



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 30, 1995

Mr. Burton F. Raiford
Commissioner
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR95-011

Dear Commissioner Raiford:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 26653.

The Texas Department of Human Services ("the department") has received three requests for information. Each request is for information concerning an investigation of a nursing facility regarding an abuse and neglect complaint. The three requests involve information about investigations of three distinct incidents. Each request for information was accompanied with a written authorization for the release of information signed by the legal representative of the subject involved in the abuse and neglect complaint.

You ask about the effect of the legal representatives' authorizations on the release of the requested information. You also ask whether section 552.023 permits the legal representatives to gain access to the requested information. As the three requests raise the same issues, you have asked that we consider them together.

Section 552.101 of the Government Code exempts from required public disclosure information considered to be confidential by law, including information made confidential by statute. We consider the application of section 242.127 of the Health and Safety Code in conjunction with section 90.216 of title 40 of the Texas Administrative Code to two categories of information: the investigative reports and the attachments to those reports.¹

¹The attachments to the reports include the following: a Medicare/Medicaid complaint form, a Statement of Deficiencies and Plan of Correction for one of the nursing facilities, a workload report of the investigation, nurse's progress notes, doctor's consultation reports, doctor's reports, nursing summaries,

Section 242.127 provides that

a report, record, or working paper used or developed in an investigation made under this subchapter is confidential and may be disclosed only for purposes consistent with the rules adopted by the board or the designated agency.

This provision, in conjunction with section 552.101 of the Government Code, protects from required public disclosure the department's reports, records, and working papers used or developed in an investigation of abuse or neglect. Attorney General Opinion JM-1048 (1989) at 5 (construing predecessor statute, V.T.C.S. art. 4442c, § 16(h), *repealed by Acts 1989, 71st Leg., ch. 678, § 13(1), at 3165*).

In accordance with section 242.127, the department adopted section 90.216(a) of title 40 of the Texas Administrative Code, which applies to investigations of complaints of abuse, neglect, and exploitation at nursing facilities and related institutions. Section 90.216(a) provides as follows:

Confidentiality. All reports, records, and working papers used or developed by the Texas Department of Human Services (department) in an investigation are confidential, and may be released to the public only as provided below.

(1) Completed written investigation reports are open to the public, provided the report is deidentified. The process of deidentification means removing all names and other personally identifiable data, including any information from witnesses and others furnished to the department as part of the investigation.

(2) The reporter and the facility will be notified of the results of the department's investigation of a reported case of abuse or neglect, whether the department concluded that abuse or neglect occurred or did not occur.

Section 90.216(a), like section 242.127 of the Health and Safety Code, provides confidentiality for a "report, record, or working paper used or developed in an investigation" of a nursing facility regarding a complaint of abuse, neglect, and exploitation. We first consider whether the attachments constitute a "report, record, or working paper used or developed in an investigation."

(Footnote continued)

social services notes, a nutritional assessment, doctor's progress notes, physician's orders, a report of contact, a complaint intake and authorization for investigation form, an incident intake and authorization for investigation form, a facility abuse/neglect report, a medical device form, an invoice, witness statements, and accident or incident reports.

Neither chapter 242 of the Health and Safety Code nor the department's rules contains a definition of "report, record, or working paper used or developed in an investigation." However, section 242.126(c) of the Health and Safety Code requires the department to make the following determinations during an investigation:

- (1) the nature, extent, and cause of the abuse or neglect;
- (2) the identity of the person responsible for the abuse or neglect;
- (3) the names and conditions of the other residents;
- (4) an evaluation of the persons responsible for the care of the residents;
- (5) the adequacy of the institution environment; and
- (6) any other information required by the department.

We think that "a report, record, or working paper used or developed in an investigation" refers to information that relates to the investigation. This includes information that allows the department to make the section 242.126(c) determinations and support the conclusions of the investigation report. The attachments to the reports here relate to the investigation and provide the necessary supporting documentation for the department to make the section 242.126(c) determinations and reach the conclusions of the reports. Accordingly, we conclude that the attachments to the completed investigation reports are confidential by law if used or developed during the course of the investigation and therefore, excepted from required public disclosure under section 552.101 of the Government Code.

