



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 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

OR98-3179

Dear Ms. Wiegman:

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# 120724.

The Texas Department of Health (the "department") received a request for all complaints concerning Knapp Medical Center for the last four years. You assert that portions of the submitted materials are made confidential by various state statutes, the informer's privilege, and by the common-law right to privacy and, therefore, are excepted from required public disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure information that is made confidential by law, including information made confidential by statute.

The first statute the department raises for portions of the information is the Medical Practice Act (the "MPA"), V.T.C.S. article 4495b, section 5.08(b). This statute 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 at 7 (1990). 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). We agree that the information you have marked consists of information obtained from confidential medical records. Thus, the department must release this information only in accordance with the MPA. Open Records Decision Nos. 598 (1991), 546 (1990); *see* V.T.C.S. art. 4495b, § 5.08 (c), (j), (k).

You also raise section 48.101 of the Human Resources Code, which pertains to disclosure of information about reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities. Section 48.101 reads in part as follows:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

(1) a report of abuse, neglect, or exploitation made under . . . chapter [48 of the Human Resources Code];

(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.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department rule and applicable federal law.

You represent that some of the submitted documents relate to reports and investigations made under chapter 48 of the Human Resources Code. Consequently, the documents at issue must not be disclosed to the public, except for a purpose consistent with chapter 48 of the Human Resources Code, or as provided by department rule or federal law. *See id.* § 48.101(b), 25 T.A.C. § 1.207; *but see* Hum. Res. Code § 48.101(c), (d), (e), (f) (permitting release of confidential information in certain circumstances).

You also argue that some of the requested information is protected by a right to privacy. Section 552.101 of the Government Code also applies to information made confidential by the common-law right to privacy. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.* While common-law privacy may protect an individual's medical history, it does not protect all medically related information. *See* Open Records Decision No. 478 (1987). Individual determinations are required. *See* Open Records Decision No. 370 (1983). After careful review, we conclude that the department may not withhold any of the marked information under the common-law right to privacy.

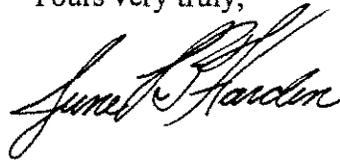
Finally, you argue that portions of the submitted documents are protected under the informer's privilege. Texas courts have recognized the informer's privilege. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The purpose of the informer's privilege is to encourage the flow of information to the government by protecting the identity of the informant. Open Records Decision Nos. 582 (1990), 579 (1990), 549 (1990). The informer's privilege is waivable by a governmental body. Open Records Decision No. 549 (1990). You explain that the marked information relates to the identity of a person who reported violations of law over which you have a duty of enforcement.<sup>1</sup> We agree that much of the information you have marked is protected from disclosure under the under the informer's privilege. We have bracketed the information that must be released.

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<sup>1</sup>Generally, when a governmental raises the informer's privilege, a governmental body should point out the specific criminal or civil statute at issue, and explain that the reported violation was made either to the police or a similar law enforcement agency, or to an "administrative official having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)).

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script, appearing to read "June B. Harden".

June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/rho

Ref.: ID# 120724

Enclosures: Marked documents

cc: Mr. James M. Bennett  
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(w/o enclosures)