



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 8, 1998

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

OR98-2392

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# 118889.

The Texas Department of Health (the "department") received a request for all complaints regarding the University of Texas Health System of San Antonio. You assert that portions of the submitted 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.

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 at 7 (1990). 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 the information you have marked consists 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).

You next contend that a portion of a submitted document 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.

Health & Safety Code § 81.101(5). We do not believe the confidentiality provisions for AIDS tests apply when the patient is deceased. See Attorney General Opinion DM-61 (1991); Open Records Decision No. 529 (1989). Consequently, section 81.103 of the Health and Safety Code no longer applies to the marked information.

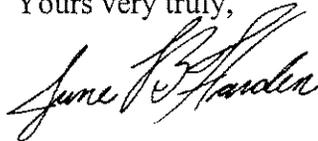
You also argue that some of the requested information is protected by a right to privacy. Section 552.101 of the Government Code also applies to information made confidential by the common-law right to privacy. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. 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.

Finally, you argue that a portion of the submitted documents is protected under the informer's privilege. 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 at 3 (1988), 208 at 1-2 (1978). 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 at 2 (1981) (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 at 2 (1990), 515 at 4-5 (1988). The purpose of the informer's privilege is to encourage the flow of information to the government by protecting the identity of the informant. Open Records Decision Nos. 582 (1990), 579 (1990), 549 (1990). The informer's privilege is waivable by a governmental body. Open Records Decision No. 549 (1990). You explain that the marked information relates to the identity of a person who reported violations of law over which you have a duty of enforcement.² Therefore, you may withhold this highlighted information under the informer's privilege.

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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

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

²Generally, when a governmental raises the informer's privilege, a governmental body should point out the specific criminal or civil statute at issue, and explain that the reported violation was made either to the police or a similar law-enforcement agency, or to an "administrative official having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)).

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Enclosures: Submitted documents

cc: Ms. Lynn Owrey, R.N.
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