



Office of the Attorney General  
State of Texas

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April 8, 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

OR98-0918

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 113836.

The Texas Department of Health (the "department") received a request for information regarding Laurel Ridge Psychiatric Hospital (the "hospital"). You have released some of the responsive information to the requestor. You contend that the remaining information is excepted from disclosure under section 552.101 of the Government Code, in conjunction with various state and federal statutes and regulations.<sup>1</sup>

Initially, we note that the submitted documents include a report about the hospital's compliance with federal law as a Medicare provider. Federal regulations require the department to release the HCFA form 2567, statements of deficiencies and plans 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. It appears that the hospital has had a reasonable opportunity to review and comment on the reports. Thus, the HCFA form 2567 must be released.

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<sup>1</sup>The department failed to timely request an open records decision from this office. Gov't Code § 552.301. In most cases, failure to timely request a decision results in the legal presumption that the requested information is presumed to be open to the public and only the demonstration of a compelling interest can overcome the presumption. *See Hancock v. State Bd. Of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). However, the presumption of openness may be overcome when the requested information is deemed confidential by law. *See* Open Records Decision No. 150 (1977).

Section 552.101 of the Government Code excepts from required public disclosure information that is deemed confidential by law, including information made confidential by judicial decision. This exception applies to information made confidential by 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). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.* In this case, common-law privacy protects from disclosure information that identifies the patients who have registered complaints against the hospital. We have marked the information that the department must withhold under section 552.101 in conjunction with the common-law right to privacy.

You 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 have marked the records that are confidential under section 611.002(a). The department may release these records only as provided by sections 611.004 and 611.0045.

You also raise section 48.101 of the Human Resources Code, which pertains to disclosure of information about reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities. Section 48.101 reads in part as follows:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

- (1) a report of abuse, neglect, or exploitation made under . . . chapter [48 of the Human Resources Code];
- (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.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department rule and applicable federal law.

Some of the submitted documents, which we have marked, are confidential pursuant to section 48.101(a) of the Human Resources Code. *See* Hum. Res. Code § 48.082(a); *see also id.* § 48.002 (definitions). Consequently, these documents must not be disclosed to the public, except for a purpose consistent with chapter 48 of the Human Resources Code, or as provided by department rule or federal law. *See id.* § 48.101(b); 25 T.A.C. § 1.207; *but see* Hum. Res. Code § 48.101(c), (d), (e), (f) (permitting release of confidential information in certain circumstances).

Finally, section 81.046 of the Health and Safety Code provides in pertinent 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 under [the Open Records Act] and may not be released or made public on subpoena or otherwise except as provided by Subsections (c) and (d).

In Open Records Decision No. 577 (1990), this office concluded that any information acquired or created by the department during an investigation under chapter 81 is confidential and may not be released unless an exception set out in the statute applies. The information that we have marked is confidential under section 81.046. It does not appear that any of the statute's exceptions apply to the requestor. *See* Health & Safety Code § 81.046(c), (d). Therefore, we conclude that the department must withhold the marked information from disclosure pursuant to section 81.406.

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,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

Ref: ID# 113836

Enclosures: Submitted documents

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