



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 30, 1998

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

OR98-0824

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# 112773.

The Texas Department of Health (the "department") received a request for a variety of information concerning "[a]ll complaints filed against [the Psychiatric Department or other departments], or providers . . . at St. Paul Medical Center in Dallas, for the past three years, and earlier years to the extent those remain on file." Specifically, the requestor requests "the statement of deficiencies, report of contacts, complaint, investigation, plan of correction and correspondence relating to the complaints." In response to the request, you submitted to this office for review a marked representative sample of the information which you assert is responsive.<sup>1</sup> You contend that portions of the requested information are excepted from disclosure under section 552.101 of the Government Code in conjunction with various state statutes and federal regulations. We have considered the exception you claim and have reviewed the documents at issue.

You did not submit your request for a decision to this office within ten business days of receiving the request for information. Chapter 552 of the Government Code imposes a duty on a governmental body seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general within ten business days after the governmental

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<sup>1</sup>We assume that the "representative sample" 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) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). 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.

body's receipt of the request for information. The time limitation found in section 552.301 is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. See Gov't Code § 552.302. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. See, e.g., Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests).

In accordance with sections 552.301 and 552.302, the information at issue is presumed public. In some instances you have raised a compelling reason to overcome the presumption that information is public because most of the exceptions you assert require that information be kept confidential. Section 552.101 protects information that is confidential by law. Because the presumption of openness is overcome by a showing that information is confidential by law, we must consider your section 552.101 claim. However, not all of the exceptions you assert overcome the presumption that the information is public.

You have marked information that you assert is protected from public disclosure pursuant to the "informer's privilege" as incorporated into section 552.101 of the Government Code. The informer's privilege aspect of section 552.101 allows a governmental body to withhold the identity of persons who report violations of the law to officials responsible for enforcing those laws. Although the privilege ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of enforcing particular laws. Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 285 (1981), 279 (1981); see also Open Records Decision No. 208 (1978).

In Open Records Decision No. 549 (1990) at 5, this office recognized that by protecting the informer's identity, the privilege protects the governmental body's interest in encouraging the flow of information to the government. Because this privilege exists to protect the governmental body's interest, it may be waived by the governmental body if the governmental body fails to timely seek a decision from this office. *Id.* at 6 (informer's privilege is waivable, whereas privacy rights of a third party are not). Because the department did not timely assert the informer's privilege, the information for which you assert the informer's privilege is public and may not be withheld from disclosure. Gov't Code § 552.302.

Some of the information you submitted as confidential is information that is made public by statute. You submitted to this office statements of deficiencies and plans of correction on federal Form HCFA 2567. In accordance with federal regulations, the department must release the federal forms in their *entirety* provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals is 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. You have marked information on these forms

as being protected under common-law privacy and various other statutes. However, since federal law clearly provides for these forms to be released in their entirety once they have been de-identified and there has been an opportunity for the provider to review and comment on the information, the department must make these federal forms public in compliance with federal law.<sup>2</sup>

We have reviewed the other documents at issue and agree that some of the information at issue is made confidential by statute or common-law. Thus, you have shown a compelling reason to overcome the Government Code section 552.302 presumption that all of the information at issue is public. We address each of the confidentiality provisions that are applicable to the information at issue. Please note that we have marked the submitted representative sample documents to show the types of information made confidential by statute and pursuant to common-law privacy requirements. These markings should be used as a guide in applying this open records letter ruling to the remaining documents.

You submitted to this office State of Texas forms of statements of deficiencies and plans of correction. You have marked information on these forms as being protected under common-law privacy, among other claimed exceptions. Because the state forms at issue do not contain any personally identifying information, release of these forms does not implicate common-law privacy. You have redacted other records to withhold identifying information about patients on the basis of common-law privacy.

Information must be withheld from public disclosure on the basis 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. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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

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<sup>2</sup>As we have concluded in several previous rulings to the department, we believe that federal law requires the department to release de-identified HCFA 2567 documents. See Open Records Letter Nos. 97-2843 (1997), 97-1514 (1997), 97-1492 (1997), 97-1472 (1997), 97-1388 (1997), 97-1230 (1997). In most instances, we do not believe that a patient's medical condition or diagnosis identifies that patient when the name is redacted from the HCFA 2567 forms. As federal provisions govern the public disclosure of the HCFA 2567 forms, we believe that the federal law prevails to the extent it may conflict with the Texas Medical Practice Act and chapter 611 of the Health and Safety Code regarding information obtained from medical and mental health records. See *English v. General Electric Co.*, 110 S.Ct. 2270, 2275 (1990) (state law preempted to extent it actually conflicts with federal law). Furthermore, we believe the de-identification required by federal law is sufficient to protect the privacy interests of the patients.

distress. *See also* Open Records Decision No. 539 (1990) at 5 (information concerning emotional state may be protected by common-law privacy). We agree that, based on the types of illness, treatment, and symptoms revealed, some of the provided records must be de-identified on the basis of common-law privacy.

