

Texas Department of  
Mental Health and Mental Retardation

Dennis R. Jones, M.S.W., M.B.A.  
Commissioner

REC-731

August 5, 1994

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SJS

Opinion Committee

Honorable Dan Morales  
Attorney General of Texas  
Price Daniel Sr. Bldg.  
14th & Lavaca, 8th Floor  
Austin, TX 78711

FILE # ML-28190-94

I.D.# 28190

**RQ-731**

Re: Request for Opinion regarding Brady Handgun Violence Prevention Act

Dear General Morales:

The Brady Handgun Violence Prevention Act (PL 103-159; 18 USCA Section 921 et. seq (1994) (hereinafter "Brady Act") amended the existing federal firearms statute by creating a five day waiting period for the purchase of handguns in order to allow law enforcement officials to have the opportunity to search existing files to the best of their ability to determine whether potential purchasers are prohibited by law from purchasing handguns. The five day waiting period will be phased out when the Department of Justice certifies that a satisfactory percentage of states have transferred their criminal records to a centralized computer access network that will allow law enforcement officers and hand gun dealers to make instant checks of purchasers' criminal histories. (There is no related provision that specifically addresses centralizing mental health or mental retardation records.)

The requirement for background checks of persons attempting to purchase firearms may conflict with laws protecting mental health, mental retardation, and substance abuse records. The Brady Act requires that the background checks determine whether potential purchasers have been committed to a "mental institution" or have been "adjudicated as a mental defective." The Brady Act and the pre-existing federal firearms statute do not define "mental institution" and "adjudicated as a mental defective." However, it appears that many of the clients served by the Texas Department of Mental Health and Mental Retardation ("TDMHMR") would fall into one of these two categories.

TDMHMR has a statutory duty to protect the confidentiality of the clients it serves. Section 595.001 of the Texas Health and Safety Code (Vernon's 1994) states that "[r]ecords 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 [regarding consent to



Central Office  
P.O. Box 12668  
Austin, TX  
78711-2668  
(512) 454-3761

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disclosure] and 595.004 [regarding exceptions]". Chapter 611 of the Texas Health and Safety Code prohibits disclosure of the records of any person who consults or is interviewed by a professional for diagnosis, evaluation or treatment of any mental or emotional condition or disorder, including alcoholism or drug addiction. In addition, federal regulations prohibit the disclosures of records regarding drug and alcohol abuse with certain exceptions.<sup>1</sup> One of the exceptions to the prohibition against disclosure of confidential information allows professionals to disclose confidential information to a governmental agency if the disclosure is required or authorized by law.<sup>2</sup> However, the Brady Law does not specifically override state or federal laws regarding confidentiality of client records. Instead, the Brady Act provides that the chief law enforcement officer "shall make a reasonable effort to ascertain within five business days whether receipt or possession [of the handgun] would be in violation of the law, including research in whatever state and local record keeping systems are available...."<sup>3</sup>

Therefore, your advice and opinion are requested with respect to the following questions:

- 1) Is TDMHMR required to disclose client-identifying information to law enforcement officers conducting background searches pursuant to the Brady Act?
- 2) Does the Brady Act require disclosure without consent for the following categories of persons at TDMHMR:
  - a) clients with mental illness or mental retardation who are able to give consent;
  - b) clients with mental illness or mental retardation who have court-appointed guardians; or

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<sup>1</sup>See "Confidentiality of Alcohol and Drug Abuse Patient Records" at 42 CFR Part 2.

<sup>2</sup>Health and Safety Code Section 611.004(a)(1)

<sup>3</sup>18 USCA §922(5)(2)

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- c) clients with mental illness or mental retardation who have been court-committed to a facility under the Mental Health Code and are unable to provide consent and have no legal guardian?

Your consideration of this request is appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "Dennis R. Jones". The signature is written in a cursive style with a large initial "D" and "J".

Dennis R. Jones  
Commissioner