OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

January 30, 2001

Ms. Tina Plummer
Open Records Coordinator
Texas Department of Mental Health and Mental Retardation
P.O. Box 12668
Austin, Texas 78711-3761

OR2001-0360

Dear Ms. Plummer:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 143229.

The Texas Department of Mental Health and Mental Retardation (the "department") received a request for records of patients from the Texas State Lunatic Asylum (now the Austin State Hospital) in the years 1883, 1884, and 1885. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with several confidentiality statutes and constitutional and common law privacy. We have considered the exception you claim and reviewed the submitted representative sample of information.[1]

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You claim that the submitted documents are confidential under chapter 611 of the Health and Safety Code. Section 611.002 provides:

[1]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

> (a) 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.
>
> (b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.[2]
>
> (c) This section applies regardless of when the patient received services from a professional.

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. You have not indicated, and the submitted records do not show on their face, whether they were created or are now maintained by a "professional," as that term is defined in the statute. Therefore, you may not withhold any of the requested information under section 611.002 of the Health and Safety Code in conjunction with section 552.101 of the Government Code.

You also contend that the submitted documents are confidential under chapter 159 of the Occupations Code regarding physician-patient communication. Section 159.002 provides:

> (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
>
> (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
>
> (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is 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.
>
> (d) The prohibitions of this chapter continue to apply to a confidential communication or record relating to a patient regardless of when the patient

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[2]Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals and by the patient to whom the records pertain in some situations.

> receives the services of a physician, except for medical records at least 100 years old that are requested for historical research purposes.
>
> (e) The privilege of confidentiality may be claimed by the patient or by the physician. The physician may claim the privilege of confidentiality only on behalf of the patient. The physician's authority to claim the privilege is presumed in the absence of evidence to the contrary.

The submitted records do not appear to be communications between a physician and a patient.[3] Therefore, you may not withhold any of the requested information under section 159.002 of the Occupations Code in conjunction with section 552.101 of the Government Code.

You also claim that the documents responsive to the request are confidential under chapter 595 of the Health and Safety Code. Section 595.001 provides:

> Records of the identity, diagnosis, evaluation, or treatment of a person that are maintained in connection with the performance of a program or activity relating to mental retardation are confidential and may be disclosed only for the purposes and under the circumstances authorized under Sections 595.003 and 595.004.

You do not indicate, nor do the documents show on their face, whether they are maintained in connection with the performance of a program or activity relating to mental retardation. Therefore, you may not withhold any of the requested information under section 595.001 of the Health and Safety Code in conjunction with section 552.101 of the Government Code.

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[3]Even if the records were physician-patient communications, we note that they are at least 100 years old and therefore could not be withheld under this statute, as provided by section 159.002(d).

You also assert that some of the requested information is "client-identifying information"[4] that is made confidential by subchapter A of chapter 414 of the Texas Administrative Code.[5] These regulations provide, in pertinent part:

> (c) Except as otherwise described in these rules, an inquiry as to whether a person is a client of a facility, local authority, or contract provider, should not be affirmed or denied, but should be answered by stating that information cannot be given without proper authorization.
>
> (d) Verbal consent to disclosure of client-identifying information is not adequate. In no case should identifying information be released to the news media or to friends and family of a client:
>
> > (1) without prior written consent in accordance with this subchapter; or
> >
> > (2) unless authorized by law (e.g., Texas Health and Safety Code, § 595.010).
>
> (e) Identifying information regarding other clients must be expunged from records released.

25 T.A.C. § 414.5(c), (d), (e). The regulations also contain a rule regarding deceased clients, which states:

> If the client is deceased, consent for disclosure of client-identifying information can be given by the client's personal representative, usually the

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[4]"Client-identifying information" is defined as "[t]he name, address, social security number, or any information by which the identity of a client can be determined either directly or by reference to other publicly available information. The term includes, but is not limited to, a client's medical record, graphs, or charts; statements made by the client, either orally or in writing, while receiving services; photographs, videotapes, etc.; and any acknowledgment that a person is or has been a client of a facility, local authority, or contract provider. The term does not include a client-identifying number. The statutes, regulations, and rules requiring that client-identifying information be kept confidential apply regardless of the means or methods utilized for the storage and retrieval of such information." 25 T.A.C. § 414.3(4).

