THE ATTORNEY GENERAL OF TEXAS

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ATTORNEY GENERAL

July 30, 1990

Mr. Gary W. Smith
City Attorney
City of Texarkana
P.O. Box 1967
Texarkana, Texas 75504

Open Records Decision No. 565

Re: Whether certain documents in a former police officer's personnel file may be withheld from release to the officer (RQ-2013)

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S.

You advise that a former police officer of the city requested a copy of her personnel file, and that you provided the requested information with the exception of seven categories of information that will be referred to herein as follows: (1) psychological records; (2) medical records; (3) a polygraph examination; (4) employment references and personal references; (5) driver's license history; (6) criminal history information; and (7) internal reports.

You claim the information in category one is excepted from public disclosure by section 3(a)(1) of the Open Records Act (information deemed confidential by law) and V.T.C.S. art. 5561h.

Article 5561h provides in section 2(a) for the confidentiality of communications between a mental health "professional" (as defined) and a "patient/client" (as defined). Section 2(b) provides for the confidentiality of "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient/client which are created or maintained by a professional. . . ." Information thus made confidential is not to be disclosed except as provided in section 4. Section 4 provides for the release of information only in court proceedings or by a professional. Section 2(c) provides as follows:

> (c) Any person who receives information from confidential communications or records as defined by Section 2, other than the persons listed in Subsection (b)(4) of Section 4 who are acting on the patient's client's behalf, shall not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

In Open Records Decision No. 314 (1982) this office considered the release of certain information covered by article 5561h to the appointed representative of a former school district employee. In that opinion we stated:

> Under whatever authority the school district itself obtained the documents relating to the evaluation, it is now clearly prohibited by section 2(c) from disclosing such information. . . . The exceptions to the privilege of confidentiality listed in section 4(b), including authorization for release of confidential information to a patient's personal representative, apply only to the 'disclosure of confidential information by a professional.' Whatever information the teacher's personal representative might obtain from the evaluating physician under section 4(b)(4), she is not authorized to obtain any mental health information directly from the school district, and as we have noted, the school district is likewise prohibited by section 2(c) from furnishing it to anyone except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained. Article 5561h permits the district to release the information under this standard, but does not require it to do so.

The Open Records Act has since been amended by the addition of section 3B. Acts 1989, 71st Leg., ch. 1248, § 10, at 5025. Section 3B provides a person, or the authorized representative of a person, a special right of access to records held by a governmental body that contain information relating to the person that is protected from public disclosure by laws intended to protect that person's privacy interests.

The privilege created by article 5561h is for the benefit of the patient/client. Ex parte Abell, 613 S.W.2d 255, 262 (Tex. 1981). Section 3 of article 5561h provides that the privilege may be claimed by the patient/client or by certain others acting on the patient/client's behalf. Section 3(b) provides that the professional may claim the privilege only on behalf of the patient/client. It is apparent that a primary purpose of article 5561h is to protect the patient/ client against an invasion of privacy thereby encouraging the full communication necessary for the effective treatment of a patient by a psychotherapist. Ginsberg v. Fifth Court of Appeals, 686 S.W.2d 105, 107 (Tex. 1985); Ex parte Abell, supra, at 263; see also Cardwell, Discovery and Release of Mental Health Records After Article 5561h, 44 Texas B.J. 1114 (1981).[1]

We conclude that the result reached in Open Records Decision No. 314 has been changed by the addition of section 3B to the Open Records Act. As article 5561h is intended to protect the privacy interests of the person making the open records request, it may not operate to defeat the special right of access granted to that person by section 3B. The information in category one must be released upon your receipt of a written, signed consent for the release of this information as provided in section 3B(b).[2]

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1. Article 5561h has also been held to have as its purpose to protect mentally incompetent persons from the abuse of the psychiatric examination and the use of the information thus gathered for any purpose other than civil commitment. A.D.P. v. State, 646 S.W.2d 568 (Tex. App. - Houston [1st Dist.] 1982, no writ). In our opinion, this purpose is entirely consistent with the protection of the patient's privacy and does not affect the operation of section 3B of the Open Records Act as applied to records made confidential by article 5561h.

