

No. 06-24-00036-CV

**IN THE SIXTH COURT OF APPEALS
TEXARKANA, TEXAS**

The State of Texas for the Best Interest and Protection of L.J.

On Appeal from the County Court of Law, Harrison County, Texas

Nos. 2003-348-M	2003-348-P [aka 2003-348-M-P]	2015-24-M
2016-22-M	2016-23-M	2016-07-M
2018-03-M	2018-09-M	2018-09-MP
		2017-02-M
		2019-03-M

The Honorable Rebecca Simpson Presiding

**AMICUS BRIEF OF CATO INSTITUTE
IN SUPPORT OF APPELLANTS**

Kevin Dubose
State Bar No. 00787396
kdubose@adjtlaw.com
ALEXANDER DUBOSE & JEFFERSON LLP
1844 Harvard Street
Houston, Texas 77008-4342
Telephone: (713) 523-2358
Facsimile: (713) 522-4553

**ATTORNEY FOR AMICUS CURIAE
CATO INSTITUTE**

TABLE OF CONTENTS

Index of Authorities	4
Interest of Amicus Curiae	6
Argument.....	6
I. The trial court’s order releasing the sealed records of LJ’s involuntary commitment proceedings violates common-law and statutory privacy rights.....	6
A. Texas recognizes a common-law right of privacy that protects mental health records.	6
1. The common-law right of privacy protects against disclosure of highly intimate or embarrassing facts that would be objectionable to a reasonable person and are not of legitimate concern to the public.	6
2. Mental health records contain highly intimate and potentially embarrassing facts, the publication of which would be highly objectionable to a reasonable person.....	7
3. Psychiatric records are rarely of legitimate concern to the public.	9
B. The Texas Legislature has extended the right of privacy to the mental health records.	10
1. Section 571.015 of the Health & Safety Code creates a presumption that mental health records shall not be disclosed.	10
2. To overcome the presumption of non-disclosure, a party must show that inspection and copying are (1) justified and (2) in the public interest.	10

C.	The trial court’s order to release the sealed records of LJ’s involuntary commitment proceedings violates her common-law privacy rights and conflicts with the Legislature’s statutory protection against disclosure of mental health records.	10
1.	The order to release the sealed records of LJ’s involuntary commitment proceedings violated her common-law right of privacy.	11
a.	The sealed records of LJ’s involuntary commitment proceedings contain highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person.....	11
b.	The sealed records of LJ’s involuntary commitment proceedings are not of legitimate concern to the public.	11
2.	The order to release the sealed records of LJ’s involuntary commitment proceedings violated section 571.015’s statutory protection of privacy for mental health records.	12
a.	The purpose of the statutory protection is to safeguard patients’ rights and health and protect them from embarrassment and trauma.	12
b.	The release of the sealed records of LJ’s involuntary commitment proceedings from years before the alleged acts and injury occurred is not justified.	13
c.	The sealed records of LJ’s involuntary commitment proceedings are not a matter of public interest.	14
II.	The release of sealed mental health records is contrary to public policy and leads to adverse consequences.	16

Conclusion and Prayer17
Certificate of Compliance19
Certificate of Service19

INDEX OF AUTHORITIES

Cases

<i>Addington v. Tex.</i> , 441 U.S. 418 (1979).....	8
<i>Ams. for Prosperity Found. v. Bonta</i> , 594 U.S. 595 (2021).....	17
<i>Barnes v. State</i> , No. 03-12-00631-CV, 2016 WL 3919680 (Tex. App.—Austin July 13, 2016, no pet.)	8
<i>Billings v. Atkinson</i> , 489 S.W.2d 858 (Tex. 1973)	6, 7
<i>Ginsberg v. Fifth Ct. of Appeals</i> , 686 S.W.2d 105 (Tex. 1985)	16
<i>Indus. Found. of the South v. Tex. Indus. Accident Bd.</i> , 540 S.W.2d 668 (Tex. 1976)	<i>passim</i>
<i>J.M. v. State</i> , 178 S.W.3d 185 (Tex. App.—Houston [1st Dist.] 2005, no pet.).....	8
<i>King v. Paxton</i> , 576 S.W.3d 881 (Tex. App.—Austin 2019, pet. denied)	<i>passim</i>
<i>Pollard v. U.S.</i> , 352 U.S. 354 (1957).....	8
<i>Sibron v. N.Y.</i> , 392 U.S. 40 (1968).....	8
<i>State v. Lodge</i> , 608 S.W.2d 910 (Tex. 1980)	8

