



May 27, 1999

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

OR99-1477

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 124479.

The Texas Department of Health (the "department") received a request for copies of certain complaints relating to a hospital licensed by the department. You contend that the requested information is confidential, in whole or in part, under section 552.101 of the Government Code.

Section 552.101 requires withholding, *inter alia*, information made confidential by statute. You cite to title 42, section 1306(a) of the United States Code and title 42, section 401.101 of the Code of Federal Regulations. The former provision, in subsection (a) prohibits disclosure of "any file record, report, or other paper, or any information" obtained at any time by or from the head or employees of the Department of Health and Human Services, except as the head of the agency prescribes by regulation and except as otherwise provided by federal law.

The federal regulation you reference, title 42, section 401.101, provides that the prohibition on disclosure in subsection (a) of section 1306, title 42, United States Code, applies to information "obtained by Medicare intermediaries or carriers in the course of carrying out agreements" under provisions of the Social Security Act, "and any other information subject to" the above-cited section of the United States Code. You also reference explanatory materials in the Health Care Finance Administration's "State Operations Manual" and in letters from the Department of Health and Human Services.

You characterize the department's role in administering the federal programs in question as a "state survey agency." The copy you provided of the May 29, 1991 letter from the

Department of Health and Human Services distinguishes between “survey agencies” and the “intermediaries or carriers” to which the above regulation appears to apply. *But see* HCFA State Operations Manual § 3300 (treating survey agencies and intermediaries together). Moreover, you have not, in our opinion, demonstrated that the material you submitted was obtained “in the course of carrying out” the agreements under the Social Security Act within the meaning of the regulation.

You also cite to subsections (e) and (f) of the above-referenced federal statute, section 1306. Those provisions require the public disclosure of certain “official reports” by the Secretary of the Department of Health and Human Services, including “program validation survey reports and other formal evaluations of the providers of services” “except that such reports shall not identify individual patients, individual health care practitioners, or other individuals” and provided that the entity whose services are being evaluated has had the opportunity to review and comment on the reports. Even assuming, however, that the subsection (e) and (f) provisions are also applicable to the department, you have not in our opinion demonstrated that the submitted information constitutes such “official reports.” In summary, you have not, in our opinion, demonstrated that any of the information at issue is protected by the federal statutes and regulations you raised.

You have marked portions of the requested information which you contend are subject to section 261.201 of the Family Code. Section 261.201(a) provides:

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 [of a child] 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, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.* [Emphasis added.]

You have not informed this office of any rules the department has adopted that would permit access to the requested records. Because the information you have marked appears to be subject to section 261.201(a), we conclude that the department must withhold in its entirety the information you have marked as subject to that provision. *But see* Family Code § 261.201(b) (provision for court ordered access), (f) (limited right of access to records held by Department of Protective and Regulatory Services).

Section 552.101 also protects information made confidential by judicial decision, which includes information coming within 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). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. We have marked information which must be withheld under common-law privacy.¹ Except as noted above, you must release the requested information.

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.

Sincerely,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/WMW/eaf

Ref:: ID# 124479

encl. Marked documents

cc: Mr. D.L. Lewis
Research Center
P.O. Box 331
Crane, Texas 79731
(w/o enclosures)

¹We note that, although the department did not request an open records decision from this office within the ten business days following the department's receipt of the open records request, the confidentiality conferred on portions of these records by section 261.201 of the Family Code and the common-law privacy protections incorporated in section 552.101 of the Government Code constitute "compelling" reasons for non-disclosure that overcome the legal presumption that the records are public information. *See* Gov't Code § 552.302; Open Records Decision No. 150 (1977).