2. You advise that the requestor did not sign her consent for the release of the requested information. The only communication from the requestor submitted for our inspection was an unsigned copy of the request itself. This request recites: "I . . . request to see my personal file. Also to have a copy of any and all items in my personal file granted to me by the open records and other laws." While this recitation contains no explicit consent language, where the requestor is the specific person to whom the requested

(Footnote Continued)

You claim the information in category two is excepted from public disclosure by section 3(a)(1) of the Open Records Act and section 5.08 of the Medical Practice Act (V.T.C.S. art. 4495b).[3] Section 5.08 of the Medical Practice Act provides, in part:

> (a) Communications between one licensed to practice medicine, relative to or in connection with any professional services as a physician to a patient, is [sic] confidential and privileged and may not be disclosed except as provided in this section.
>
> (b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.
>
> (c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are 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.
>
> . . . .
>
> (e) The privilege of confidentiality may be claimed by the patient or physician acting on the patient's behalf.
>
> . . . .

(Footnote Continued)
information relates, the request itself may operate as the consent for the release of the information. Of course, it must be signed.

3. You also claim exception from public disclosure under section 3(a)(2) of the Open Records Act. As noted above, section 3B precludes the assertion of exceptions designed to protect the privacy of the requestor in this circumstance.

(h) Exceptions to the privilege of confidentiality, in other than court or administrative proceedings, allowing disclosure of confidential information by a physician, exist only to the following:

(1) governmental agencies if the disclosures are required or authorized by law;

. . . .

(5) any person who bears a written consent of the patient or other person authorized to act on the patient's behalf for the release of confidential information, as provided by Subsection (j) of this section;

(6) individuals, corporations, or governmental agencies involved in the payment or collection of fees for medical services rendered by a physician;

. . . .

(j)(1) Consent for the release of confidential information must be in writing and signed by the patient . . . provided that the written consent specifies the following:

(A) the information or medical records to be covered by the release;

(B) the reasons or purposes for the release; and

(C) the person to whom the information is to be released.

. . . .

(3) Any person who receives information made confidential by this Act may disclose the information to others only to the extent consistent with the authorized purposes for which consent to release the information was obtained.

(k) A physician shall furnish copies of medical records requested, or a summary or

> narrative of the records, pursuant to a written consent for release of the information as provided by Subsection (j) of this section, except if the physician determines that access to the information would be harmful to the physical, mental, or emotional health of the patient, and the physician may delete confidential information about another person . . . . The information shall be furnished by the physician within a reasonable period of time . . . . (Emphasis added.)

In Open Records Decision No. 507 (1988) this office considered whether records in the possession of the Texas Department of Health made confidential by section 10(d) of article 4447u, V.T.C.S., were disclosable to the patient who was the subject of those records under the provisions of section 5.08 of the Medical Practice Act. In concluding that the records were not disclosable, we stated:

> Moreover, the provision in subsection (k) of section 5.08 on the release of medical records pursuant to a written consent applies only to a physician. Not only does this subsection refer repeatedly to 'the physician,' but it also allows him to withhold information if he 'determines that access to the information would be harmful to the physical, mental, or emotional health of the patient . . . .' This determination can only be made by the patient's physician, and not by a state agency which has acquired the records in connection with an investigation of a health services provider. The Department of Health has no authority under section 5.08 of the Medical Practice Act to release medical records to the patient or to the requestor who has the patient's written consent. Accordingly, the Department of Health may not disclose to the requestor any portion of the documents submitted for our review.

