



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 17, 1997

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

OR97-2312

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# 110083.

The Texas Department of Health (the "department") received a request for information related to St. Paul Medical Center (the "medical facility"). 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 various statutory provisions and constitutional and common-law privacy. In addition, you claim that the informer's privilege protects the identity of complainants.

Initially, we note that one of the documents submitted for our review consists of statements of deficiencies and plans of correction for the medical facility which were prepared for purposes of a Medicare or Medicaid complaint investigation survey. You must, in accordance with federal regulations, release this document 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). Accordingly, you must release this report, but with deletions of information that identifies the persons specified in the regulations. *See* Open Records No. 138 (1976) at 3.

Section 552.101 excepts from required public disclosure information that is considered confidential by law, either constitutional, statutory, or by judicial decision. Information may be withheld under section 552.101 in conjunction with the common-law right to privacy (1) if the information contains highly intimate or embarrassing facts about

a person's private affairs such that release of the information would be highly objectionable to a reasonable person, and (2) if the information is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing 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. 540 S.W.2d at 683; *see also*, Open Records Decision Nos. 470 (1987) (concluding that fact that a person broke out in hives as a result of severe emotional distress is excepted by common-law privacy), 455 (1987) (concluding that kinds of prescription drugs a person is taking are protected by common-law privacy), 343 (1982) (concluding that information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress is protected by common-law privacy).

The constitutional right to privacy protects two interests. Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 (1992) at 4. The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.* The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 (1987) at 5-7 (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional privacy doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). We have marked the information which must be withheld based on the constitutional or common-law right to privacy.

Section 611.002 of the Health and Safety Code, which pertains specifically to mental health patients, 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 and Safety Code § 611.001 (defining "patient" and "professional"). Some of the submitted information appears to have been obtained from such records and communications. We have examined and marked the documents subject to section 611.002 which may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Health and Safety Code § 611.002(b); *see id.* §§ 611.004, .0045.

We next 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 MPA, 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 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.

Some of the documents at issue include medical records generated by physicians or contain information which appears to have been obtained from medical records. Therefore, the MPA 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 MPA. Open Records Decision No. 598 (1991).

Finally, you assert that the informer's privilege protects the identity of the complainants from disclosure. The Texas courts have recognized the informer's privilege. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 (1988) at 3, 208 (1978) at 1-2. The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 (1981) at 2 (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 (1990) at 2, 515 (1988) at 4-5.

Although the privilege ordinarily applies to the efforts of law enforcement agencies, it also applies to administrative officials with a duty of enforcing particular laws. Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 285 (1981), 279 (1981). This may include enforcement of quasi-criminal civil laws. Open Records Decision Nos. 515 (1988), 391 (1983). You have not explained how the communications in the records you claim are encompassed by the informer's privilege relate to any specific violation of a

criminal or civil statute. We also note that it appears from the content of one of the submitted records that the identity of the complainant has been disclosed. Therefore, the department may not withhold the information for which it claims the informer's privilege.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/ glg

Ref.: ID# 110083

Enclosures: Submitted documents

cc: Ms. Katherine Hall
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(w/o enclosures)