Statutes

TEX. HEALTH & SAFETY CODE § 571.00212, 13
TEX. HEALTH & SAFETY CODE § 571.01510, 15

Other Authorities

Tex. Att’y
 Gen. Op. No. JM-260 (1984).....10, 14

INTEREST OF AMICUS CURIAE

The Cato Institute was founded in 1977 as nonpartisan public policy research foundation dedicated to advancing the principles of liberty, free markets, and limited government. Cato publishes books and studies and conducts conferences dedicated to restoring the principles of limited constitutional government that are the foundation of liberty. Of particular relevance to this case are Cato's interest in restraining governmental intrusion into health care and the protection of privacy interests of individuals receiving health care.

The author of this brief has not received and will not receive any compensation for preparing this brief. Counsel for the parties has not participated in drafting this brief.

ARGUMENT

- I. The trial court's order releasing the sealed records of LJ's involuntary commitment proceedings violates common-law and statutory privacy rights.**
 - A. Texas recognizes a common-law right of privacy that protects mental health records.**
 - 1. The common-law right of privacy protects against disclosure of highly intimate or embarrassing facts that would be objectionable to a reasonable person and are not of legitimate concern to the public.**

Since 1973, the Texas Supreme Court has recognized a common-law right of privacy that includes "the right to be free from . . . the publicizing of one's private affairs with which the public has no legitimate concern." *See Billings v. Atkinson*,

489 S.W.2d 858, 859 (Tex. 1973); *Indus. Found. of the South v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 679 (Tex. 1976); *King v. Paxton*, 576 S.W.3d 881, 901 (Tex. App.—Austin 2019, pet. denied). Although *Billings* acknowledged that “no right of privacy existed at common law nor had it been added by statute,” the court identified the origin of the legal recognition of the right of privacy as an 1890 Harvard Law review article by Samuel D. Warren and Louis D. Brandeis. *Billings* then traces the broad recognition and acceptance of the common-law right of privacy through judicial decisions cited in *Corpus Juris Secundum*, *American Jurisprudence*, *American Law Reports*, and THE RESTATEMENT OF TORTS. See generally *Billings*, 489 S.W.2d at 859-60.

This right of privacy protects information from disclosure when “(1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.” *King*, 576 S.W.3d at 901 (quoting *Indus. Found.* 540 S.W.2d at 685).

2. Mental health records contain highly intimate and potentially embarrassing facts, the publication of which would be highly objectionable to a reasonable person.

The first element of the right of privacy is satisfied here. Information about involuntary commitments for mental health reasons is highly intimate and potentially embarrassing. Texas courts have expressly included “psychiatric

treatment” as an example of information protected by the common-law privacy right. *Id.* (Information that is “highly intimate or embarrassing” includes information concerning “sexual assault, pregnancy, illegitimacy, mental or physical abuse, contraception, **psychiatric treatment**, injuries to genitalia, and attempted suicide.”) (emphasis added) (citing *Indus. Found.*, 540 S.W.2d. at 683).

