



August 31, 2000

Mr. George D. Cato
Supervising Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2000-3390

Dear Mr. Cato:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 138516.

The Texas Department of Health (the "department") received a request for copies of all recent complaints, investigations, and surveys on East Texas Medical Center. You explain that East Texas Medical Center is a general hospital with a psychiatric unit that is licensed by the department. You claim that much of the highlighted and marked information is made confidential by various state and federal statutes or by the common law right to privacy and is therefore excepted from disclosure under section 552.101 of the Government Code. You also claim that a portion of the submitted records is excepted from disclosure under section 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You assert that portions of the submitted information are confidential medical records. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by statute. The Medical Practice Act ("MPA"), section 159.002(b) of the Occupations Code, provides the following:

A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

Thus, access to medical records is governed by provisions outside the Public Information Act. See Open Records Decision No. 598 (1991). The MPA provides for both confidentiality of medical records and certain statutory access requirements. Occ. Code §§ 159.002, .003.

Medical records may be released only in accordance with the MPA. Open Records Decision No. 598 (1991). We agree that portions of the submitted information, which you have marked, are excepted under section 552.101 and the MPA and must be withheld. You must also withhold information obtained from a patient's medical record and included as part of a "medical record review" as well as patient identification numbers under section 552.101 and the MPA.

You also assert that all information and materials obtained or compiled by the department as a result of a complaint and investigation filed on or after September 1, 1999 concerning a general hospital are excepted from disclosure under section 552.101 and section 241.051(d) of the Health and Safety Code. Chapter 241 of the Health and Safety Code governs licensing of hospitals. Section 241.051 authorizes the department to make any inspection, survey, or investigation that it considers necessary. Section 241.051 provides in pertinent part:

(d) All information and materials obtained or compiled by the department in connection with a complaint and investigation concerning a hospital are confidential and not subject to disclosure under Section 552.001 et seq., Government Code, and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the department or its employees or agents involved in the enforcement action except that this information may be disclosed to:

- (1) persons involved with the department in the enforcement action against the hospital;
- (2) the hospital that is the subject of the enforcement action, or the hospital's authorized representative;
- (3) appropriate state or federal agencies that are authorized to inspect, survey, or investigate hospital services;
- (4) law enforcement agencies; and
- (5) persons engaged in bona fide research, if all individual-identifying and hospital-identifying information has been deleted.

(e) The following information is subject to disclosure in accordance with Section 552.001 et seq., Government Code:

- (1) a notice of alleged violation against the hospital, which notice shall include the provisions of law which the hospital is alleged to have violated, and a general statement of the nature of the alleged violation;

- (2) the pleadings in the administrative proceeding; and
- (3) a final decision or order by the department.

Health & Safety Code § 241.051(d)-(e). You assert that all of the submitted documents were obtained or compiled by the department as a result of a complaint and investigation concerning a hospital. You also inform this office that the submitted information does not contain any information which falls within the exceptions to confidentiality listed in subsections (d) and (e) of section 241.051. Based on your representations and our review of the submitted information, we agree that the submitted documents, which you have marked, are confidential pursuant to section 241.051 of the Health and Safety Code in conjunction with section 552.101 of the Government Code.

Further, you assert that a portion of the documents are excepted under section 552.101 and 577.013(d) of the Health and Safety Code. Section 577.013 authorizes the department to make necessary investigations of mental hospitals and provides in pertinent part:

(d) All information and material obtained or compiled by the department in connection with a complaint and investigation concerning a mental hospital licensed under this chapter are confidential and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the department or its employees or agents involved in the enforcement action except that this information may be disclosed to:

- (1) persons involved with the department in the enforcement action against the licensed mental hospital;
- (2) the licensed mental hospital that is the subject of the enforcement action, or the licensed mental hospital's authorized representative;
- (3) appropriate state or federal agencies that are authorized to inspect, survey, or investigate licensed mental hospital services;
- (4) law enforcement agencies; and
- (5) persons engaged in bona fide research, if all individual-identifying and information identifying the mental hospital has been deleted.

