



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 26, 1997

Ms. Susan I. Goodman  
Hilgers & Watkins  
San Jacinto Center, Suite 1300  
98 San Jacinto Boulevard  
Austin, Texas 78701

OR97-2608

Dear Ms. Goodman:

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# 110415.

The Austin-Travis County Mental Health-Mental Retardation Center (the "center"), which you represent, received a request from a former physician at the center for "copies of all information pertaining to me and/or my work at (the center): all letters, reports, memoranda and notes regarding me and/or my work, my requests for equal treatment in the workplace, peer reviews, death reviews, any correspondence between staff, and any other written material that references me and/or my work." You assert that the information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with a right of privacy and other statutory confidentiality provisions, as well as sections 552.103 and 552.111 of the Government Code. We have considered your arguments and have reviewed the information submitted.<sup>1</sup>

Initially, we note that you have marked a portion of the information submitted to this office as either medical records of center clients, access to which is governed by the confidentiality provisions of chapters 576 and 611 of the Health and Safety Code,<sup>2</sup> or peer

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<sup>1</sup>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.

<sup>2</sup>Section 576.005 of the Health & Safety Code states that "[r]ecords of a mental health facility that directly or indirectly identify a present, former or proposed patient are confidential unless disclosure is permitted by other state law." 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").

review and "death review" records, which may only be released in accordance with the requirements of section 5.06 of the Medical Practice Act ("MPA"), article 4495b, V.T.C.S., or sections 161.031-161.033 of the Health and Safety Code.<sup>3</sup> We agree that these statutes govern access to the information you have marked, and conclude that access to the medical and peer review records at issue is not governed by chapter 552 of the Government Code, but rather by the cited provisions of the Health and Safety Code and the MPA. Therefore, sections 552.103 and 552.111 are inapplicable to these records, *see* Open Records Decision No. 598 (1991), and they may only be released in accordance with the applicable statutes.

We will next address the applicability of the exceptions you claim to the information not covered by the MPA and the Health and Safety Code. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the governing body is or may be a party. The governing body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The governing body must meet both prongs of this test for information to be excepted under section 552.103(a).

You supplied this office with a copy of a complaint of discrimination filed with the Texas Commission on Human Rights (the "TCHR") by the requestor. The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The Equal Employment Opportunity Commission ("EEOC") defers jurisdiction to the TCHR over complaints alleging employment discrimination. *Id.* This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 (1983) at 2, 336 (1982) at 1.

By showing that a complaint filed with the TCHR is pending, you have shown that litigation is reasonably anticipated. Upon review of the information submitted, we conclude it is related to the anticipated litigation. However, we note that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). In this case, it is clear that some of the submitted information has been seen by the requestor. The center may not withhold under section 552.103(a) the responsive information that the requestor has

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<sup>3</sup>Section 5.06(g) of article 4495b, V.T.C.S., provides that "[a]ll proceedings and records of a medical peer review committee are confidential, and all communications made to a peer review committee are privileged." Section 161.032(a) of the Health and Safety Code renders confidential "[t]he records and proceedings of a medical committee." Section 161.031(a) defines "medical committee" for purposes of the subchapter to include any committee . . . of: (1) a hospital; (2) a medical organization; (3) a university medical school or health science center; (4) a health maintenance organization . . . ; or (5) an extended care facility.

seen or had access to.<sup>4</sup> In addition, the information submitted contains a medical examiner's report. The center may not withhold this report from the requestor as a medical examiner's report is deemed public by statute. Code Crim Proc. art. 49.25 § 11; *see* Open Records Decision No. 529 (1989) at 4.

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,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/ch

Ref.: ID# 110415

Enclosures: Submitted documents

cc: Dr. Linda Taylor, D.O.  
4411 Spicewood Springs Rd., #2704  
Austin, Texas 78759  
(w/o enclosures)

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<sup>4</sup>In this regard, we note your argument that state and federal laws and regulations prohibit release of the center's TCHR/EEOC response filings. We conclude that the laws and regulations you cite are inapplicable to such information when held by the center and thus, such response filings may not be withheld under these provisions in conjunction with section 552.101.