Some of the information at issue contains private details about individuals' finances, credit sources, and medical payment plans. 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.

We agree that the identity of the individuals to whom the private financial information relates must be withheld from disclosure, and have marked the submitted representative sample to show what type of information must be withheld.

However, not all of the records at issue implicate the common-law privacy of patients or other private individuals. Additionally, some of the patients whose names you have redacted on the basis of common-law privacy are deceased. 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. When the patient's right of privacy is the only privacy interest at stake, and that patient is deceased, the information at issue is not protected from disclosure.

We next consider the application of the claimed confidentiality statutes to the submitted records. Section 552.101 of the Government Code also excepts from disclosure information that is made confidential by statute. 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) 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). Thus, unless the access provisions of the MPA provide for release of the records, both the medical records and the information in other records that was obtained from the medical records, is confidential. We have marked the submitted representative sample documents for information which should be withheld under the MPA.

You also contend that some of the records at issue are confidential under chapter 611 of the Health and Safety Code, which 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 agree that these types of records are confidential unless provided in compliance with sections 611.004 and 611.0045. We have marked the submitted representative records to show the type of information that is protected.

You assert that some of the documents are 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

This office has marked the information in the submitted representative sample covered by this provision.

You marked some information as being 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.” Section 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.

Both section 5.06 of V.T.C.S. article 4495b, and 161.032(a) of the Health and Safety Code contain provisions making certain types of information confidential. Section 5.06(g) states that, “except as otherwise provided by this Act, all proceedings and records of a medical peer review committee are confidential, and all communications made to a medical peer review committee are privileged.”

However, neither section 5.06 nor section 161.032(a) make confidential “records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, or extended care facility.” Health & Safety Code § 161.032(b); *see also Memorial Hospital-theWoodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996) (“The reference to section 5.06 in section 161.032 is a clear signal that records should be accorded the same treatment under both statutes in determining if they were made ‘in the regular course of business.’”) In *Barnes v. Whittington*, 751 S.W.2d 493, 496 (Tex. 1988), the Texas Supreme Court indicated that “routinely accumulated information” unless submitted or created in connection with a committee’s deliberative process, does not constitute confidential committee records. In *Jordan v. Court of Appeals for Fourth Supreme Judicial District*, 701 S.W.2d 644, 648 (Tex

1985) the court stated that records “gratuitously submitted to a committee or which have been created without committee impetus and purpose are not protected.”<sup>3</sup> *See Memorial Hospital-theWoodlands v. McCown*, 927 S.W.2d 1, 9-10 (Tex. 1996) (discussion concerning business records and review of holdings in *Barnes* and *Jordan*).

Our review indicates that certain marked information 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. We have marked the information, in the submitted representative sample, covered by this provision.

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(a) 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.

We agree that some of the submitted information is made confidential in its entirety under section 48.101(a) of the Human Resources Code, and accordingly, we have marked the submitted representative sample documents.

Finally, you assert that some information is confidential and may not be disclosed pursuant to chapter 261 of the Family Code. Subsection (a) of section 261.201 of the Family Code provides:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with . . . [the Family] 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 . . . chapter [261 of the Family Code] and the identity of the person making the report; and

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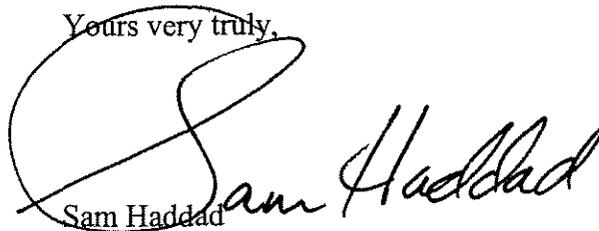
<sup>3</sup>*Barnes* and *Jordan* both relied upon the predecessor statute to 161.032 of the Health & Safety Code, article 447d, section 3 of the Civil Statutes, which provided, in part, that “records made or maintained in the regular course of business” were not confidential.

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under . . . chapter [261 of the Family Code] or in providing services as a result of an investigation.

In reviewing the submitted records, we did not find any information specifically subject to this provision.

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 any questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Sam Haddad". The signature is written in a cursive style with a large, looping initial "S".

Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/rho

Ref: ID# 112773

Enclosures: Marked documents

cc: Ms. Katherine C. Hall, P.C.  
P. O. Box 8405  
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(w/o enclosures)