



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 13, 1997

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

OR97-1808

Dear Mr. Richards:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 107702.

The Texas Department of Health (the "department") received a request for "all complaints, work sheets, memoranda, survey notes, statements of deficiencies and plans of correction and any other documents related to surveys" of The Methodist Hospital in Houston, for the years 1993 through 1996. You contend that some of the information requested is confidential pursuant to section 552.101 of the Government Code in conjunction with section 5.08, article 4495b, V.T.C.S., chapter 48 of the Human Resources Code, and sections 81.046, 161.032 and 611.002 of the Health and Safety Code. You have submitted to this office for review copies of the requested records.

We note initially that the documents submitted to this office include an autopsy report. Section 11 of article 49.25 of the Texas Code of Criminal Procedure provides that autopsy reports, including the full report and detailed findings of an autopsy, are public records. *See* Open Records Decision No. 529 (1989) at 4. Thus, the autopsy report may not be withheld from disclosure.

We further note that federal law governs access to some of the reports submitted to this office. Federal regulations require the department to release the HCFA 2567, statement of deficiencies and plan of correction, 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) at 5.

Section 552.101 of the Government Code provides an exception from required public disclosure for information that is made confidential by law. Section 5.08 of V.T.C.S. article 4495b, the Medical Practice Act (the "MPA"), provides:

(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 as 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.

Section 5.08(j)(3) also requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 (1990) at 7. Thus, access to the medical records at issue is not governed by chapter 552 of the Government Code, but rather provisions of the MPA. Open Records Decision No. 598 (1991). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* V.T.C.S. art. 4495b § 5.08(a), (b), (c), (j); Open Records Decision No. 598 (1991).

Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

Communications 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, are confidential.

Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990).

We note that some of the information at issue is protected from disclosure under section 773.091 of the Health and Safety Code (the Emergency Medical Services Act), which provides in part:

(b) Records of the identity, evaluation or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

....

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services. . . .

Some of the submitted information contains EMS record information. Section 773.091(b) protects information showing the identity, evaluation, or treatment of patients, except for the information specifically listed as not confidential in section 773.091(g). *See* Open Records Decision No. 598 (1991).¹

You also assert that some of the information at issue is excepted from disclosure pursuant to section 48.101 of the Human Resources Code. Section 48.101 makes the following information confidential:

- (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.

¹Open Records Decision No. 598 (1991) addresses a release of records under the Medical Practice Act, article 4495b, V.T.C.S. The opinion notes section 773.091 of the Health and Safety Code, and states:

Section 773.091 thus provides for the same confidentiality, exceptions to confidentiality, and requirements for release of the information at issue as does section 5.08 of the Medical Practice Act, without conflicting with the provisions of that act. . . . Our analysis under the Medical Practice Act is therefore equally applicable to a consideration of the issue under the Health and Safety Code provisions.

We agree that some of the submitted information is made confidential in its entirety under section 48.101 of the Human Resources Code.

You assert that some of the information at issue is excepted from disclosure pursuant to section 81.046 of the Health and Safety Code, which provides, in part:

(a) Reports, records, and information furnished to a health authority or the department that relate to cases or suspected cases of diseases or health conditions are confidential and may be used only for the purposes of this chapter...

(b) Reports, records, and information relating to cases or suspected cases of diseases or health conditions are not public information . .

We agree that certain submitted records are confidential in their entirety under the provisions of section 81.046.

You assert that certain records are excepted from disclosure pursuant to section 161.032(a) of the Health and Safety Code, which provides that "records and proceedings of a medical committee are confidential and are not subject to court subpoena." We agree that some of the information submitted includes the records and proceedings of a medical committee created in connection with the committee's deliberative process. *Barnes v. Whittington*, 751 S.W.2d 493, 496 (Tex. 1988). This information is confidential.²

²Section 161.031 of the Health and Safety Code defines medical committee as follows:

(a) In this subchapter, "medical committee" includes any committee, including a joint committee, of:

(1) a hospital;

(2) a medical organization;

(3) a university medical school or health science center;

(4) a health maintenance organization licensed under the Texas Health Maintenance Organization Act (Chapter 20A, Vernon's Texas Insurance Code), including an independent practice association or other physician association whose committee or joint committee is a condition of contract with the health maintenance organization; or

(5) an extended care facility.

(b) The term includes a committee appointed ad hoc to conduct a specific investigation or established under state or federal law or rule or under the bylaws or rules of the organization or institution.

As previously discussed, Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by constitutional or common-law privacy and under certain circumstances excepts from disclosure private facts about individuals. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from public disclosure under a common-law right of privacy when the information is (1) highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. However, an individual's right of common-law privacy is a personal right that does not extend past that individual's own death. Attorney General Opinion H-917 (1976); Open Records Decision No. 272 (1981) at 1. Thus, a common-law right of privacy would not generally protect records of an individual who is deceased.

The type of information the supreme court considered intimate and embarrassing in *Industrial Foundation* included information such as that 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. In Open Records Decision No. 262 (1980), this office stated that information about a patient's injury or illness might be protected under common-law privacy if such injury or illness relates to drug overdoses, acute alcohol intoxication, gynecological or obstetrical illnesses, convulsions and seizures, or emotional and mental distress. *See also* Open Records Decision No. 539 (1990) at 5 (information concerning emotional state may be protected by common-law privacy).

Personal financial information may also be protected from disclosure on the basis of common-law privacy. In Open Records Decision No. 373 (1983) at 3, we stated:

In our opinion, all financial information relating to an individual -- including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history -- ordinarily satisfies the first requirement of common-law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

Included in the information submitted is certain private financial information concerning patients that must be withheld from disclosure.

The identities of individuals who have filed complaints with the department are not generally protected from disclosure on the basis of common-law privacy. We note that identifying information about individuals who file complaints alleging that there has been a violation of a civil or criminal statute may be protected under the informer's privilege

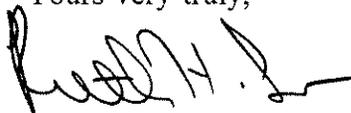
aspect of section 552.101 of the Government Code. *See Roviario v. United States*, 353 U.S. 53, 59 (1957) (explaining the rationale underlying informer's privilege). As this office discussed in Open Records Decision No. 549 (1990) at 6, the informer's privilege is waivable by the department when the exception is not timely raised. You did not timely raise the informer's privilege as an argument against disclosing the identities of complainants.

We also note that some of the information for which you assert protection on the basis of privacy is contained in records that appear to have been filed with a court. Documents filed with a court are generally considered to be public. *Cf. Star Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992). Thus, these records may not be withheld from disclosure on the basis of privacy.

We have labeled and marked documents in accordance with this decision.

We are resolving this matter with this 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 may 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,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref.: ID# 107702

Enclosures: Marked documents

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(w/o enclosures)