This protection of information regarding psychiatric treatment is not surprising. Texas courts have acknowledged U.S. Supreme Court holdings that commitment to a mental hospital can cause stigma and adverse social consequences; these negative effects are so obvious that they can be presumed without being specifically proved. *See State v. Lodge*, 608 S.W.2d 910, 912 (Tex. 1980) (citing *Addington v. Tex.*, 441 U.S. 418 (1979); *Sibron v. N.Y.*, 392 U.S. 40 (1968); and *Pollard v. U.S.*, 352 U.S. 354 (1957)). *See also J.M. v. State*, 178 S.W.3d 185, 189 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (describing “the stigma that attaches to a mental health commitment”); *Barnes v. State*, No. 03-12-00631-CV, 2016 WL 3919680, at *3 (Tex. App.—Austin July 13, 2016, no pet.) (discussing whether “stigma of mental-health-commitment order will be redressed on appeal”). The acknowledged, unfortunate stigma that accompanies a mental health commitment goes far beyond the threshold of intimate, embarrassing, and highly objectionable information that triggers the right of privacy.

3. Psychiatric records are rarely of legitimate concern to the public.

Psychiatric records also satisfy the second element of the right of privacy because they are not of legitimate concern to the public. *King*, 576 S.W.3d at 901 (citing *Indus. Found.*, 540 S.W.2d at 685). In fact, by meeting the first element, the mental health records are presumed to meet the second: “[i]f the information meets the first test, it will be presumed that the information is not of legitimate public concern unless the requestor can show that, under the particular circumstances of the case, the public has a legitimate interest in the information notwithstanding its private nature.” *Id.* Whether information is of legitimate concern to the public “can only be considered in the context of each particular case, considering the nature of the information and the public's legitimate interest in its disclosure.” *Id.*

In weighing whether intimate and potentially embarrassing matters are of legitimate concern to the public, the Texas Supreme Court has cautioned that, “In general . . . the public will have no legitimate interest in such highly private facts about private citizens.” *Indus. Found.*, 540 S.W.2d at 685. The court further noted that unless the person requesting such information from a governmental unit can show special circumstances that make these private facts a matter of legitimate public concern, the information should be deemed confidential under the common-law right of privacy. *Id.*

B. The Texas Legislature has extended the right of privacy to the mental health records.

- 1. Section 571.015 of the Health & Safety Code creates a presumption that mental health records shall not be disclosed.**

Section 571.015 of the Health & Safety Code addresses the use, inspection, or copying of records from mental health proceedings. TEX. HEALTH & SAFETY CODE § 571.015(a). It describes documents from these proceedings as “a public record of a private nature that may be used, inspected, or copied only under a written order issued by [the appropriate judge].” *Id.*

- 2. To overcome the presumption of non-disclosure, a party must show that inspection and copying are (1) justified and (2) in the public interest.**

The statute further provides that “A judge may not issue an order under Subsection (a) unless . . . the judge enters a finding that the use, inspection, or copying is **justified and in the public interest.**” *Id.* at §571.015(b)(1) (emphasis added).

A Texas Attorney General Opinion has recognized that the identical test imposed by section 571.015’s predecessor (article 5547-12 of the Texas Civil Statutes) “is similar to that used by the Texas Supreme Court in determining whether information is excepted from disclosure by a common law right of privacy.” Tex. Att’y Gen. Op. No. JM-260 (1984) (citing *Ind. Found.*, 540 S.W.2d at 683).

C. The trial court’s order to release the sealed records of LJ’s involuntary commitment proceedings violates her common-law

privacy rights and conflicts with the Legislature’s statutory protection against disclosure of mental health records.

- 1. The order to release the sealed records of LJ’s involuntary commitment proceedings violated her common-law right of privacy.**
 - a. The sealed records of LJ’s involuntary commitment proceedings contain highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person.**

As previously demonstrated, Texas courts have held that “psychiatric records” contain intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person. *See supra* pp. 5-6 (citing *King*, 576 S.W.3d at 901; *Indus. Found.*, 540 S.W.2d at 683). Although “psychiatric records” can describe a wide range of information — including a brief counselling session — disclosure of six involuntary commitment proceedings over a twenty-year period is clearly on the highly intimate and embarrassing end of the spectrum.

