



**THE ATTORNEY GENERAL
OF TEXAS**

August 11, 1989

**JIM MATTOX
ATTORNEY GENERAL**

Ms. Mary Ann Courter
Legal Counsel
Texas Department of Public Safety
P. O. Box 4087
Austin, Texas 78773-0001

Dear Ms. Courter:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 6834; this decision is OR89-241.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

The Department of Public Safety has received a request from an individual for "all documents, letters, reports and any other writing" concerning her case that are held in the department file. You indicate that the file involves an investigation into the requestor's ability to drive, and contains records and reports relating to her medical condition. The requestor's case was referred to the Medical Advisory Board of the Department of Public Safety, which recommended that she be tested by the department to determine if her emotional state affects her driving ability. The requestor's driving privileges have not been affected and no administrative hearing concerning her case has been scheduled. You have submitted various documents that you consider responsive to this request, including letters to the requestor from the department; a copy of the requestor's driving record; a letter to the requestor from the Medical Advisory Board for Driver Licensing; a Department of Public Safety Medical Evaluation Request (DL-44); a Supplemental Medical History Information (DL-45); two interoffice memoranda; an unidentified department form signed by an

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evaluator, without indication as to what or to whom the form refers; and an unsigned, anonymous letter to the department alleging that the requestor has medical problems which affect her driving abilities.

You contend that the information requested is excepted from disclosure under section 3(a)(1), which protects from required disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You assert that the information requested is deemed confidential by article 6687b, sections 6(b) and 21A(e)(1), V.T.C.S.

Article 6687b, section 6(b), provides in pertinent part:

Information about the medical history of an applicant supplied to the Department or a Medical Advisory Board is for the confidential use of the Department or the Board and may not be divulged to any person or used as evidence in a legal proceeding except a proceeding under Section 22 or Section 31 of this Act.

Section 21A creates a medical advisory board to assist the Department of Public Safety in determining whether an applicant or licensee can safely operate a motor vehicle. Subsection 21A(e)(1) provides:

All records, reports, and testimony relating to the medical condition of an applicant or licensee are for the confidential use of the board or the department and as such are privileged information. Such information may not be divulged to any person or used as evidence in any trial except as provided in Subdivision (2) of this subsection.

Both provisions protect medical history and medical diagnosis information from disclosure except in proceedings under sections 22 or 31 of article 6687b.

These sections protect information about the medical history or diagnosis of a driver. Most of the information you have submitted as being responsive to the request does not contain medical information, and so is not protected by these sections of article 6687b. This includes the letters to the claimant from the department, but not the letter from the Medical Advisory Board; the claimant's driving record, (which may be released pursuant to article 6687b, section 21(d), (e); and the anonymous letter to the department

concerning the requestor's driving abilities. As to the latter, we note that section 3(a)(1) includes information protected by the informer's privilege. See Open Records Decision No. 434 (1986). We conclude, however, that this letter is not protected by the informer's privilege. Not only is the letter anonymous, but the activity it reports falls outside the realm of criminal or quasi-criminal law enforcement activity that is protected by the informer's privilege. See Open Records Decision No. 515 (1988). We have addressed this issue previously in informal letter ruling ID# 2483, a copy of which is enclosed with this decision. Nor do we consider that this letter is a "report," for purposes of section 21A(e)(1) "relating to the medical condition" of the licensee. The Medical Evaluation Request and the Supplemental Medical History Information and the interoffice memoranda are within the confidentiality provisions of article 6687b, and are not public information.

We think, however, that the confidentiality provisions of article 6687b are not appropriately invoked against the person to whom the information relates. A reading of the bill analysis accompanying House Bill 447, which amended article 6687b, section 6(b), to include the confidentiality provision you rely on, makes it clear that the purpose of this provision is to protect medical information about an applicant for a driver's license from third parties, not from the applicant herself. See H.B. 447, Acts 1977, 65th Leg., ch. 564, at 1400. The bill analysis reads as follows:

Driver's license applications require information on the applicant's medical history, including information on mental disorders and treatment. Persons giving indication of such disorders are required to file a more complete history with the Medical Advisory Board. That portion of the medical history included on the driver's license application is public information and subject to possible abuse by third parties.

. . . .

This bill amends existing law to declare information given on a driver's license application as well as that filed with the Medical Advisory Board to be confidential. (Emphasis added.)

Bill Analysis, H.B. 447, 65th Leg. (1977). Thus, in light of the bill analysis, we think that the reference to "any person" in the statute does not refer to the applicant herself. The protection of 3(a)(1) under a statute must be interpreted by the terms of the statute invoked. Here,

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since the statute does not deem the information confidential as to the requestor, it must be released to her. This accords with the holding in Hutchins v. Texas Rehabilitation Comm'n, 544 S.W.2d 802 (Tex. Civ. App., Austin 1976, no writ), which held that a patient had a common law right of access to her own records held by the commission, even though they were within the scope of a statute making such records confidential, and were thus protected by section 3(a)(1) from public disclosure. See Open Records Decision No. 507 (1988) (individual may use procedures of Open Records Act to obtain information open to him but closed to the public).

Regarding the letter from the Medical Advisory Board to the requestor, dated May 11, and the anonymous letter to the department concerning the requestor's driving abilities, we think these are protected from public disclosure under common law privacy principles, as dealing with matters of an intimate or possibly embarrassing nature, release of which would be highly objectionable to a reasonable person and in which the public has no legitimate interest. See Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 930 (1977). As with the other information discussed, these letters may not be withheld from the requestor, since they relate to her. In any case, she presumably has already received a copy of the letter from the Medical Advisory Board, as it was addressed to her.

You ask whether, a letter from the requestor's attorney constitutes a request for the information, or whether she must provide a release herself. We think the general principles of authorized representation would apply in this context as in any other. Generally, an attorney acting on behalf of a client may request information. See e.g., V.T.C.S. art. 4495b, § 5.07 (j)(1).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR89-241.

Yours very truly,
*Open Government Section
of the Opinion Committee*

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DAN/bc

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Enclosure