(e) The following information is subject to disclosure in accordance with Section 552.001 et seq., Government Code:

- (1) a notice of alleged violation against the licensed mental hospital, which notice shall include the provisions of law which the licensed mental hospital is alleged to have violated, and the nature of the alleged violation;
- (2) the pleadings in the administrative proceeding; and
- (3) a final decision or order by the department.

Health and Safety Code § 577.013(d)-(e).¹ You also state that the submitted information does not contain any information which falls within the exceptions to confidentiality listed in subsections (d) and (e) of section 577.013. Based on your representations and our review of the documents, we conclude that a portion of the documents, which you have marked, is excepted under section 552.101 in conjunction with section 577.013(d) of the Health and Safety Code.

You have also submitted information pertaining to complaints and investigations made before September 1, 1999. You assert that portions of these documents are excepted under section 552.101 and common law privacy. The doctrine of common law privacy protects information that 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 the information must be of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We agree that identifying information of hospital patients must be redacted under section 552.101 and common law privacy. Identifying information includes the patient's name, home address, home telephone number, and social security number and the names of relatives. You must withhold the patient's identifying information under section 552.101 and common law privacy. However, you must release the remaining information that you have marked under common law privacy.

You have also marked some documents as being part of a Medicare survey. You explain that the department is the Medicare state survey agency pursuant to an agreement with the federal Health Care Financing Administration (HCFA). You assert that section 1306(a)(1) of

¹Because you have asserted section 577.013(d), we assume that East Texas Medical Center meets the definition of a "mental hospital" as defined in section 571.003(13) of the Health and Safety Code.

Title 42 of the United States Code prohibits the disclosure of any file, record, report, or other paper, or any information, obtained at any time by the head of the Department of Health and Human Services ("DHHS") or by any officer or employee of DHHS in the course of discharging the duties of the head of DHHS. Further, you also cite to 42 CFR § 401.101(a)(1)(b)(c) and the HCFA State Operations Manual for the proposition that section 1306(a)(1) applies to survey agencies. You have also enclosed a copy of section 3308 of the HCFA State Operations Manual which allows a state agency to disclose the official Medicare/Medicaid report of a survey but must redact the following information: (1) the name of any patient; (2) medical information about any identifiable patient; (3) the identity of a complainant; (4) the address of anyone other than the owner of the facility; or (5) information which could be defamatory toward any identifiable person. Based on your representations that the reports are the result of a Medicare survey, we conclude that most of the information you have marked must be withheld. We have, however, marked a portion of the material that does not identify the patient or complainant and, therefore, must be released.

You also claim that a portion of the documents are excepted under section 552.108. Section 552.108(a)(1) provides that information held by a law enforcement agency that deals with the detection, investigation, or prosecution of crime is excepted from required public disclosure if release of the information would interfere with the detection, investigation, or prosecution of crime. Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a), (b), .301(b)(1); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You assert that an active investigation is in progress and have provided a letter from an assistant district attorney for Smith County who claims that the criminal case is still pending and that release of the information could jeopardize the criminal investigation and prosecution. Because the information relates to a pending criminal investigation and prosecution, you may withhold the marked documents under section 552.108(a)(1) as release of the information "would interfere with the detection, investigation, or prosecution of crime." *See, e.g.,* Open Records Decision Nos. 474 (1987), 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information which relates to incident), *see also* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108).

In conclusion, we have determined that you must withhold medical records under the MPA. We have also found that you must withhold the majority of the marked information under section 552.101 in conjunction with sections 241.051(d) and 577.013(d) of the Health and Safety Code and the federal Medicare provisions. Further, you must also withhold patient identifying information under section 552.101 and common law privacy and may withhold the police investigation under section 552.108. You must release the remaining information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB\er

Ref: ID# 138516

Encl: Submitted documents

cc: Mr. Marvin Ellis
The Tyler Paper
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(w/o enclosures)