



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 26, 1998

Mr. George Cato
Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-1558

Dear Mr. Cato:

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# 116075.

The Texas Department of Health (the "department") received a request for information seeking "state health department reports concerning Brazosport Memorial Hospital." The requested information concerns the hospital's compliance with federal law as a Medicare provider, specifically, section 1867 of the Consolidated Omnibus Reconciliation Act¹ pertaining to allegations of "patient dumping."² You assert that portions of the requested information are made confidential by various state statutes or by the common-law right to privacy and therefore are excepted from required public disclosure under section 552.101 of the Government Code. Government Code section 552.101 excepts

¹Consolidated Omnibus Reconciliation Act of 1985, Pub.L.No. 99-272, § 9121, 100 Stat. 164-167 (1986) (codified at 42 U.S.C. § 1395dd (1994) (discussing examination and treatment for emergency medical conditions and women in labor).

²Specifically, 42 U.S.C.A. § 1395dd (Emergency Medical Treatment And Active Labor Act, "EMTALA") imposes two requirements on any hospital which participates in Medicare program: hospital must conduct appropriate medical screening to persons visiting hospital's emergency room, and hospital generally may not transfer out of hospital a patient whose medical condition has not been stabilized. A hospital's failure to meet any one of the conditions constitutes a violation of the statute. Later amendments to EMTALA include a prohibition of delaying the screening exam in order to inquire about payment or insurance coverage; "whistle blower" protections, which prohibit the hospital from penalizing a physician who refuses to transfer an unstable patient or from taking action against a hospital employee who reports a violation of the law; and a requirement that hospitals with specialized facilities, such as burn units or neonatal intensive care units, accept transfer patients needing specialized care.

from disclosure information that is made confidential by law, including information made confidential by statute. You have submitted the requested information to this office for review.

As we have concluded in several previous rulings to the department, we believe that federal law requires the department to release deidentified 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 patient's name is redacted from the HCFA 2567 forms. As federal provisions govern the public disclosure of the HCFA 2567 forms, including title 42 Code of Federal Regulations section 401.126, we believe that the federal law prevails to the extent it may conflict with other state statutes. *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 deidentification required by federal law is sufficient to protect the privacy interests of the patients. Accordingly, the department must release these HCFA 2567 reports, but with deletions of information that identifies the persons specified in the regulation.³

In this particular instance, we observe that the Department of Health and Human Services (HHS) is the agency responsible for enforcing EMTALA. The Health Care Financing Administration, an agency of HHS is responsible for Medicare terminations, and the Office of Inspector General ("OIG"), also an agency under the auspices of HHS which is charged with promoting the efficiency, effectiveness, and integrity of HHS programs. HCFA is responsible for Medicare termination and the OIG for imposing fines *See* 42 C.F.R. § 489.24(f). In this instance, the HCFA enforcement process began when one of its ten regional offices received a complaint about alleged EMTALA violations. HCFA subsequently referred the matter to the TDH, the state hospital licensing agency which conducts a survey of the hospital to gather information, ultimately returning the information to the HCFA regional office for a determination as to whether a violation occurred.⁴

³We note that you have already released the pertinent information as per the department's contact, Ms. Kathy Dunnigan.

⁴We observe that as of August 15, 1995, the HCFA Freedom of Information/Privacy Office granted authority to the Health Standards and Quality Bureau to release HCFA central logs listing EMTALA violations directly in response to requests from the public. 8 *Health Matrix: Journal of Law-Medicine* Winter 1998, "The Emergency Medical Treatment and Active Labor Act: The Anomalous Right To Health Care," n. 48 (Letter from Kathy Pirotte, Health Standards and Quality Bureau, Sept. 29, 1995). Additionally we note that the central HCFA logs list the date a complaint was received by HCFA, the hospital name, city, state, a one word description of the violations, the dates of the projected termination date and resolution of the complaint.

Simultaneously, and in conjunction with the HCFA complaint referral, TDH coordinated its own investigation of hospital transfer policy violations under section 241.028(d) of the Health and Safety Code (also known as the Texas Hospital Licensing Act), section 311.022 of the Health and Safety Code and title 25 Texas Administrative Code section 133.111(e)(2).⁵

You now assert that section 552.101 excepts the documents from disclosure as they contain "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes, and you cite to the Medical Practice Act (the "MPA"), V.T.C.S. article 4495b, section 5.08 which provides in part:

(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.

⁵Additionally, we note section 311.022 of the Health and Safety Code which provides:

(a) An officer, employee, or medical staff member of a general hospital may not deny emergency services because a person cannot establish the person's ability to pay for the services or because of the person's race, religion, or national ancestry if:

- (1) the services are available at the hospital; and
- (2) the person is diagnosed by a licensed physician as requiring those services.

(b) An officer or employee of a general hospital may not deny a person in need of emergency services access to diagnosis by a licensed physician on the hospital staff because the person cannot establish the person's ability to pay for the services or because of the person's race, religion, or national ancestry.

(c) In addition, the person needing emergency services may not be subjected to arbitrary, capricious, or unreasonable discrimination based on age, sex, physical condition, or economic status.

(d) An officer, employee, or medical staff member of a general hospital commits an offense if that person recklessly violates this section. An offense under this subsection is a Class B misdemeanor, except that if the offense results in permanent injury, permanent disability, or death, or the offense is a Class A misdemeanor.

(e) An officer, employee, or medical staff member of a general hospital commits an offense if that person intentionally or knowingly violates this section. An offense under this subsection is a Class A misdemeanor, except that if, as a direct result of the offense, a person denied emergency services dies, the offense is a felony of the third degree.

