Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 1, 1997

Mr. John T. Richards
Assistant General Counsel
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR97-1514

Dear Mr. Richards:

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# 106769.

The Texas Department of Health (the "department") received a request for information pertaining to complaints filed with the department regarding Mercy Regional Medical Center (the "medical center"). You assert that certain marked portions of the requested documents are excepted from required public disclosure pursuant to section 552.101 of the Government Code in conjunction with common-law privacy, section 48.101 of the Human Resources Code, section 5.08(b) of article 4495(b), V.T.C.S., and section 161.032 of the Health and Safety Code.[1]

Two of the records consist of statements of deficiencies and plans of correction for the medical center which were prepared for purposes of a Medicare or Medicaid complaint investigation survey. In accordance with federal regulations, you must release these records

[1]We 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 552.101 in conjunction with common-law privacy and various confidentiality provisions 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).

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).[2]

Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including the common-law right to privacy. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. This office has determined that the following information is excepted from disclosure by common-law privacy: the fact that a person broke out in hives as a result of severe emotional distress, Open Records Decision No. 470 (1987), the kinds of prescription drugs a person is taking, Open Records Decision No. 455 (1987), and information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/ mental distress, Open Records Decision No. 343 (1982). *See also* Open Records Decision No. 422 (1984) (regarding emotional or mental distress). We agree that most of the information you have marked must be withheld based on common-law privacy under section 552.101. One of the documents you have marked, however, may not be withheld under common-law privacy. We have marked the document accordingly,

We next address your argument that section 48.101 of the Human Resources Code applies to some of the requested documents. Chapter 48 of the Human Resources Code sets out guidelines for the investigation of abuse, exploitation, or neglect of an elderly or disabled person. Hum. Res. Code § 48.001. Section 48.101(a) provides that a report of abuse, neglect, or exploitation, the identity of the person making the report, and all files, reports, records, communications, and working papers used or developed in an investigation under chapter 48 are confidential.

You state that some of the submitted documents are "files, reports, records, communications, and working papers" used or developed in an investigation of alleged abuse or neglect. We conclude that section 552.101 of the Government Code in conjunction with section 48.101(a) of the Human Resources Code excepts most of the information you have marked from required public disclosure. As noted above, however, the statement of

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[2]You claim that section 161.032(a) of the Health and Safety Code applies to certain information that you have marked in one of the reports, and that section 48.101 of the Human Resources Code makes the other report confidential in its entirety. As we conclude that federal law requires you to release de-identified copies if these reports, we do not address your arguments regarding the confidentiality of the reports under these provisions. *See* Open Records Decision No. 487 (1988).

deficiencies and plans of correction for the medical center which were prepared for purposes of a Medicare or Medicaid complaint investigation survey must be released pursuant to federal regulations.

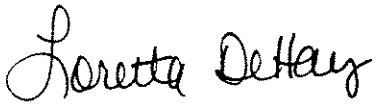
Lastly, we address your claims that section 5.08(b) of the Medical Practice Act (the "MPA"), article 4495b, V.T.C.S., makes some of the documents confidential. Sections 5.08(b) and (c) of the Medical Practice Act (the "MPA"), article 4495b, V.T.C.S., provide:

> (b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except at provided in this section.
>
> (c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are 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.

The documents at issue are medical records generated by medical center physicians or contain information which appears to have been obtained from medical records. Therefore, the Medical Practice Act governs the release of these records. Section 5.08(c) requires that any subsequent release of medical records be consistent with the purposes for which the department obtained the records. The medical record information may therefore be released only in accordance with the Medical Practice Act. Open Records Decision No. 598 (1991).

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.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/rho

Ref.: ID# 106769

Enclosures: Marked documents

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