



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 11, 1995

David R. Smith, M.D.  
Commissioner  
Texas Department of Health  
1100 West 49th Street  
Austin, Texas 78756-3199

OR95-1395

Dear Dr. Smith:

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# 33216. The requested information relates to a complaint arising out of an investigation and survey conducted on the open records requestor, which is a licensed home and community support services agency.

The open records request lists eighteen requested items. The Texas Department of Health ("TDH" or the "department") has released items 5, 6, 11(a), 11(b), 14, and 18, but contends that the remaining items are excepted from required public disclosure under chapter 552.

The requested items 1 through 4 are as follows:

- 1) Nance Stearman's memo to Theresa Centeno (counseling format in accordance with TDH's policies and procedures concerning complaints against employees).
- 2) Nance Stearman's memo to Beverly Terry (counseling format in accordance with TDH's policies and procedures concerning complaints against employees).
- 3) Narrative prepared by Theresa Centeno in response to the notice of the Complaint.
- 4) Narrative prepared by Beverly Terry in response to the notice of the Complaint.

You claim that those items are excepted from public disclosure under Government Code section 552.101 as "information considered to be confidential by law," specifically, as information that is protected by section 142.009 of the Health and Safety Code and by constitutional and common-law privacy. You also claim that each is excepted by Government Code section 552.111 as an agency memorandum.

Subsection (a) of section 142.009 of the Health and Safety Code permits the department to enter the premises of, and conduct an inspection of, a holder of a license to provide home health, hospice, or personal assistance services when necessary to enforce Health and Safety Code chapter 142 and the department's rules implementing that chapter. Subsection (c) of section 142.009 provides:

The department or its authorized representative shall investigate complaints received regarding the provision of home health, hospice, or personal assistance services and may, as a part of the investigation:

(1) conduct an unannounced inspection of a place of business, including an inspection of medical and personnel records, if the department has reasonable cause to believe that the place of business is in violation of this chapter or a rule adopted under this chapter;

(2) conduct an interview with a recipient of home health services, which may be conducted in the recipient's home if the recipient consents;

(3) conduct an interview with a family member of a recipient of home health, hospice, or personal assistance services who is deceased or other person who may have knowledge of the care received by the deceased recipient of home health, hospice, or personal assistance services; or

(4) interview a physician or other health care practitioner, including a member of the personnel of a home and community support services agency, who cares for a recipient of home health, hospice, or personal assistance services.

Subsection (d) of section 142.009 provides:

The reports, records, and working papers used or developed in an investigation made under this section are confidential and may not be released or made public except:

(1) to a state or federal agency;

(2) to federal, state, or local law enforcement personnel;

(3) with the consent of each person identified in the information released;

(4) in civil or criminal litigation matters or licensing proceedings as otherwise allowed by law or judicial rule; or

(5) on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency.

Subsection (d) thus falls within the exception for statutory confidentiality found in section 552.101 of the Government Code. *See* Open Records Decision No. 603 (1992). We understand that the survey conducted on the open records requestor here was an investigation under section 142.009.

Section 552.101 also protects information coming within the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

Section 552.101 also embraces constitutional privacy. *Industrial Found.*, 540 S.W.2d at 678. The constitutional right to privacy consists of two related interests: (1) the individual interest in independence in making certain kinds of important decisions, and (2) the individual interest in independence in avoiding disclosure of personal matters.

The first interest applies to the traditional "zones of privacy" described by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), and *Paul v. Davis*, 424 U.S. 693 (1976). These "zones" include matters related to marriage, procreation, contraception, family relationships, and child rearing and education.

The second interest, in nondisclosure or confidentiality, may be somewhat broader than the first. Unlike the test for common-law privacy, the test for constitutional privacy involves a *balancing* of the individual's privacy interests against the public's need to know information of public concern. Although such a test might appear more protective of privacy interests than the common-law test, the scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)).

Government Code section 552.111 excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993) at 5. The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). In Open Records Decision No. 615, this office concluded that

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters . . . .

Open Records Decision No. 615 (1993) at 5 (emphasis added).

Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 (1993) at 5. If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982).

