



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 29, 2009

Mr. Dan Meador
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2009-05682

Dear Mr. Meador:

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# 341341 (DSHS OR File #014365-538-2009).

The Texas Department of State Health Services (the "department") received a request for all information pertaining to a specified complaint. You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.115, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

(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.

Occ. Code § 159.002(b), (c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Open Records Decision No. 598 (1991). Medical records may be released only as provided under the MPA. *Id.* We have

marked the portion of the submitted information that constitutes medical records and that may only be released in accordance with the MPA.

Section 552.101 also encompasses the informer's privilege, which has long been recognized by Texas courts. *E.g.*, *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). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. *See* Open Records Decision No. 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 1-2 (1981). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988). The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990).

You assert that the submitted information contains identifying information of a complainant who reported a complaint to the department. You state that some of the information relates specifically to enforcement by the department of criminal or civil statutes, and that the department has a pending investigation relating to the complaint. However, the submitted information demonstrates that the subject of the complaint knows the identity of the complainant. Thus, no portion of the submitted information may be withheld pursuant to section 552.101 in conjunction with the informer's privilege.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found that medical information or information indicating disabilities or specific illnesses is excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked the information that is confidential under common-law privacy and that the department must withhold under section 552.101. But the remaining information is not highly intimate or embarrassing; therefore, the remaining information is not confidential under common-law privacy, and the department may not withhold it on that ground.

You assert that a portion of the remaining information is excepted under section 552.115 of the Government Code. Section 552.115(a) provides that "[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from the requirements of Section 552.021[.]" Section 552.115 only applies to information maintained by the department's bureau of vital

statistics or local registration officials. *See* Open Records Decision No. 338 (1982). In this instance, we note, and you acknowledge, that the document at issue is part of an investigation and is maintained in the department's capacity as administrative support for the Texas Midwifery Board. Because this document is not maintained by the department's bureau of vital statistics, we find that section 552.115 is not applicable to it, and no portion of the submitted information may be withheld on this basis.

You assert that some of the remaining information is excepted under section 552.147 of the Government Code, which provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. The department may withhold the social security numbers in the submitted information under section 552.147.¹

In summary, the medical records we have marked may only be released in accordance with the MPA. The department must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The department may withhold the social security numbers under section 552.147. The remaining information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/jb

¹We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

Mr. Dan Meador - Page 4

Ref: ID# 341341

Enc. Submitted documents

c: Requestor
(w/o enclosures)