



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 22, 1998

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

OR98-1704

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# 116818.

The Texas Department of Health (the "department") received a request for all documents relating to Laurel Ridge Hospital. You assert that portions of the requested materials are made confidential by various state statutes, the informer's privilege, or by the common-law right to privacy and, therefore, are excepted from required public disclosure under section 552.101 of the Government Code. Section 552.101 excepts 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.

The first statute the department raises for portions of the information is the Medical Practice Act (the "MPA"), V.T.C.S. article 4495b, section 5.08(b). This statute 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). We agree that portions of the requested documents consist of information obtained from confidential medical records. Thus, the department must release this information only 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).

The department also argues that some of the requested documents are confidential mental health records. 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”). We agree that the information you have marked 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, 611.0045.

You next contend that portions of the requested documents may be withheld under section 81.103 of the Health and Safety Code which makes certain test result information confidential. Section 81.103(a) provides:

A test result is confidential. A person that possesses or has knowledge of a test result may not release or disclose the test result or allow the test result to become known except as provided by this section.

“Test results” are defined as:

any statement that indicates that an identifiable individual has or has not been tested for AIDS or HIV infection, antibodies to HIV, or infection with any other probable causative agent of AIDS, including a statement or assertion that the individual is positive, negative, at risk, or has or does not have a certain level of antigen or antibody. [Emphasis added.]

Health & Safety Code § 81.101(5). Because the records have been de-identified under other provisions of law, the records do not contain statements that identify an individual. Therefore, section 81.103 of the Health and Safety Code no longer applies to the requested information.

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.

We believe that some of the submitted information is 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). We have marked the documents that 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); *but see id.* § 48.101(c), (d), (e), (f) (permitting release of confidential information in certain circumstances).

In addition, 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). You have not cited any specific rule that the department has adopted with regard to the release of this type of information; therefore, we assume that no such regulation exists. Given this assumption, some 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 and are thus confidential. *See* Open Records Decision

No. 440 (1986) at 2 (predecessor statute). Accordingly, we have marked the documents made confidential by section 261.201 of the Family Code that the department must withhold from disclosure under section 552.101 of the Government Code. You also state that one of the survey reports contains information that is similar to information contained in the investigation report. You indicate that the survey report is not a document that was used or developed in an investigation under this chapter. Consequently, the survey may not be withheld under Chapter 261 of the Family Code.

You also seek to withhold certain social security numbers under section 552.101. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* You state that the social security numbers in the submitted records were obtained or maintained pursuant to an amendment of the Health & Safety Code which was enacted in 1993. Based on your representation, we conclude that the social security numbers are confidential under section 405(c)(2)(C)(viii)(I), and, therefore, excepted from public disclosure under section 552.101 of the Open Records Act.

Finally, some of the requested information is protected by a right to privacy. 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). Furthermore, we note that the common-law right of privacy lapses upon death. Attorney General Opinion H-917 (1976); Open Records Decision No. 272 (1981). After reviewing the documents at issue, we agree that much of the information you have marked is protected from disclosure under the common-law right to privacy.¹ We have bracketed the information that must be released.²

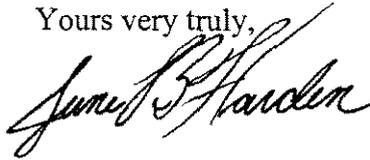
We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts

¹We note that for all of the submitted information, we agree with your markings unless otherwise indicated.

²You also assert that this information may be withheld under the informer's privilege. Because we are able to make a determination under the common-law privacy doctrine, we do not address your informer's privilege claim.

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,

A handwritten signature in black ink, appearing to read "June B. Harden". The signature is fluid and cursive, with the first name "June" being the most prominent.

June B. Harden
Assistant Attorney General
Open Records Division

JBH/cbh

Ref.: ID# 116818

Enclosures: Marked documents

cc: Mr. Martin J. Cirkiel
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(w/o enclosures)