- b. The sealed records of LJ’s involuntary commitment proceedings are not of legitimate concern to the public.**

As previously demonstrated, highly intimate or embarrassing is presumed to be outside the realm of legitimate public concern. *See supra* at pg. 7 (citing *King*, 576 S.W.3d at 901).

Rather than asserting the **public’s** interest, Harrison County and Southern Health Partners assert their own litigation interest in LJ’s involuntary commitment records as defendants in a lawsuit brought by LJ’s family and estate. *See* Brief of

Appellees at 16-20. That litigation interest is not the “public interest.” As the Texas Supreme Court noted, “We should make clear that the particular interest of the requestor, and the purposes for which he seeks the information, are not to be considered in determining whether the matter requested is of legitimate concern to the public, except insofar as the requestor’s interest in the information is the same as that of the public at large.” *Indus. Found.*, 540 S.W.2d at 685. Harrison County and Southern Health Partners have not demonstrated any public interest in the sealed documents they seek to be released.

- 2. The order to release the sealed records of LJ’s involuntary commitment proceedings violated section 571.015’s statutory protection of privacy for mental health records.**
 - a. The purpose of the statutory protection is to safeguard patients’ rights and health and protect them from embarrassment and trauma.**

Section 571.002 articulates the purpose of this subchapter of the Health and Safety Code: to provide “humane care and treatment” to “each person having severe mental illness.” TEX. HEALTH & SAFETY CODE § 571.002 (emphasis added). The Legislature’s goals also include: (1) “enabling the person to obtain necessary evaluation, care, treatment, and rehabilitation with the least possible trouble, expense, and embarrassment to the person and the person’s family”; and (2) “eliminating . . . the traumatic effect on the person’s mental health of public trial and criminal-like procedures.” *Id.* at § 571.002(2), (3) (emphasis added). The Legislature

also intended to “safeguard[] the person’s legal rights.” *Id.* at § 571.002(7) (emphasis added). All of these purposes should be paramount when analyzing whether Harrison County and Southern Health Partners made the necessary showing to reverse the statutory presumption of privacy in these records.

b. The release of the sealed records of LJ’s involuntary commitment proceedings from years before the alleged acts and injury occurred is not justified.

Harrison County and Southern Health Partners argue that the release of the sealed records of LJ’s involuntary commitment proceedings from 2003-2019 is justified because LJ’s estate and family have filed suit against them for circumstances surrounding LJ’s death in 2022. *See* Brief of Appellee at 16-20. But Texas courts have held that filing a claim to pursue one’s rights does not impliedly consent to releasing private information or waive the right of privacy. The *Industrial Foundation* case involved the release of information held by the Industrial Accident Board that had been disclosed in worker’s compensation claims. The court concluded, “We cannot say that an injured workman impliedly consents to the government’s publication of private information about his injury merely by filing his claim for compensation with the Board We decline to hold that claimants have waived any legally protected right of privacy in information contained in their claim files by filing them with the Board.” *Indus. Found.*, 540 S.W.2d at 685. Thus, the sole fact of filing a claim cannot justify public release of private information.

Finally, even if the filing of the suit by LJ's family opened the door to disclosing some private information directly implicated in the suit, the information sought here does not meet that criterion. "In order for information to be disclosed, there must be a 'logical nexus' between 'the private facts disclosed' and 'the general subject matter' that is of public concern." *King*, 576 S.W.3d at 903. Even if the lawsuit brought by LJ's family were a matter of public concern generally, there is no logical nexus between her death in medical custody in 2022 and her six involuntary commitment proceedings between 2003 and 2019. The allegations in that suit do not include any negligence or deprivation of constitutional rights in those involuntary commitment proceedings. Instead, they are limited to the actions of Harrison County and Southern Health Partners while LJ was in custody from December 2021 to death in January 2022. The filing of a lawsuit based on those limited facts does not justify the release of private psychiatric records that have no logical nexus to this suit.

c. The sealed records of LJ's involuntary commitment proceedings are not a matter of public interest.

