



February 17, 1999

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

OR99-0483

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 121074.

The Department of Health (the "department") received a request for various information pertaining to the Houston Northwest Medical Center. You seek to withhold portions of the information responsive to the request under section 552.101 of the Government Code.

Section 552.101 excepts from disclosure information made confidential by statutory or constitutional law or by judicial decision. The Texas Medical Practice Act, V.T.C.S. article 4495b, provides:

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.

V.T.C.S. art. 4495b, § 5.08(b). You have marked information you contend is protected by article 4495b. We agree that you must withhold, under that article, the material you have so marked.

Chapter 48 of the Human Resources Code provides “for the authority to investigate the abuse, exploitation, or neglect of an elderly or disabled person and to provide protective services to that person.” Section 48.101(a) makes confidential, with exceptions which do not appear to apply here,

- (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 agree that you must withhold under section 48.101(a) the material you have marked as subject to that section.

Section 161.032 of the Health and Safety Code makes confidential, with exceptions which do not appear to be applicable here, “the records and proceedings of a medical committee.” *See also* § 161.031 (defining “medical committee”). We agree that you must withhold under section 161.032 the information you have marked as being subject to that section.

Section 611.002 of the Health and Safety Code makes confidential “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.” *See also* Health and Safety Code § 611.001 (definitions). The provisions of section 611.004 authorize certain disclosures of mental health records, but none of those provisions appear to apply here. You have marked information which you contend must be withheld under section 611.002. We agree that you must withhold under section 611.002 the information you have so marked.

42 U.S.C. § 405(c)(2)(C)(vii) makes confidential any social security number obtained or maintained by any “authorized person” pursuant to any provision of law, enacted on or after October 1, 1990. You have marked social security numbers which you contend were obtained or maintained pursuant to provisions of chapter 241 of the Health and Safety Code that were adopted after that date. If that is the case, we agree that you must withhold such social security numbers under 42 U.S.C. § 405(c)(2)(C)(vii).

Section 552.101 also incorporates information made confidential by judicial decision. The informer’s privilege has been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). 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. [Emphasis added.]

The "informer's privilege" aspect of section 552.101 protects the identity of persons who report violations of the law. Although the privilege ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of enforcing particular laws. Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 285, 279 (1981); *see also* Open Records Decision No. 208 (1978). This may include enforcement of quasi-criminal civil laws. Open Records Decision Nos. 515 (1988); 391 (1983). We agree that you may withhold the material you have so marked under the informer's privilege aspect of section 552.101.

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 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. You advise that you "read the definition of 'official reports' in 42 C.F.R. §401.126[(b)(1)], to include Intake Reports, Reports of Contact and Complaint Reports, when a Medicare investigation has occurred." 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).

You also note that other federal regulations, 42 CFR section 431.301 et seq, restrict access to information pertaining to medicaid applicants and recipients. Section 431.306 (c) provides, for example, that an "agency must not publish names of applicants or recipients." You indicate that the department is a "Medicaid operating agency" but ask whether these restrictions on release apply to the information at issue here, "since the names were not gathered for Medicaid purposes." In our opinion, the federal regulations in question do not

apply to information not acquired by the department in the performance of Medicaid duties.¹

Finally, you ask whether Medicare and Medicaid recipients' identities might also be protected by common-law or constitutional privacy, as incorporated in section 552.101 of the Open Records Act. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. The constitutional right to privacy consists of two related interests: 1) the individual interest in independence in making certain kinds of important decisions, and 2) the individual interest in independence in avoiding disclosure of personal matters. The first interest applies to the traditional "zones of privacy" described by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), and *Paul v. Davis*, 424 U.S. 693 (1976). These "zones" include matters related to marriage, procreation, contraception, family relationships, and child rearing and education.

The second interest, in nondisclosure or confidentiality, may be somewhat broader than the first. Unlike the test for common-law privacy, the test for constitutional privacy involves a *balancing* of the individual's privacy interests against the public's need to know information of public concern. Although such a test might appear more protective of privacy interests than the common-law test, the scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." See Open Records Decision No. 455 at 5 (1987) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)).

We do not believe that the identities of Medicare and Medicaid recipients are protected by either constitutional or common-law privacy. Although the fact of receiving such assistance might be "intimate or embarrassing," we believe that there is a public interest in expenditures of public funds such that the common-law test is not met. Moreover, we find no basis for concluding that receipt of such assistance involves the most intimate aspects of human affairs under the constitutional test.

You have also marked other portions of the submitted information as protected by common-law privacy. We have indicated those portions of the information which we believe must be withheld under common-law privacy.

¹Compare Open Records Letter 94-691 (1994) (ruling that the department must, under section 12.003 of the Human Resources Code, withhold "any information concerning persons applying for or receiving" medicaid assistance, where the department acquired the information at issue in connection with the department's administration of the Medicaid Vendor Drug Program). See generally Open Records Decision No. 584 (1991).

Except as noted above, you must release the requested information. We are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



William Walker
Assistant Attorney General
Open Records Division

WMW/ch

Ref: ID# 121074

Enclosures: Submitted documents

cc: Mr. Robert D. O'Connor
Attorney at Law
2900 Wesleyan, Suite 125
Houston, Texas 77027-5150
(w/o enclosures)