



May 9, 2002

Ms. Tina Plummer  
Open Records Coordinator  
Texas Department of Mental Health Mental Retardation  
P.O. Box 12668  
Austin, Texas 78711-2668

OR2002-2475

Dear Ms. Plummer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162673.

On December 4, 2001, the Texas Department of Mental Health Mental Retardation (the "department") received a request for "public records relative to the deaths of all patients and students that occurred at the San Antonio State Hospital . . . from the time periods of 1996 through and including 2001." The requestor subsequently narrowed his request to exclude patient-identifying information, and to include only those documents related to patient restraint. That request, and information submitted as responsive to that request, were the subject of a ruling by this office in Open Records Letter No. 2002-0914 (2002). You now notify us that, subsequent to that ruling, you located additional documents responsive to the request that were not previously submitted to this office for review. You claim that this additional information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You acknowledge that the department failed to comply with section 552.301 of the Government Code in asking for this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e) provides that a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not, however, timely submit to this office a copy

of a portion of the specific information requested or written comments stating the reasons why each exception that you raised would allow the information to be withheld.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982).

You argue that the submitted information is excepted under sections 552.101 and 552.111 of the Government Code. Section 552.111 is a discretionary exception to disclosure. Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)); 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding); 522 at 4 (1989) (discretionary exceptions in general); 473 (1987) (governmental body may waive section 552.111). Discretionary exceptions therefore do not constitute "other law" that makes information confidential. However, as section 552.101 provides a compelling reason to overcome the presumption of openness, we will address your arguments under that exception. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests).

Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Thus, section 552.101 protects information that is made confidential by statute. Subchapter D of chapter 161 of the Health and Safety Code governs medical committees and medical peer review committees. Section 161.031 defines a "medical committee" as including "any committee, including a joint committee, of . . . a hospital [or] medical organization" and further provides that "[t]he 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." Health & Safety Code § 161.031(a)(1)-(2), (b). Section 161.0315 provides in relevant part that "[t]he governing body of a hospital [or] medical organization . . . may form . . . a medical committee, as defined by section 161.031, to evaluate medical and health care services[.]" Health & Safety Code § 161.0315(a). Section 161.032 provides in relevant part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena. . . . Records, information, or reports of a medical committee . . . and records, information, or reports provided by a

medical committee . . . to the governing body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code.

...

(c) This section . . . do[es] not apply to records made or maintained in the regular course of business by a hospital[.]

Health & Safety Code § 161.032(a), (c). A portion of the submitted information consists of a memorandum prepared by an investigating officer to provide information to the death review committee regarding the death of a patient. You inform us that departmental rules specify that the death review committee is a medical peer review body. 25 T.A.C. § 405.270(b). Based on your representations and our review of the submitted documents, we conclude that the information in Exhibit A comprises records, information, or reports of a medical committee acting under subchapter D of chapter 161 of the Health and Safety Code. We therefore conclude that this information is confidential under section 552.101 of the Government Code in conjunction with section 161.032(a) of the Health and Safety Code. Accordingly, the department must withhold the documents in Exhibit A from public disclosure. *See also Terrell State Hosp. v. Ashworth*, 794 S.W.2d 937 (Tex.App.--Dallas 1990, mand. overr.) (applying Health & Safety Code § 161.032(a) to committee of state mental hospital); *Barnes v. Whittington*, 751 S.W.2d 493, 495-96 (Tex. 1988) (construing predecessor statute); *Jordan v. Court of Appeals for the Fourth Judicial Dist.*, 701 S.W.2d 644, 646-48 (Tex. 1985) (same); *Texarkana Mem'l Hosp., Inc. v. Jones*, 551 S.W.2d 33, 34-36 (Tex. 1977) (same); Open Records Decision No. 591 at 2-3 (1991) (addressing scope of Health & Safety Code §§ 161.031, 161.032).

You argue that the information submitted in Exhibit B is confidential under section 576.005 of the Health and Safety Code. Section 576.005 of the Health and Safety Code provides that “[r]ecords of a mental health facility that directly or indirectly identify a present, former, or proposed patient are confidential unless disclosure is permitted by other state law.” Health & Safety Code § 576.005. We note that the information submitted by the department that you seek to withhold under section 576.005 is not a “record of a mental health facility.” Therefore, we conclude that this information may not be withheld under section 576.005 of the Health and Safety Code. *See* Open Records Decision No. 163 (1977) (construing predecessor statute).

You also claim that the information in Exhibit B is excepted from disclosure under section 48.101 of the Human Resources Code. Section 48.101 of the Human Resources Code provides as follows:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

(1) a report of abuse, neglect, or exploitation made under this chapter;

(2) the identity of the person making the report; and

(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.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department or investigating state agency rule and applicable federal law.

Chapter 48 of the Human Resources Code provides for the investigation of abuse, exploitation, or neglect of an elderly or disabled person. Hum. Res. Code § 48.001. You inform this office that the requested information in Exhibit B concerns the death of a patient that was investigated by the Department of Protective and Regulatory Services. Based on your representation and our review of the information at issue, we agree that this information consists of files, reports, records, communications, and working papers used or developed in an investigation made under chapter 48 of the Human Resources Code or in providing services as a result of an investigation. Therefore, this information is confidential under section 48.101 of the Human Resources Code and must be withheld from disclosure under section 552.101 of the Government Code as information made confidential by law.

In conclusion, the department must withhold the information in Exhibit A under section 552.101 in conjunction with section 161.032 of the Health and Safety Code. The information in Exhibit B is confidential under section 48.101 of the Human Resources Code and must be withheld from disclosure under section 552.101 of the Government Code.

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/seg

Ref: ID# 162673

Enc. Submitted documents

c: Mr. Skip Hajek  
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(w/o enclosures)