



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 22, 1998

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

OR98-2471

Dear Ms. Wiegman:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 118890.

The Texas Department of Health (the "department") received a request for complaints, investigations, incident reports, and other documents concerning Osteopathic Medical Center of Texas. You contend that some of the information requested is confidential on the basis of common-law privacy and the informer's privilege. You also assert that information is confidential pursuant to section 552.101 of the Government Code in conjunction with section 5.08, article 4495b, Vernon's Texas Civil Statutes; chapter 48 of the Human Resources Code; and sections 611.002, 611.004 and 161.032 of the Health and Safety Code. You have submitted to this office for review copies of the requested records.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by constitutional or common-law privacy and under certain circumstances excepts from disclosure private facts about individuals. *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 from public disclosure under a common-law right of privacy when the information is (1) highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

The type of information the supreme court considered intimate and embarrassing in *Industrial Foundation* included information such as that relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. In Open Records Decision No. 262 (1980), this office stated that information about a patient's injury or illness might be protected under common-law privacy if such injury or illness relates to drug overdoses, acute alcohol intoxication, gynecological or obstetrical illnesses, convulsions and seizures, or emotional and mental distress. *See also* Open Records Decision No. 539 at 5 (1990) (information concerning emotional state may be protected by common-law privacy).

This office has also found privacy interests in financial information about individuals. Open Records Decision No. 373 (1983). However, an individual's right of common-law privacy is a personal right that does not extend past that individual's own death. Attorney General Opinion H-917 (1976); Open Records Decision No. 272 at 1 (1981). Thus, a common-law right of privacy would not generally protect records of an individual who is deceased. We have indicated on the submitted records which of the records should be de-identified to protect the privacy of patients.

You assert that the identity of complainants is protected from disclosure under the informer's privilege aspect of section 552.101 of the Government Code. Texas courts have recognized the informer's privilege, *see Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928), and it is a well-established exception under the Open Records Act, Open Records Decision No. 549 at 4 (1990). For information to come under the protection of the informer's privilege, the information must relate to a violation of a civil or criminal statute. *See* Open Records Decision Nos. 515 at 2-5 (1988), 391 (1983). In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies the informer's privilege:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. [Citations omitted.] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

Although the "informer's privilege" aspect of section 552.101 ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of enforcing particular laws. Attorney General Opinion MW-575 at 2 (1982); Open Records

Decision Nos. 285 at 1 (1981), 279 at 1-2 (1981); *see also* Open Records Decision No. 208 at 1-2 (1978). This may include enforcement of quasi-criminal civil laws. *See* ORDs 515 at 3, 391 at 3.

However, the rationale behind the privilege is inapplicable when the complainant is an employee whose job includes reporting violations of law. Thus, you may not withhold the identities of informants who are employed by the state and whose job includes reporting violations. The rationale is also inapplicable to complaints filed by the Citizens Commission on Human Rights. The commission, which is an organization that monitors certain types of health care, is an advocacy organization rather than an individual complainant whose identity might be protected under the informer's privilege.

We agree that the other identities you seek to protect under the informer's privilege may be withheld from disclosure. We note, however, that the privilege excepts the informer's statement itself only to the extent necessary to protect the informer's identity. ORD 549. The exception is inapplicable if the identity of the informer is known to the subject of the communication. Open Records Decision No. 202 at 2 (1978).

Section 5.08 of Vernon's Texas Civil Statutes article 4495b, the Medical Practice Act (the "MPA"), 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) 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 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 have noted on the files where we agree with your MPA markings.

Chapter 611 of the Health and Safety Code 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 noted on the documents where we agree with your markings concerning mental health records.

You assert that certain portions of records are excepted from disclosure pursuant to section 161.032(a) of the Health and Safety Code, which provides that "records and proceedings of a medical committee are confidential and are not subject to court subpoena." We agree that some of the information submitted includes the records and proceedings of a medical committee created in connection with the committee's deliberative process. *Barnes v. Whittington*, 751 S.W.2d 493, 496 (Tex. 1988). This information, which you have marked, is confidential.¹

You also assert that one of the submitted files is excepted from disclosure in its entirety pursuant to section 48.101 of the Human Resources Code. Section 48.101 makes the following information confidential:

- (1) a report of abuse, neglect, or exploitation made under this chapter
- (2) the identity of the person making the report; and

¹Section 161.031 of the Health and Safety Code defines medical committee as follows:

- (a) In this subchapter, "medical committee" includes any committee, including a joint committee, of:
 - (1) a hospital;
 - (2) a medical organization;
 - (3) a university medical school or health science center;
 - (4) a health maintenance organization licensed under the Texas Health Maintenance Organization Act (Chapter 20A, Vernon's Texas Insurance Code), including an independent practice association or other physician association whose committee or joint committee is a condition of contract with the health maintenance organization; or
 - (5) an extended care facility.
- (b) The term includes a committee appointed ad hoc to conduct a specific investigation or established under state or federal law or rule or under the bylaws or rules of the organization or institution.

- (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.

We agree that with your markings concerning the file that is confidential in its entirety under section 48.101 of the Human Resources Code.

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 questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref: ID# 118890

Enclosures: Submitted documents

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(w/o enclosures)