Department of Health (the "department") received a request for the complete investigative file on the requestor's client. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a) excepts from disclosure information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. *Open Records Decision No. 551 (1990)*. A contested case under

the Administrative Procedure Act is litigation for purposes of section 552.103(a). Open Records Decision No. 588 (1991).

You explain that two licensing boards that are administratively attached to the department have initiated proceedings to revoke the professional licenses of the requestor's client. You state that these proceedings will be conducted before the State Office of Administrative Hearings. We find that the department reasonably anticipates litigation in this matter. We also find that the submitted documents relate to the anticipated litigation. Therefore, the department may withhold the requested information under section 552.103(a).

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). After reviewing the submitted information, we note that some of the documents were obtained from or provided to the opposing party or his representative. We also note that you have not raised any additional exceptions to disclosure for these documents. Consequently, these documents must be released to the requestor. The remaining documents may be withheld under section 552.103.¹ The applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

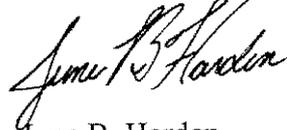
You also argue that some of the information at issue is confidential by law. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. The Medical 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). Texas law also prohibits the public disclosure of psychological records. Communications between a patient and a mental health professional and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a mental health professional are confidential. Health & Safety Code § 611.002(a). We agree that the documents you have marked must be withheld under the MPA and section 611.002 of the Health and Safety Code.

Because we are able to make a determination under sections 552.103 and 552.101, we need address your section 552.108 claim. 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

¹We caution, however, that some of the information contained in these documents may be confidential by law. Therefore, if the department receives a request in the future, at a time when litigation is no longer reasonably anticipated or pending, the department should seek a ruling from this office before releasing any of the requested information. See Gov't Code § 552.352 (distribution of confidential information may constitute criminal offense).

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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref.: ID# 118304

Enclosures: Submitted documents

cc: Ms. Twyla Tranfaglia
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(w/o enclosures)