



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 9, 2005

Mr. Marc Allen Connelly
Assistant General Counsel
Texas Department of State Health Services
1100 West 49th Street
Austin, Texas 78756

OR2005-02007

Dear Mr. Connelly:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 219924.

The Texas Department of State Health Services (the "department") received a request for information concerning an investigation by the department of a facility licensed by the department. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information made confidential by other statutes. Section 577.013(d) of the Health and Safety Code provides as follows:

(d) All information and materials 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 information and information identifying the licensed mental hospital has been deleted.

Health & Safety Code § 577.013(d). However, subsection (e) of section 577.013 provides that notice of the alleged violation against the licensed mental hospital, pleadings in the administrative hearing, and the final decision or order by the department are subject to disclosure under the Act. You indicate that some of the submitted information was obtained or compiled by the department as a result of a complaint and investigation concerning a mental hospital. Furthermore, you state that none of the exceptions listed in subsections (d)(1) through (d)(5) and (e) apply in this instance. Based on your representations and our review of the documents at issue, we agree that the department must withhold the information it asserts is confidential under section 577.013(d) of the Health and Safety Code. We have marked this information accordingly.¹

You argue that information that you have highlighted in the submitted Notice of Violation Letter is excepted under section 611.002 of the Health and Safety Code, which applies to “[c]ommunications between a patient and a professional, [and] records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional.” *See also* Health & Safety Code § 611.001 (defining “patient” and “professional”). Because the highlighted information at issue does not constitute communications between a patient and a professional, nor is this information a record of the identity, diagnosis, evaluation, or treatment of a patient that was created or maintained by a professional, as defined by section 611.001, we conclude that none of the highlighted information is confidential under section 611.002. Thus, the highlighted information at issue may not be withheld on the basis of this provision.

You also argue that the information you have highlighted in the submitted Notice of Violation Letter is excepted under section 576.005 of the Health and Safety Code. Section 576.005 provides that “[r]ecords of a mental health facility that directly or indirectly identify a present, former, or proposed patient are confidential unless disclosure is permitted by other state law.” Health & Safety Code § 576.005. We note, however, that the Notice of Violation Letter, sent to the licensed facility by the department, is not a record of a mental health facility as contemplated by section 576.005. As such, we conclude that the highlighted

¹ As our ruling is dispositive for this information, we need not consider your other claimed exception.

information may not be withheld under section 576.005 of the Health and Safety Code. See Open Records Decision No. 163 (1977) (construing predecessor statute).

We note, however, that a small portion of the information you have highlighted in the Notice of Violation letter is subject to the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) 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.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is 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.

Occ. Code § 159.002(b), (c). Further, information that is subject to the MPA also includes information obtained from medical records. See Occ. Code § 159.002(a), (b), (c). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We conclude that a portion of the information that you have highlighted may only be released in accordance with the MPA. We have marked the information subject to the MPA.

We further note that the remaining information you have highlighted in the Notice of Violation Letter, which consists of identifying information of patients of the licensed facility, is confidential under section 552.101 in conjunction with the common law right to privacy.² The doctrine of common law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person; and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The types 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. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: an individual's criminal history when compiled by

² Section 552.101 also encompasses the doctrine of common law privacy.

a governmental body, *see* Open Records Decision No. 565 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); 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); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). The department must withhold the identifying information of patients that you have highlighted under section 552.101 in conjunction with the common law right to privacy.

Finally, you argue that the information you have highlighted in the submitted Centers for Medicare & Medicaid Services Form CMS-2567, which consists of identifying information of a representative of the facility and initials of other individuals, is confidential under section 552.101 in conjunction with sections 401.126 and 401.133 of title 42 of the Code of Federal Regulations. These federal regulations require the department to release the Form CMS-2567 provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 (1988). We note that the signature of the agency representative on the Form CMS-2567 indicates that the provider has had a reasonable opportunity to review the report and offer comments. As such, upon review, we find that the information you have highlighted identifies individual patients, physicians, other medical practitioners or other individuals. Accordingly, we agree that, in compliance with federal law, the department must not release to the requestor the highlighted information.

In summary, the department must withhold the submitted information at issue, which we have marked, under section 552.101 of the Government Code in conjunction with section 577.013(d) of the Health and Safety Code. The information we have marked in the Notice of Violation Letter may only be released in accordance with the MPA. The department must withhold the identifying information of patients of the facility that you have highlighted in the Notice of Violation Letter under section 552.101 in conjunction with the common law right to privacy. The department must withhold the highlighted information in the Form CMS-2567 under section 552.101 in conjunction with sections 401.126 and 401.133 of title 42 of the Code of Federal Regulations. All remaining information must be released.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Cary Grace

Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID# 219924

Enc. Submitted documents

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(w/o enclosures)