[5]You also claim that the information in Exhibit B is confidential under 25 T.A.C. § 405.261, *et. seq.*, (or subchapter K of chapter 405), which relates to deaths of persons served by department facilities. Although we cannot find any confidentiality provisions within that particular subchapter, we note that it makes reference to "Chapter 403, Subchapter K of this title (relating to Client-Identifying Information)." *See* 25 T.A.C. § 405.279(4). Subchapter K of chapter 403 was repealed on August 3, 1998, and replaced by subchapter A of chapter 414. *See* 23 Tex. Reg. 7565 (1998) (Tex. Dep't of Mental Health & Mental Retardation). Therefore, we look to subchapter A of chapter 414 when dealing with client-identifying information contained in records relating to deaths of persons served by the department.

> executor or administrator of the client's estate. For clients with mental retardation, if an executor or administrator has not been appointed, consent can be given by the client's spouse, or if the client was not married, by an adult related to the client within the first degree of consanguinity (i.e., parent or child).

25 T.A.C. § 414.10(c). The regulations state that client-identifying information is "information deemed confidential by law" for purposes of the "Texas Open Records Act." 25 T.A.C. § 414.4(g). Subchapter A of chapter 414 of the Texas Administrative Code was proposed and adopted by the Texas Mental Health and Mental Retardation Board (the "board") under the authority of section 595.002, which allows the board to adopt rules that it considers necessary to facilitate compliance with chapter 595, and under section 532.015 of the Health and Safety Code, which provides the board with authority to adopt rules to administer subtitle A of title 7 of the Health and Safety Code. *See* 23 Tex. Reg. 3181 (1998); 23 Tex. Reg. 7566 (1998). Because we have already concluded that chapter 595 of the Health and Safety Code does not apply to the submitted information, we further conclude that you may not withhold any of the submitted information under subchapter A of chapter 414 of the Texas Administrative Code.

You claim that the documents responsive to the request are confidential under constitutional and common law privacy. You admit, however, that the clients' constitutional and common law privacy interests extinguished upon their deaths. We agree. *See* Attorney General Opinion JM-229 (1984) (right of privacy lapses upon death), H-917 (1976) (same); Open Records Decision No. 272 (1981) (same). Therefore, you may not withhold any of the requested information under constitutional or common law privacy in conjunction with section 552.101 of the Government Code.

Finally, you claim that the submitted records are confidential under part 2 of title 42 of the Code of Federal Regulations.[6] Those rules provide, in pertinent part:

> Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to alcoholism or alcohol abuse education, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

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[6]Because you indicate that these regulations concern "client-identifying information for patients with drug or alcohol treatment or diagnosis," we assume that you intended to refer to part 2 of subchapter A of chapter 1 of title 42 of the Code of Federal Regulations.

42 C.F.R. § 2.2(a). You do not indicate, nor do the documents show on their face, whether they are maintained in connection with the performance of any program or activity relating to alcoholism or alcohol abuse education, training, treatment, rehabilitation, or research. Therefore, you may not withhold any of the requested information under part 2 of subchapter A of chapter 1 title 42 of the Code of Federal Regulations in conjunction with section 552.101 of the Government Code.

In conclusion, you have not demonstrated that any of the submitted documents are confidential by law, either constitutional, statutory, or by judicial decision. Therefore, you may not withhold any of the requested information under section 552.101 of the Government Code. Because you have not demonstrated that any of the Act's exceptions apply to the submitted documents, you must release them to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

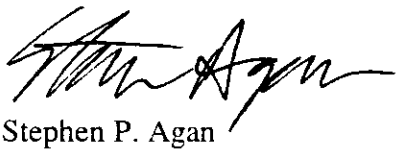
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Stephen P. Agan
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Open Records Division

SPA/seg

Ref: ID# 143229

Encl. Submitted documents

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