



April 13, 1999

Mr. Eric Bost
Texas Department of Human Services
701 West 51st Street
Austin, Texas 78714-9030

OR99-1009

Dear Mr. Bost:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 123480.

The Texas Department of Human Services (the “department”) received a request for the investigative file concerning a specific nursing facility administrator. You assert that the residents’ identities and the complainants’ statements are made confidential by various statutes, the common-law right to privacy and the informer’s privilege respectively, and therefore, are excepted from required public disclosure under section 552.101 of the Government Code. Section 552.101 Government Code excepts from disclosure information that is made confidential by law. You have submitted the requested information to this office for review.

Section 552.301 of the Government Code provides that a governmental body must ask the attorney general for a decision as to whether requested documents must be disclosed not later than the tenth business day after the date of receiving the written request. The department received the requestor’s written request for information on January 8, 1999. You did not request a decision from this office until January 25, 1999, more than ten business days after the requestor’s written request.¹ The department’s delay in this matter results in the presumption that the requested information is public. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). You state that you have released some of the requested information. However, you seek to withhold the

¹This office contacted your Human Resources Division, and they confirmed that the department was open for business on January 18, 1999.

complainants' statements under the informer's privilege. In order to overcome the presumption that the requested information is public, a governmental body must provide compelling reasons why the information should not be disclosed. *Hancock*, 797 S.W.2d at 381. A claim under the informer's privilege may be waived by the governmental body since the privilege belongs to the government. *See* Open Records Decision No. 549 at 6 (1990). We conclude that the informer's privilege is not a compelling exception and, therefore, may not be used to withhold the complainants' statements or identifying information from required public disclosure.

You also argue that some of the submitted information is protected from disclosure under section 552.101.² 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 careful review, we have marked the information that is protected from disclosure under the common-law right to privacy.

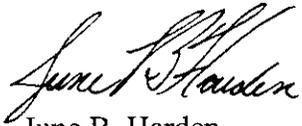
Finally, you argue that information relating to Medicaid recipients is confidential under section 552.101 in conjunction with section 12.003 of the Human Resources Code. You did not, however, indicate which patients were Medicaid recipients. Pursuant to section 552.303(c) of the Government Code, this office notified you by facsimile dated March 29, 1999, that we needed additional information in order to address your argument that some of the information was protected by section 12.003 of the Human Resources Code. We requested that you provide this information to our office within seven days from the date of receiving the notice. The notice further stated that under section 552.303(e) failure to comply would result in the legal presumption that the information at issue was public. *See* Open Records Decision No. 497 (1988) (fact that submitting copies for review to Attorney General may be burdensome does not relieve a governmental body of the responsibility of doing so). As of the date of this letter, you have not provided our office with the information that was requested. The Public Information Act requires the release of public information unless a governmental body demonstrates that the stated exceptions apply. *See* Gov't Code § 552.301 Since we are unable to rule on the applicability of the statute to the submitted information, the department must release the information unless the department can

²A demonstration that information is protected by section 552.101 provides a compelling reason to overcome the presumption of openness.

demonstrate to this office or a court that the information is confidential by law. *See* Gov't Code § 552.324. We note that the distribution of confidential information is a criminal offense under the Public Information Act. Gov't Code § 552.353. The department may not rely on this ruling as an affirmative defense for releasing any confidential information.

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.

Sincerely,

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

June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref: ID# 123480

encl. Marked documents

cc: Mr. Breck Harrison
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(w/o enclosures)