Whether the sealed records of LJ's involuntary commitment proceedings are "a matter of public interest" under the statute is very similar to the question of whether they are "of legitimate concern to the public" under the common-law right of privacy. *See* Att'y Gen. Op. No. JM-260, (1984) (citing *Ind. Found.*, 540 S.W.2d

at 683). Moreover, “In general . . . the public will have no legitimate interest in such highly private facts about private citizens.” *Indus. Found.*, 540 S.W.2d at 685.

Harrison County and Southern Health argue that they need these sealed records of LJ’s involuntary commitment proceedings to defend the section 1983 lawsuit brought by LJ’s family. This contention fails for two reasons.

First, these records are not necessary or relevant because they are removed in time and subject matter, and will not assist Harrison County and Southern Health in proving that they had policies and procedures in place in 2022 that were not likely to deprive citizens in custody of their constitutional rights.

Second, even if the records were relevant to the lawsuit, “the motives of the individual requestor are not relevant to the determination of whether the matter requested is ‘public information.’” *Id.* Whether these records are “a matter of public interest” should be determined by the records themselves, and not the purposes for which Harrison County and Southern Health intend to use them. Harrison County and Southern Health have made no attempt to make the required showing that the disclosure of these involuntary commitment records are “in the public interest.”

The statute prohibits the use, inspection, or copying of sealed records from involuntary commitment proceedings unless a judge finds that the use, inspection, or copying of the records “is justified **and** in the public interest.” TEX. HEALTH & SAFETY CODE § 571.015 (emphasis added). If either element is missing, the records

should not be disclosed. Because Harrison County and Southern Health have failed to demonstrate the statutory requirement that disclosure of these records is either justified or in the public interest, the order compelling their disclosure should be reversed and vacated.

II. The release of sealed mental health records is contrary to public policy and leads to adverse consequences.

Releasing the sealed records of LJ's involuntary commitment proceedings should be foreclosed solely because of LJ's personal right of privacy, recognized by common law and by statute. But there are broader policy concerns that extend beyond her personal interests and the facts of this case.

First, in order to encourage full communication in the diagnosis and treatment of mental health patients, those patients should be able to rely on privacy and confidentiality. Courts have recognized "the policy of encouraging the full communication necessary for effective treatment of a patient by a psychotherapist. C. McCormick § 72.", *Ginsberg v. Fifth Ct. of Appeals*, 686 S.W.2d 105, 107 (Tex. 1985). If a psychiatric patient knows their sealed mental health records can be released with the scant justification offered in this case, they would be reluctant to engage in the "full communication necessary for [their] effective treatment." That reluctance to provide full communication would have an adverse effect on the mental health community at large, far beyond this case.

Second, if the mere filing of a lawsuit to secure one’s constitutional rights creates a public interest sufficient to warrant the release of sealed mental health records, that would have a chilling effect on individuals and their families filing those suits to hold the government accountable. In *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595 (2021), the Supreme Court held that a California law compelling the disclosure of donor information for tax-exempt charities was unconstitutional because it created an unnecessary risk of chilling First Amendment rights. The same fears of physical, emotional, or financial injuries present in cases involving political or ideological association can be attributed to the disclosure of sensitive mental health records and may deter people from bringing lawsuits to hold the government accountable.

Thus, ordering the release of sealed documents from involuntary commitment proceedings — especially on the thin record in this case, with only vague assertions and no evidence could have a chilling effect that would adversely affect both the mental health treatment community and the exercise of legal rights.

CONCLUSION AND PRAYER

For all these reasons, Amicus Curiae the Cato Institute urges the Court to reverse and vacate the trial court’s order compelling the release of the sealed records of LJ’s involuntary commitment proceedings.

