



February 12, 1999

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

OR99-0447

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# 121014.

The Texas Department of Health (the “department”) received a request for information pertaining to HealthSouth Rehabilitation Hospital of Arlington. You assert that portions of the responsive documents are made confidential by various statutes, the informer’s privilege, and 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. We have considered your arguments and have reviewed the submitted information.

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 most of the information you have marked consists of information obtained from confidential medical records. We have marked the information that must be released. We have also identified additional information that falls within the ambit of this statute. 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).

There remains the question of information contained in the requested materials which identifies or relates to Medicare and Medicaid recipients. You note that Open Records Letter 98-2321 (1998) stated: "The identities of Medicare and Medicaid patients are made confidential by federal law," citing title 42 C.F.R. section 401.126. As a matter of general application, it appears that statement is too broad.

You cite title 42 C.F.R. section 401.126(b)(1), which provides that information in program validation survey reports and other formal evaluations of providers of services which identifies Medicare or Medicaid patients, individual health care providers, and other individuals must be withheld. The documents submitted consists of Intake Reports, Reports of Contact and other complaint documents. Having examined the records at issue, we do not find that the information is required to be withheld under 42 C.F.R. section 401.126(b)(1).

Next, you contend 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 identities of persons who reported violations of law over which you have a duty of enforcement.¹ Based on your representations, we agree that the information you have marked is protected from disclosure under the under the informer's privilege and may be withheld.

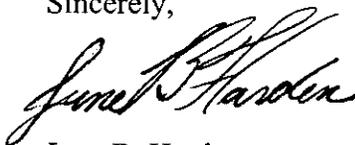
¹Generally, when a governmental raises the informer's privilege, a governmental body should point out the specific criminal or civil statute at issue, and explain that the reported violation was made either to the police or a similar law-enforcement agency, or to an "administrative official having a 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)).

You also seek to withhold certain social security numbers under section 552.101. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* You state that the social security numbers in the submitted records were obtained or maintained pursuant to an amendment of the Health & Safety Code which was enacted in 1993. Based on your representation, we conclude that the social security numbers are confidential under section 405(c)(2)(C)(viii)(I), and, therefore, excepted from public disclosure under section 552.101 of the Government Code.

Finally, you assert 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. 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 reviewing the documents at issue, we agree that some of the information you have marked is protected from disclosure under the common-law right to privacy. We have bracketed the information that must be released.

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.

Sincerely,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch