



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 28, 1997

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

OR97-1230

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 105962.

The Texas Department of Health (the "department") received an open records request for "copies of complaints, reports on contact (with attachments), statement of deficiencies, and plans of corrections for the time period of July 31, 1993, through December 31, 1994."¹ You have submitted to this office for review what appears to be a representative sample of documents, which you contend are confidential under section 48.101 of the Human Resource Code, as well as section 261.201 of the Family Code, and which thus must be withheld from the public pursuant to section 552.101 of the Government Code.² We have considered your arguments and reviewed the information submitted.³

¹We note by letter dated November 19, 1996, the requestor narrowed his request to records for the period July 1, 1993 to July 31, 1994. However, we note, in his November 19th 1996 letter, the requestor seeks various records of which you have not submitted samples, and which are not protected by section 552.101. We therefore conclude, to the extent the requestor has not withdrawn his request for this information, it is presumed public and must be released.

²Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

³In reaching our conclusion here, we assume that the "representative samples" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Chapter 48 of the Human Resource Code pertains to protective services for elderly and disabled persons. Section 48.082 of the Human Resource Code provides in pertinent part:

(a) If a person has reasonable cause to believe that an elderly or disabled person has been abused, exploited, or neglected in a facility operated, licensed, certified, or registered by a state agency other than the Texas Department of Mental Health and Mental Retardation, the person shall report the information to the state agency that operates, licenses, certifies, or registers the facility for investigation by that agency.

....

(c) A state agency that receives a report under this section shall make a thorough investigation promptly after receiving a report that an elderly or disabled person has been or may be abused, exploited, or neglected in a facility operated, licensed, certified, or registered by the agency.⁴ The primary purpose of the investigation is the protection of the elderly or disabled person.

(d) The state agency shall prepare and keep on file a complete written report of each investigation conducted by the state agency under this section. [Footnote added.]

Section 48.101 of the Human Resource Code provides in pertinent part:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

- (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.

Section 261.201(a) of the Family Code provides:

(a) The following information is confidential, is not subject to public

⁴For purposes of this ruling, we assume the facility that is the subject of this investigation is "a facility operated, licensed, certified, or registered by" the department.

release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report;

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.⁵

(Footnote added). The other provisions of section 261.201 do not appear to apply here.

The documents you have submitted to this office appear to constitute "files, reports, records, communications, and working papers used or developed in an investigation" under chapter 48 of the Human Resource Code or under chapter 261.201 of the Family Code. However, much of the information consists of statements of deficiencies and plans of correction for a particular hospital which were prepared for purposes of a Medicare or Medicaid complaint investigation survey. In accordance with federal regulations, you must release these 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). As the reports are signed by a provider representative and the "provider's plan of correction" portion of the report appears to contain the provider's comments to the report, we believe the provider has had a reasonable opportunity to review and comment on the report. Accordingly, you must release these reports, but with deletions of information that identify the persons specified in the regulation. The remainder of the requested information is made confidential by section 261.201 of the Family Code and chapter 48 of the Human Resource Code and must be withheld from disclosure under section 552.101 of the Government Code.⁶

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

⁵Section 261.201 was added to the Family Code in the last legislative session and became effective, as amended, on September 1, 1995. Act of April 6, 1995, 74th Leg., R.S., ch. 20, § 1, 1995 Tex. Sess. Law Serv. 113, 262 (Vernon); Act of May 25, 1995, 74th Leg., R.S., ch. 751, §§ 93, 129, 1995 Tex. Sess. Law Serv. 3888, 3924, 3933 (Vernon). We apply the new law, as the request for information was received by the governmental body after September 1, 1995. However, we note that the result would be the same regardless of which law we applied to the requested information.

⁶We note that although the department did not request an open records decision from this office within the ten days following the department's receipt of the open records request, the confidentiality conferred on these records by section 48.101 and section 261.201 constitutes a "compelling" reason for non-disclosure that overcomes the legal presumption that the records are public information. *See* Gov't Code § 552.302; Open Records Decision No. 150 (1977).

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.

Yours very truly,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 105962

Enclosures: Submitted documents

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(w/o enclosures)