



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 5, 1998

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

OR98-1858

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# 117015.

The Texas Department of Health (the "department") received a request for information relating to Brookhaven Psychiatric Pavilion and Robert H. Dedman Hospital. You contend that section 552.101 of the Government Code, in conjunction with various state statutes and federal regulations, excepts portions of the requested documents from disclosure. We have considered the arguments you raise and have reviewed the documents at issue.¹

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 report. Thus, in accordance with federal law, the department must release the HCFA form 2567.

¹The 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 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. This exception applies to information made confidential by the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must 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 many of the patient's identities from disclosure. We have marked the information that the department must withhold under section 552.101 in conjunction with the common-law right to privacy.

Section 5.08 the Medical Practice Act (the "MPA"), V.T.C.S. article 4495b, 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.

V.T.C.S. art. 4495b, § 5.08. Section 5.08(j)(3) also 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 medical records is not governed by chapter 552 of the Government Code, but rather 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 Nos. 598 (1991), 546 (1990). We have marked the information in the submitted documents that is subject to the MPA. The department may only release this information in accordance with the MPA.

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 information that is confidential under section 611.002(a). The department may only release this information as provided by sections 611.004 and 611.0045.

You also claim that some of the submitted records are confidential under section 161.032(a) of the Health and Safety Code. This provision provides that "records and proceedings of a medical committee are confidential and are not subject to court subpoena." The confidentiality does not extend to "records made or maintained in the regular course of business by a hospital." Health & Safety Code § 161.032(c). A "medical committee" includes, among other things, any committee of a hospital. *Id.* § 161.031(a). Documents generated by a committee in order to conduct open and thorough review are confidential, as are documents that have been prepared by or at the direction of the committee for committee purposes. *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1986) (orig. proceeding). We have marked the documents that are "records and proceedings of a medical committee. These documents are made confidential by section 161.032 of the Health and Safety Code and must be withheld under section 552.101.

You next contend that portions of the submitted documents are confidential under section 81.103 of the Health and Safety Code. 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.

Health & Safety Code § 81.101(5). Having reviewed the submitted documents, we find that none of the information contained in these documents is confidential under section 81.103(a).

You seek to withhold social security numbers from disclosure under section 552.101. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make social security numbers confidential if they 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* Open Records Decision No. 622 (1994). 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 disclosure under section 552.101.

Finally, we note that the submitted documents contain information relating to two investigations of alleged sexual abuse. If these investigations were conducted pursuant to chapter 261 of the Family Code or chapter 48 of the Human Resources Code, then documents relating to the investigations must be withheld from disclosure under section 552.101 as information made confidential by law. *See* Fam. Code § 261.201 (information used or developed in investigation of child abuse or neglect is confidential), Hum. Res. Code § 48.101 (information used or developed in investigation of abuse or neglect of elderly or disabled is confidential).

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

KEH/mjc

Ref: ID# 117015

Enclosures: Marked documents

cc: Ms. J. Catherine Gillis
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