As Open Records Decision No. 507 correctly points out, the provisions of section 5.08(k) of the Medical Practice Act on the release of medical records pursuant to a written consent apply only to the release of such records by a physician. Moreover, Open Records Decision No. 507 reaches the correct result regarding the confidentiality of records

within the scope of section 10(d) of article 4447u. However, we do not believe that section 5.08 always precludes the further release of medical records by a person to whom medical records have been released by a physician. To the extent Open Records Decision No. 507 suggests otherwise, it will not be followed. Section 5.08 of the Medical Practice Act clearly anticipates the further release of medical records by one who has obtained them from a physician pursuant to its provisions. See V.T.C.S. art. 4495b, § 5.08(c), (j)(3), quoted above.

You advise that the medical records in question were released to the city pursuant to section 5.08(j) of the Medical Practice Act. When medical records are released by a physician to a person bearing a written consent of the patient pursuant to section 5.08(j), the physician must determine, under section 5.08(k), that access to the records would not harm the physical, mental, or emotional health of the patient. In this instance, the confidentiality imparted to medical records under the Medical Practice Act is intended to protect more than just the privacy interests of the patient. Also protected are the patient's medical interests as judged by the responsible physician.

As the requested medical records are no longer in the custody of a physician, the provisions of section 5.08 of the Medical Practice Act governing the release of records by a physician have, presumably, been followed, including the determination by the physician, required by section 5.08(k), that access to the records would not be harmful to the patient. Section 5.08 (j)(3) requires that any subsequent release of the records be consistent with the purposes for which the city originally obtained the records.[4] The medical interests of the patient have been considered by the

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4. The Medical Practice Act, in section 5.08(h), lists persons to whom medical records may be released. These persons may be characterized as falling into two categories: (1) those acting on the patient's behalf by consent of the patient or someone authorized to consent for the patient, and (2) those not so acting. Persons in both categories may further release the records only to the extent such release is consistent with the purposes for which the records were obtained. For persons in the first category this requirement is found in section 5.08(j)(3). For persons in the second category this requirement is found in section 5.08(c).

responsible physician pursuant to section 5.08(k). The remaining interest protected by section 5.08(j)(3) is the patient's privacy. As noted above, section 3B of the Open Records Act provides this requestor with a special right of access which overcomes any privacy considerations.

Section 5.08(j) of the Medical Practice Act sets forth a detailed set of requirements for consent to the release of information. However, as the records are no longer in the custody of a physician, provisions of section 5.08 of the Medical Practice Act concerning the release of information by a physician are not relevant here. The requestor's signed, written consent in compliance with section 3B(b) will be sufficient. On receipt of such consent, the information in category two must be released.

Subsection (d) of section 3B could be taken to imply that such consent must state the authorized purposes for which the information is to be obtained, but to reach such a result would impose a requirement that goes far beyond the plain language of the statute, particularly in light of the prohibition found in section 5 of the Open Records Act of any inquiry into the motives of a requestor of information. Had the legislature wished to impose such a requirement, it could easily have done so as is demonstrated by the above-quoted language from section 5.08(j) of the Medical Practice Act.

Category three consists of a polygraph examination that was conducted for the city. This examination consists of a written questionnaire and a one page "polygraph results report" on which the examiner has indicated the result of his examination as to eight questions by circling a letter. You claim the polygraph examination is excepted by section 3(a)(11) of the Open Records Act. In addition to your claim under section 3(a)(11), you claim that the polygraph examination is excepted from public disclosure by section 3(a)(1) of the Open Records Act and V.T.C.S. article 4413(29cc), section 19A.

Article 4413(29cc), section 19A, while not requiring disclosure, expressly permits the city to release the information in question to the examinee. Thus, at least with respect to this requestor, no part of the polygraph examination may be said to be "deemed confidential by law" as required for exception from public disclosure under section 3(a)(1). Thus, the polygraph examination may not be withheld from this requestor under section 3(a)(1).

Section 3(a)(11) excepts from public disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." It is well established that the purpose of section 3(a)(11) is to protect from public disclosure advice, opinion, and recommendation used in the decisional process within an agency or between agencies. This protection is intended to encourage open and frank discussion in the deliberative process. See, e.g., Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App. - San Antonio 1982, writ ref'd n.r.e.); Attorney General Opinion H-436 (1974); Open Records Decision Nos. 538 (1990); 470 (1987).

