



June 10, 2002

Mr. George D. Cato
Deputy General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2002-3124

Dear Mr. Cato:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164073.

The Texas Department of Health (the "department") received a request for fourteen categories of information regarding the Northeast Fort Worth Dialysis Center (the "Center"). You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note, and you acknowledge, that the department has not sought an open records decision from this office within the ten-business-day time period prescribed by section 552.301 of the Government Code. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). To overcome this presumption, the governmental body must show a compelling interest to withhold the information. *See* Gov't Code § 552.302; *Hancock*, 797 S.W.2d at 381. Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 at 2 (1977). As the presumption of openness can be overcome by a showing that information is confidential by law, we will consider your arguments under section 552.101.

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 exception protects information that another statute makes confidential. Chapter 251 of the Health and Safety Code relates to end stage renal disease facilities and provides:

(a) A medical review board shall advise the board on minimum standards and rules to be adopted under this chapter.

(b) The medical review board shall review the information on quality of care provided in the annual report filed under Section 251.013(f) and other appropriate information provided to or compiled by the department with respect to an end stage renal disease facility. Based on the review, the medical review board may advise the department about the quality of care provided by a facility and recommend an appropriate corrective action plan under Section 251.061 or other enforcement proceedings against the facility.

(c) Information concerning the quality of care provided to or compiled by the department or medical review board and a recommendation of the medical review board are confidential. The information or recommendation may not be made available for public inspection, is not subject to disclosure under Chapter 552, Government Code, and is not subject to discovery, subpoena, or other compulsory legal process.

(d) The department, in its discretion, may release to a facility information relating to that facility that is made confidential under Sub-section (c). Release of information to a facility under this subsection does not waive the confidentiality of that information or the privilege from compulsory legal process.

Health & Safety Code § 251.015. Section 251.061 of the Health and Safety Code provides in part:

(g) A corrective action plan is not confidential. Information contained in the plan may be excepted from required disclosure under Chapter 552, Government Code, in accordance with that chapter or other applicable law.

Id. § 251.061(g). You inform us that the Center is an end stage renal disease facility licensed by the department. You indicate that the submitted documents contain information concerning quality of care that was provided to or compiled by the department or a medical review board and recommendations of the medical review board. You inform us that the state surveyor created the submitted state forms upon inspection of the facility. You explain that the left column of the state forms contains the deficiencies cited, much of which is quality of care information. You also indicate that information you have marked in other documents relates to quality of care or recommendations of the medical review board. You claim that section 251.015(c) makes confidential the information you have marked in the state forms and other documents. Based on your representations and our review of the submitted documents, we agree that the information you have marked under

section 251.015(c) is confidential and must be withheld from disclosure under section 552.101 of the Government Code.

On the other hand, you state that the information in the right column of the state forms consists of plan of correction information, as submitted by the facility, that may be released under section 251.061(g). Based on this representation and our review of the plan of correction information, we find that this information is not confidential, pursuant to section 251.061(g). Furthermore, we do not find that this information is otherwise excepted from disclosure under chapter 552 of the Government Code. Accordingly, the department must release the information in the right column of the state forms under section 251.061(g).

We turn now to the "Intake Worksheet," portions of which you assert are confidential under the Medical Practice Act (the "MPA"). Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA 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.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Information subject to the MPA may be released only as provided under the MPA. *See* Open Records Decision No. 598 (1991).

We find that the information you seek to withhold in the Intake Worksheet is not subject to the MPA. Therefore, we find that you may not withhold this information under the MPA.

We note, however, that common law privacy may protect this information. Section 552.101 encompasses the doctrine of common law privacy, which protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has previously found information indicating that a person has a serious illness or disability to be protected by common law privacy. See Open Records Decision Nos. 470 (1987), 455 (1987). However, because a right of privacy is purely personal, it lapses upon the death of the individual. See *Moore v. Charles B. Pierce Film Enterprises Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); see also Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981).

The request for information concerns an end stage renal disease facility. We believe, in this instance, that information identifying patients of this facility is protected by common law privacy. However, the submitted information indicates that one of the patients named in the Intake Worksheet is deceased. Therefore, this person's identity is no longer protected by common law privacy. The department must redact the identity of the surviving patient from the Intake Worksheet pursuant to section 552.101 and common law privacy.

You also contend that portions of other submitted information are confidential under section 161.032 of the Health and Safety Code. 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). In interpreting the predecessor to this section, the Texas Supreme Court in *Jordan v. Court of Appeals*, 701 S.W.2d 644, 647-48 (Tex. 1985), stated that "the statutory language, 'records and proceedings' means those documents generated by the committee in order to conduct open and thorough review. In general, this privilege extends to documents that have been prepared by or at the direction of the committee for committee purposes." The *Jordan* court found that the privilege extends to "minutes of committee meetings, correspondence between members relating to the deliberation process and any final committee product, such as recommendations." *Jordan*, 701 S.W.2d at 648.

You represent to this office that some of the submitted documents relate to the proceedings of a medical committee in a health care facility. You state that the documents in question are records of the committee's proceedings. Based on your representations and our review of the documents in question, we agree that they constitute records, information, or reports of a medical committee under subchapter D of the Health and Safety Code and are therefore confidential under section 161.032(a) of the Health and Safety Code. *See also* Open Records Decision No. 591 (1991) (Texas court decisions construing section 161.032 of Health and Safety Code establish that minutes of medical committee are confidential; therefore, minutes of hospital's Quality Management Committee are within scope of confidentiality provision). These documents must therefore be withheld under section 552.101 of the Government Code.

Finally, we note that the submitted information also contains e-mail addresses obtained from the public. Section 552.137 of the Government Code makes certain e-mail addresses confidential, providing:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The department must therefore withhold e-mail addresses of members of the public under section 552.137.

In summary, you must withhold the information you have marked under sections 251.015(c) and 161.032 of the Health and Safety Code in conjunction with section 552.101 of the Government Code. The identity of the surviving patient of the Center and the email addresses must also be withheld. All other submitted information must be released.

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).

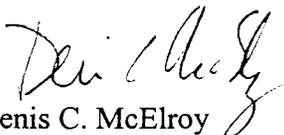
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,


Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/seg

Ref: ID# 164073

Enc. Marked documents

c: Mr. Stephen J. Gugenheim
128 East Hargott Street, Suite 3003
Raleigh, North Carolina 27601
(w/o enclosures)