(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). We note that some of the information at issue appears to have been obtained from hospital records. Hospital treatment is routinely conducted under the supervision of physicians. Thus, information relating to the diagnosis and treatment of a patient in a hospital is confidential under section 5.08 of the MPA. Open Records Decision No. 546 (1990). We agree that portions of the requested information consist of information obtained from confidential medical records. Thus, the department may only release this information in accordance with the MPA. Open Records Decision Nos. 598 (1991), 546 (1990); *see* V.T.C.S. art. 4495b, §§ 5.08 (c), (j), (k). We have marked the documents accordingly.

Section 161.032 of the Health and Safety Code makes confidential the "records and proceedings of a medical committee." Under section 161.031(a) of the Health and Safety Code, a "medical committee" includes any committee of a hospital, medical organization, or extended care facility. It includes an ad hoc committee appointed to conduct a specific investigation as well as a committee established under the bylaws or rules of the organization. Health & Safety Code § 161.031(b). While the records and proceedings of a medical committee are confidential, *id.* § 161.032(a), the confidentiality does not extend to "records made or maintained in the regular course of business by a hospital." *Id.* § 161.032(c); Open Records Decision No. 591 (1991). Documents generated by a committee in order to conduct open and thorough review, as well as documents prepared by or at the direction of the committee for committee purposes, are confidential.

We believe some of the information at issue is a record or proceeding of a medical committee made confidential by section 161.032 of the Health and Safety Code. *See Texarkana Mem'l Hosp., Inc. v. Jones*, 551 S.W.2d 33 (Tex. 1977). Consequently, we have marked the information the department must withhold from the requestor.

You 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.

Additionally, we note that section 48.002 provides:

(1) "Elderly person" means a person 65 years of age or older.

(2) "Abuse" means:

(A) the negligent or wilful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical or emotional harm or pain to an elderly or disabled person by the person's caretaker, family member, or other individual who has an ongoing relationship with the person; or

(B) sexual abuse of an elderly or disabled person, including any involuntary or nonconsensual sexual conduct that would constitute an offense under Section 21.08, Penal Code (indecent exposure) or Chapter 22, Penal Code (assaultive offenses), committed by the person's caretaker, family member, or other individual who has an ongoing relationship with the person.

...

(4) "Neglect" means the failure to provide for one's self the goods or services, including medical services, which are necessary to avoid physical or emotional harm or pain or the failure of caretaker to provide such goods or services.

(5) "Protective services" means the services furnished by the department of by a protective services agency to an elderly or disabled person who has been

determined to be in a state of abuse, exploitation, or neglect. These services may include social casework, case management, and arranging for psychiatric and health evaluation, home care, day care, social services, health care, and other services consistent with the chapter.

(6) "Protective services agency" means a public or private agency, corporation, board, or organization that provides protective services to elderly or disabled persons in the state of abuse, exploitation, or neglect.

(7) "Department" means the Department of Protective and Regulatory Services.

(8) "Disabled person" means a person with a mental, physical, or developmental disability that substantially impairs the person's ability to provide adequately for the person's care or protection and who is:

(A) 18 years of age or older; or

(B) under 18 years of age and who has had the disabilities of minority removed.

The term disabled person does not encompass sick or injured individuals as envisioned under section 311.021 of the Health and Safety Code. Section 311.021 provides that emergency services are services usually and customarily available at a hospital and that must be provided immediately to sustain a person's life, prevent serious permanent disfigurement or loss or impairment of the function of a body part or organ or provide for the care of a woman in active labor. You have not explain how the individual patients, especially those from eighteen years of age to 55 qualify as "disabled" under section 48.101 of the Human Resources Code. Consequently, you may not withhold any of the information under this provision.

Next you assert that some of the requested information is made confidential by section 261.201(a) of the Family Code which provides as follows:

(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 this 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 this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an

investigation under this chapter or in providing services as a result of an investigation.

See also 25 T.A.C. § 1.207 (confidentiality of Family Code § 261.201 investigative process and report). None of the submitted records appear to constitute “files, reports, records, communications, and working papers used or developed in an investigation” under chapter 261 of the Family Code. *See* Open Records Decision No. 440 (1986) at 2 (predecessor statute). Accordingly, you may not withhold any of the documents from disclosure under section 552.101 of the Government Code.

Section 552.101 of the Government Code also 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.* While common-law privacy may protect an individual’s medical history, it does not protect all medically related information. *See* Open Records Decision No. 478 (1987). Individual determinations are required. *See* Open Records Decision No. 370 (1983). We have marked the information that is protected from disclosure under the common-law right to privacy.

Finally, 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. In some instances, the informer’s privilege is inapplicable because the subject of the information, *i.e.* the hospital, already knows the identity of the informer. We have marked the information that you may withhold under the informer’s privilege.

Additionally, we observe some information may be subject to 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.

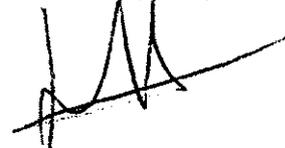
....

(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. . . .

Section 773.091(b) thus protects from disclosure the emergency medical service "run sheets" to the extent that they supply information as to 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).⁶ As section 773.091(g) provides that a patient's age and sex is not confidential, you must disclose information giving the patient's age, date of birth, and sex. You must release the medical information that concerns the presence or nature of injury or illness for which the patient was treated. In summary, we have marked the information that you must withhold; you must release the remainder of the information as it is not excepted by the exceptions you have raised.

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,



Janet I. Monteros
Assistant Attorney General
Open Records Division

⁶Open 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.

JIM/rho

Ref.: ID# 116075

Enclosures: Marked documents

cc: Ms. Yvonne A. Guerrero
Staff Writer
The Facts--Brazosport
720 South Main Street
Clute, Texas 77531
(w/o enclosures)