In our review of the documents, we find that item 1 is not "Nance Stearman's memo to Theresa Centeno," but rather a copy of a letter from Beth B. Sherfy to Nance Stearman dated March 6, 1995, that is, the complaint that arose from the investigation and survey conducted on the open records requestor. The above-described memorandum was not submitted to our office; so we are unable to determine how much, if any, of it is excepted by section 552.101 or 552.111. You have not met your burden of showing that any portion of the above-described memorandum, if it exists, is protected under the deliberative process privilege of section 552.111. You must not release any portions of the memorandum that are protected by section 142.009(d) or constitutional or common-law privacy. Release of such information would constitute official misconduct and a misdemeanor punishable by either or both of the following: a maximum fine of \$1,000, confinement in the county jail for a maximum period of six months. Gov't Code § 552.352. You must release all portions of the memorandum, if it exists, that are not protected as confidential information. Failure to release such information has the same consequences as stated above regarding the release of confidential information. *See id.* § 552.353.

Items 2 through 4, "Nance Stearman's memo to Beverly Terry," the "Narrative prepared by Theresa Centeno in response to the notice of the Complaint," and the "Narrative prepared by Beverly Terry in response to the notice of the Complaint," do not contain advice, opinion, or recommendation that is related to the *policymaking* functions of the governmental body. Rather, all the information in those documents is either purely

factual or is related to routine internal administrative and personnel matters that are not policymaking in nature. We accordingly conclude that none of the information in those documents is excepted by the deliberative process privilege of section 552.111.

In applying section 142.009(d), we note that the requested information relates only indirectly to an investigation under that section; more directly, it relates to an investigation of the investigation. The fact situation you present raises the question of whether section 142.009(d) makes any of the information in items 2 through 4 confidential as "reports, records, and working papers used or developed in an investigation made under th[at] section."

We believe the word "records" as used in section 142.009(d) is ambiguous. The word *record* can mean "something that records: as a : something that recalls or relates past events b : an official document that records the acts of a public body or officer," or it can mean "(1) : a body of known or recorded facts about something or someone esp. with reference to a particular sphere of activity that often forms a discernible pattern <a good academic ~><a liberal voting ~> (2) : a collection of related items of information (as in a data base) treated as a unit." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 984 (1989). The former sense of the word denotes the medium, whereas the latter denotes the message. Some of the *information* contained in items 2 through 4 no doubt was originally used or developed in the underlying investigation under section 142.009, but none of it is contained in a *document* that was used or developed in that investigation. Rather, the documents labeled as items 2 through 4 apparently were created and used only in response to the complaint arising out of the investigation.

The legislative purpose, or "object sought to be attained" in the section 142.009(d), Gov't Code § 311.023(1), and the "consequences of a particular construction" of the provision, *id.* § 311.023(1), are helpful in construing the word "records." They indicate that the word refers to the information "used or developed in an investigation under . . . section [142.009]," Health & Safety Code § 142.009(d), and not just the documents or other media used or developed in the investigation. Subsection (d) specifically prohibits the release of "reports, records, and working papers" except (1) to certain federal, state, or local entities; (2) "with the consent of each person identified on the information released;" (3) in certain litigation or licensing proceedings; or (4) "on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community services agency." The second and fourth exceptions just noted indicate a purpose to protect the identity of persons involved in the investigation under section 142.009. This purpose would not be served if the confidentiality of "records" under that section were limited only to documents or other media used or developed in the investigation but would be served if the word "records" were construed as meaning the information itself used or developed in the investigation.

We therefore conclude that any information in items 2 through 4 that was used or developed in a section 142.009 investigation is confidential under section 142.009(d). Having reviewed the information, we find that some of it is not a "record[] . . . used or developed in an investigation made under" section 142.009(d) as construed above. Only those portions of items 2 through 4 that constitute information used or developed in the underlying investigation are confidential under section 142.009(d). You must withhold those portions unless each person identified in the information consents. *See* Health & Safety Code § 142.009(d); Gov't Code § 552.352. The rest of the information in those items is not excepted from disclosure by section 142.009(d) in conjunction with section 552.101.

We further find that none of the information in items 2 through 4 is protected by constitutional or common-law privacy, except, possibly, for some of the information that is confidential under section 142.009(d). Therefore, you must release all information in those items that is not confidential under section 142.009(d).

You claim that items 7, 8, 9, 10, 11(c), 11(d), 12, and 13 also are protected by section 142.009(d).

Item 7 is a "Report of Contact" relating to the underlying complaint investigation under section 142.009(c); the requestor refers to this document as "Report of Contact of the Survey made by Theresa Centeno." We conclude that this report is confidential in its entirety under section 142.009(d) and may not be disclosed without the consent of each person identified therein. *See* Health & Safety Code § 142.009(d); Gov't Code §§ 552.101, .352.