Purely factual information does not constitute advice, opinion, or recommendation and may not be withheld under section 3(a)(11). Open Records Decision No. 450 (1986).

The questionnaire contains no advice, opinion, or recommendation and cannot be excepted from public disclosure by section 3(a)(11). The questionnaire must be released.

The one page "polygraph results report" represents nothing more than the opinions of the examiner. As no factual information is contained in this report, the "polygraph results report" may be withheld under section 3(a)(11).

The information in category four consists of questionnaires which the city submitted to previous employers or references of the requestor for the purpose of evaluating the requestor's application for employment. Information of this character was considered by this office in Open Records Decision No. 466 (1987). In that opinion we stated that where (1) a governmental body has authority to conduct an evaluation, (2) the governmental body initiated the evaluation or recommendation, and (3) the governmental body has a purpose for seeking the information from the source in question, the information may be excepted from public disclosure under section 3(a)(11). As the information in category four consists of advice, opinion, or recommendation and meets the criteria set forth in Open Records Decision No. 466, it may be withheld.

The information in category five consists of a driver's license history obtained by the city from the Texas Law Enforcement Telecommunications System (TELETS). You claim exception from public disclosure for this information under section 3(a)(1), yet you cite no law which makes this information confidential. Under the Open Records Act, all

information held by governmental bodies is open unless it falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). As you have cited no law under which the information in category five is "deemed confidential" we have no basis upon which to consider your claim. Consequently, the information must be released.

Category six consists of teletype information from the National Crime Information Center (NCIC) and Texas Crime Information Center (TCIC). You claim this information is excepted from public disclosure by section 3(a)(1) and direct our attention to federal law. 28 U.S.C. § 534(b), 42 U.S.C. 3789g, 28 C.F.R. ch. 1, part 20.

Section 534 of Title 28 of the Unites States Code provides for the exchange of criminal history information among "authorized officials of the Federal Government, the States, cities, and penal and other institutions." Section 534(b) provides that the FBI's exchange of criminal history information with any other agency is subject to cancellation "if dissemination is made outside the receiving departments or related agencies." Section 534(b) does not explicitly deem information confidential; however, it evinces a congressional intent to protect the privacy of criminal-history subjects. See Department of Justice v. Reporters Comm. for Freedom of the Press, 109 S. Ct. 1468, 1477 (1989).

The NCIC is a nationwide computerized information system established as a service to criminal justice agencies. It includes a variety of information collected by criminal justice agencies including criminal history information. As defined at section 20.3 of Title 28 of the Code of Federal Regulations "criminal history information" includes "identifiable descriptions and notations of arrests, detentions, indictments, informations, of other formal criminal charges, and any disposition arising therefrom, sentencing, correctional supervision, and release."

The Interstate Identification Index (III) is an automated system to provide for the interstate exchange of criminal history information. The III is the mechanism by which participating jurisdictions share criminal history information through the NCIC.

Criminal history information is entered into the TCIC computerized criminal history file by the Texas Department of Public Safety in Austin. The information entered by the Department of Public Safety is received from local law enforcement agencies in Texas. Information in the TCIC may be shared with jurisdictions outside of Texas through the III. In stating general policies on the use and dissemination of such information, Title 28, section 20.21(c)(3), of the Code of Federal Regulations states, in part, "States and local governments will determine the purpose for which dissemination of criminal history record information is authorized by state law."

Information shared with local governments through the III is subject to the regulations promulgated by the U.S. Department of Justice regarding its use. These regulations, codified as Title 28, chapter 1, part 20, subparts A and C, of the Code of Federal Regulations were promulgated "to assure that criminal history information wherever it appears is collected, stored, and disseminated in a manner to insure the completeness, integrity, accuracy and security of such information and to protect individual privacy." 28 C.F.R. § 20.1.