Respectfully submitted,

/s/ Kevin Dubose

Kevin Dubose

State Bar No. 00787396

kdubose@adjtlaw.com

ALEXANDER DUBOSE & JEFFERSON LLP

1844 Harvard Street

Houston, Texas 77008-4342

Telephone: (713) 523-2358

Facsimile: (713) 522-4553

**ATTORNEY FOR AMICUS CURIAE CATO
INSTITUTE**

CERTIFICATE OF COMPLIANCE

Based on a word count run in Microsoft Word 2016, this brief contains 2,779 words, excluding the portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Kevin Dubose
Kevin Dubose

CERTIFICATE OF SERVICE

On September 5, 2024, I electronically filed this Brief with the Clerk of the Court using the eFile.TXCourts.gov electronic filing system which will send notification of such filing to all parties (unless otherwise noted below).

/s/ Kevin Dubose
Kevin Dubose

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Mandy Patterson on behalf of Kevin Dubose

Bar No. 6150500

mpatterson@adjtlaw.com

Envelope ID: 91699043

Filing Code Description: Brief Not Requesting Oral Argument

Filing Description: Amicus Brief of Cato Institute in Support of Appellants

Status as of 9/5/2024 4:28 PM CST

Associated Case Party: LashunFuqua

Name	BarNumber	Email	TimestampSubmitted	Status
T. DEANMALONE		DEAN@DEANMALONE.COM	9/5/2024 4:20:24 PM	SENT
MICHAEL T.O'CONNOR		MICHAEL.OCONNOR@DEANMALONE.COM	9/5/2024 4:20:24 PM	SENT
JENNIFER KINGAARD		JENNIFER.KINGAARD@DEANMALONE.COM	9/5/2024 4:20:24 PM	SENT
CHERI THOMAS		CTHOMAS@LEWISTHOMASLAWPC.COM	9/5/2024 4:20:24 PM	SENT
ABRIELLE PERRY		ABRIELLE.PERRY@DEANMALONE.COM	9/5/2024 4:20:24 PM	ERROR

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Virginia Lopez		virginia.lopez@deanmalone.com	9/5/2024 4:20:24 PM	SENT

Associated Case Party: Harrison County, Texas

Name	BarNumber	Email	TimestampSubmitted	Status
ROBERT SDAVIS		RSD@FLOWERSDAVIS.COM	9/5/2024 4:20:24 PM	SENT
JOHN "JACK" RFULGHAM		JRF@FLOWERSDAVIS.COM	9/5/2024 4:20:24 PM	SENT
R. CASEYO'NEILL		RCO@FLOWERSDAVIS.COM	9/5/2024 4:20:24 PM	ERROR

Associated Case Party: Southern Health Partners, Inc.

Name	BarNumber	Email	TimestampSubmitted	Status
FRANK ALVAREZ		FRANK.ALVAREZ@QPWBLAW.COM	9/5/2024 4:20:24 PM	SENT
WENDY AMCMILLON		WENDY.MCMILLON@QPWBLAW.COM	9/5/2024 4:20:24 PM	SENT

Associated Case Party: Cato Institute

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Mandy Patterson on behalf of Kevin Dubose

Bar No. 6150500

mpatterson@adjtlaw.com

Envelope ID: 91699043

Filing Code Description: Brief Not Requesting Oral Argument

Filing Description: Amicus Brief of Cato Institute in Support of Appellants

Status as of 9/5/2024 4:28 PM CST

Associated Case Party: Cato Institute

Name	BarNumber	Email	TimestampSubmitted	Status
Mandy Patterson		mpatterson@adjtlaw.com	9/5/2024 4:20:24 PM	SENT
Stacey Jett		sjett@adjtlaw.com	9/5/2024 4:20:24 PM	SENT
Kevin Dubose		kdubose@adjtlaw.com	9/5/2024 4:20:24 PM	SENT