You did not submit to us for consideration items 8, 9, and 10, which the requestor refers to as the "Report of Contact of the investigation made by Theresa Centeno, if distinct from the Report of the Survey," the "Report of Contact of the Investigation made by Theresa Centeno, if distinct from the Report of the Survey," and the "Report of Contact of the Investigation made by Beverly Terry, if distinct from the Report of the Survey." You do not indicate whether these documents exist. If they do, we are unable to determine how much, if any, of them is excepted by section 552.101. You must not release any portions of items 8, 9, and 10 that are protected by section 142.009(d) or any other law of confidentiality. *See* Gov't Code § 552.352. You must release all portions of those items that are not protected as confidential information. *See id.* § 552.353.

The request in item 11 is for the "Complete Record of the survey, including without limitation, a) the statement of deficiencies; b) plan of correction; c) all correspondence; and d) all TDH memoranda." The request in item 12 is for the "Complete Record of the Investigation, including without limitation, a) all GSI documents photocopied by Ms. Centeno; b) all original records taken by Ms. Centeno; c) all correspondence; and d) all TDH memoranda." Regarding items 11(c), 11(d), and 12, we again note that the requested information relates only indirectly to an investigation under that section; more directly, it relates to an investigation of the investigation.

Having reviewed the information, we find that some of it is not a "record[] . . . used or developed in an investigation made under" section 142.009(d). Only those portions of items 11(c), 11(d), and 12 containing information that was used or developed by the department in the course of the underlying investigation under section 142.009 are confidential under section 142.009(d). You must withhold those portions unless each person identified in the information consents. See Health & Safety Code § 142.009(d); Gov't Code § 552.352. The rest of the information in those items is not excepted from disclosure by section 142.009(d) in conjunction with section 552.101 and must be released. See Gov't Code § 552.353.

The request in item 13 is for the "Complete Record of all actions taken and recommendations made in connection with the Complaint." The documents that you submitted for review in response to the request in item 13 do not contain any information that was used or developed in the underlying investigation under section 142.009. Those documents are not excepted from disclosure by section 142.009(d) in conjunction with section 552.101. You therefore must release those documents. See Gov't Code § 552.353.

Regarding items 15 through 17, you claim that the information responsive to those requests is protected by section 142.009(d) and constitutional and common-law privacy in conjunction with section 552.101 and also the deliberative process privilege of section 552.111. Those items are as follows:

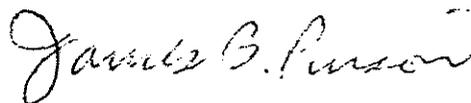
- 15) All complaints made to TDH against Beverly Terry by home health agencies; or a written statement from you that there are none.
- 16) All complaints made to TDH against Theresa Centeno by home health agencies; or a written statement from you that there are none.
- 17) All documentation concerning the original complaint against GSI which resulted in the TDH investigation, including without limitation, the date the complaint was made, the manner or method by which the complaint was made; the substance of the complaint; and the identity of the complainant.

From our review of the information submitted in response to item 15, we cannot discern that any of the information was used or developed in an investigation under section 142.009. You have not met your burden of showing that any of the information is confidential under that section and therefore is excepted from disclosure by section 552.101. Nor is any of the information confidential under the doctrines of constitutional and common-law privacy. Finally, none of the information is excepted from required public disclosure by the deliberative process privilege of section 552.111. We conclude that you must release all the information responsive to item 15. Regarding item 16, we conclude that none of the exceptions you raise apply to the submitted information, which is a copy of the letter of complaint from Ms. Beth B. Sherfy to Ms. Nance Stearman dated

March 6, 1995. Finally, the information you submitted in response to item 17 is a copy of the intake worksheet and report created by the department to record the complaint that initiated the underlying investigation under section 142.009, along with a copy of the letter from the department to the complainant acknowledging receipt of the complaint. Those documents are confidential under section 142.009(d) and may not be released without the consent of each person identified therein, *see* Gov't Code § 552.352.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



James B. Pinson  
Assistant Attorney General  
Open Records Division

JBP/RHS/rho

Ref.: ID# 33216

Enclosures: Submitted documents

cc: Ms. Beth Sherfy  
Attorney and Counselor at Law  
P. O. Box 700592  
San Antonio, Texas 78270-0592  
(w/o enclosures)