The regulations applicable to "state and local criminal justice agencies to the extent that they utilize the services of the Department of Justice criminal history record information systems" provide for access by individuals to criminal history information maintained about him or her in a Department of Justice criminal history record information system. 28 C.F.R. §§ 20.30, 20.34. An explanation of the security guidelines relating to the NCIC III is set forth in a policy paper entitled "NCIC CCH Program Background, Concept and Policy" as approved by the NCIC Advisory Policy Board on March 1, 1984. This policy paper states in part:

> The remote accessing of III for individual access and review is not allowed since states desire to follow individual state dissemination procedures for this purpose. The subject of the record indexed in III may submit a written request directly to [the FBI, NCIC Section] to obtain information concerning his or her record. . . . The NCIC will provide a copy of the Index record and Federal Offender File (FOF) record, if such exists. If the record is indexed for a participating state(s), NCIC will provide the

> name and address of the appropriate state agency(s) to contact.

The policy codified in the applicable federal regulations is that each state follow its individual law with respect to information it generates, but maintain information from other states or the federal government accessed through III as confidential. An individual wishing to access information about himself contained in the III must either apply for the information from the NCIC pursuant to Title 28, section 20.34, of the Code of Federal Regulations or, if the individual is interested in information generated in another state, contact the appropriate agency in that state for access according to that state's laws.

In this instance, you have asserted no law enforcement interest in the TCIC criminal history information in your possession which would except the information from public disclosure under section 3(a)(8) of the Open Records Act. The only remaining interest to be protected is the privacy of the subject of the criminal history information. As this interest alone does not except information from required disclosure when the requestor is the subject of the information, we conclude the information obtained from TCIC must be released if a request in compliance with section 3B(b) is received. In our opinion such release is in compliance with federal regulations applicable to the information. However, the NCIC III information may not be released.

You describe the seventh and final category of information as follows:

> The final category, internal reports, consists of interview score worksheet, interview summary forms, background investigation summary letter and evidence organizer and report of background investigation. The interview score worksheet and the interview summary forms are products of an interview board. They reflect the opinions, impressions, thoughts, comments and advice of the police department personnel who conducted the interview. . . . The background summary letter and the evidence organizer and report of background investigation were prepared by a police department employee and consists of his opinions, recommendations and advice deduced from the complete background investigation.

You claim the information in category seven is excepted from public disclosure by section 3(a)(11). The purpose and coverage of this exception from public disclosure are noted above. The interview score worksheet and interview summary forms reflect the advice, opinion, and recommendations of the interview board and may be withheld. The background investigation summary letter may be withheld as it reflects the advice, opinion, and recommendation of the officer preparing the report. The evidence organizer and report of background investigation consists largely of factual information. Those portions of the work history page which reveal the advice, opinion, or recommendation of former employers may be withheld pursuant to the reasoning of Open Records Decision No. 466 (discussed above). All other portions of the evidence organizer and report of background investigation must be released.

S U M M A R Y

Article 5561h (providing confidentiality for mental health records) is intended to protect the privacy interests of the person who is the subject of the records. When the subject of the records is the person making a request for the records under the Open Records Act, this provision will not operate to defeat the special right of access granted to that person by section 3B of the Open Records Act.

While medical records are under the control of a physician, section 5.08(k) of the Medical Practice Act controls over the right of access granted in section 3B of the Open Records Act. However, once released to a governmental body, and no longer under the supervision or control of a physician, medical records are subject to an ordinary analysis under section 3(a) of the Open Records Act.

Criminal history information in the hands of a local governmental body obtained from the NCIC must be released pursuant to section 3B of the Open Records Act if the only interest protected by withholding it is the privacy of the requestor. Information obtained from the NCIC III may not be released. Persons who are subjects of NCIC

III records may obtain information concerning the records from the FBI in accordance with federal regulations.

Very truly yours,

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