This is so even though in this case the legal representatives of the subject of the complaints have authorized the release of information. Health and Safety Code section 242.126, in conjunction with the department's rules, controls access to the attachments to the investigation report. Section 242.126 and the department rules do not give the subject of the complaints or the subject's representative a right to see the attachments, or the department the authority to make the attachments available. *Cf.* Open Records Decision No. 507 (1988) (concluding that former section 10(d) of V.T.C.S. art. 4447u does not provide for release to patient of information concerning patient in records of an investigation of a complaint about a home health agency).

On the other hand, by department rule, the investigation report is open to the public. 40 T.A.C. § 90.216(a)(1). However, the rule requires the report to be "deidentified" when released, which means "removing all names and other personally identifiable data, including any information from witnesses and others furnished to the department as part of the investigation." *See id.* You ask whether, in light of the fact that the legal representatives of the subjects of the investigations have authorized the release of information, the department may release the investigation report without deidentifying it.

As mentioned above, the department rules promulgated pursuant to section 252.126 of the Health and Safety Code control the amount of information the department may release to the public, including to the representatives of the subjects of the complaints. Those rules do not authorize the release of a completed written investigation report unless it has been deidentified.

Nor does 552.023 of the Government Code grant access to the investigation reports without deidentification or to the reports' attachments. Section 552.023 states in pertinent part as follows:

(a) A person or a person's authorized representative has a special right of access, beyond the right of the general public, to records and copies of 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 interest.

(b) A governmental body may not deny access to information to the person, or the person's representative, to whom the information relates on the grounds that the information is considered confidential by privacy principles under this chapter but may assert as grounds for denial of access other provisions of this chapter or other law that are not intended to protect the person's privacy interest.

Section 552.023 grants access to an individual or to an individual's representative when information is excepted from required public disclosure based on a law that protects that individual's privacy interests. *See* Open Records Decision No. 587 (1991). Thus, section 552.023 is not applicable to a confidentiality provision that protects more than privacy interests. *See id.*

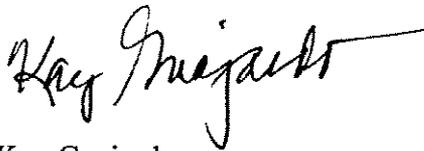
For example, section 142.009(d) of the Health and Safety Code provides confidentiality for the reports, records, and working papers developed in an investigation of home health services agencies made by the Texas Department of Health under chapter 142 of the Health and Safety Code. Because section 142.009(d) was designed to protect the integrity of the investigatory process of the Texas Department of Health, and not solely the privacy interests of individuals, an individual may not invoke section 552.023 to gain access to records made confidential under section 142.009(d) of the Health and Safety Code. *See* Open Records Decision No. 603 (1992).

Similarly, we think section 242.127 of the Health and Safety Code in conjunction with section 90.216 of title 40 of the Texas Administrative Code protects more than the privacy interests of the individuals involved; it also protects the department's investigatory process. Moreover, like the confidentiality provision discussed in Open Records Decision No. 603, section 242.127 of the Health and Safety Code and section

90.216 of title 40 of the Texas Administrative Code do not provide for the release of information to individuals who give written consent to the release of information concerning themselves. We, therefore, conclude that section 552.023 does not permit the authorized representative to gain access to information made confidential by section 242.127 of the Health and Safety Code in conjunction with section 90.216 of title 40 of the Texas Administrative Code. *See id.*; *cf.* Open Records Decision No. 577 (1990) at 4 (finding statutory predecessor to section 552.023, Government Code, applicable to certain information where section 81.046 of Health and Safety Code provided exception to confidentiality when person identified in information consents).²

In summary, notwithstanding the written authorizations from the legal representatives of the individuals involved in the nursing facility complaints, the department must release only a deidentified copy of the completed investigation report, in accordance with section 90.216 of title 40 of the Texas Administrative Code. Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Government Section

KHG/LRD/rho

Ref.: ID# 26653

Enclosures: Submitted documents

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²We note that section 102.003(l) of the Human Resources Code provides that "an elderly individual may inspect the individual's personal records maintained by the person providing services." A "person providing services" means an individual, corporation, association, partnership, or other private entity providing convalescent and nursing home services, home health services, or alternate care services. Hum. Res. Code § 102.001(4). The department is not one of the entities described in section 102.001(4). Nor does the department provide any of the services described in section 102.004(4). Thus, the department is not a "person providing services" for purposes of section 102.003(l) of the Human Resources Code. Accordingly, section 102.003(l) does not govern the department's release of the requested information.

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