



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 30, 1998

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

OR98-2339

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# 117634.

The Texas Department of Health (the "department") received a request for records concerning "Timberlawn Psychiatric Hospital a/k/a Timberlawn Mental Health System" and also information concerning certain named individuals. You contend that some of the information is protected from disclosure under sections 552.103, 552.107 and 552.111 of the Government Code. You also assert that portions of the requested records are protected from disclosure on the basis of common-law privacy and under state or federal statutes, in conjunction with section 552.101 of the Government Code. Additionally, you assert that the identities of some individuals are protected from disclosure under the informer's privilege.

You have marked a number of documents that you contend are protected from disclosure under section 552.103. 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). We note, however, that once information has been obtained by all parties to the litigation, no section 552.103(a) interest generally exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). The applicability of section 552.103(a) also ends once the litigation has concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

You have provided information to this office showing that litigation is pending. We have reviewed the marked records and agree that they are related to the pending litigation. However, we note that some of the records at issue are subject to disclosure requirements outside of the Open Records Act. Included in the documents marked as protected under section 552.103(a) are reports which are required to be made public under federal law. Federal regulations require the department to release the forms titled HCFA 2567, statement of deficiencies and plan of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be 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 at 5 (1988).

Additionally, the documents for which you assert section 552.103 protection include medical record information, access to which is governed by the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes, rather than section 552.103(a) of the Government Code. Open Records Decision No. 598 (1991). Sections 5.08(b) and (c) of the MPA 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 department obtained the records. Open Records Decision No. 565 at 7 (1990).

In summary, as to the records for which you assert section 552.103(a), these records are generally subject to section 552.103(a) protection and thus may be withheld from disclosure unless they have already been seen by the opposing party to the litigation. However, the HCFA 2567 forms must be released as required by federal law. Also, medical

records that you marked as protected under section 552.103 are confidential and may be released only as provided under the MPA.¹

We will address the remaining records for which you do not assert section 552.103(a) protection. You have de-identified the records as to patients, asserting that this information is confidential on the basis of the patients' privacy interests, as protected under section 552.101. Section 552.101 protects from disclosure information made confidential by law, including statutory or common-law. 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 such as that relating to psychiatric treatment and attempted suicide. 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. at 5 539 (1990) (information concerning emotional state may be protected by common-law privacy). However, 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.

We agree that the submitted patient records must be de-identified to protect the privacy of these particular patients. De-identification of patients generally includes redaction of their names, home addresses, home telephone numbers, social security numbers, patient identification numbers, and identities of family members. We note that you have not de-identified patient records for those patients who are deceased, as discussed above.

You marked some portions of the records as protected from disclosure under the MPA and under section 611.002(a) of the Health and Safety Code. Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

¹We note that you asserted the applicability of sections 552.111 and 552.107 for the information which we conclude may be withheld under section 552.103. We thus do not need at this time to address your section 552.107 argument, and we note that since your section 552.111 argument was not timely raised we will not consider it.

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 some of the information submitted is protected under the MPA and is subject to access only as provided under the MPA, as previously discussed. We also agree that some of the information submitted is confidential under section 611.002, with access only as provided under sections 611.004 and 611.0045. We agree with your markings, as noted on the documents.

Some information is marked as protected from disclosure under 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 .

We agree that certain submitted records are confidential in their entirety under the provisions of section 81.046, and have marked these records.

You assert that some of documents are confidential under section 48.101 of the Human Resources Code, in conjunction with section 552.101 of the Government Code. Section 48.101 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 have reviewed the records that you contend are protected under section 48.101, and we generally agree with your markings, as noted on the documents.

You assert that certain documents are confidential under chapter 261 of the Family Code, in conjunction with section 552.101 of the Government 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.

You marked records as protected 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." We agree that the records and proceedings of a medical committee created in connection with the committee's deliberative process are confidential. *Barnes v. Whittington*, 751 S.W.2d 493, 496 (Tex. 1988). The information you have marked as being protected medical committee information is confidential.²

You also assert that the informer's privilege aspect of section 552.101 is applicable to the identities of individuals who have filed complaints with the department. Most of the information for which you assert the informer's privilege is otherwise protected from

²Section 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.

disclosure. We agree, however, that the names of individuals who have filed complaints with the department, alleging violations of civil or criminal laws, may be withheld from disclosure under the informer's privilege, if not otherwise protected from disclosure as discussed above. See *Roviaro v. United States*, 353 U.S. 53, 59 (1957) (explaining the rationale underlying informer's privilege).

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,

A handwritten signature in black ink, appearing to read 'Ruth H. Soucy', written in a cursive style.

Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref: ID# 117634

Enclosures: Submitted documents

cc: Mr. Aamer Ravji, Esq.
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(w/o enclosures)