



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 5, 1997

Mr. John T. Richards
Assistant General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR97-1995

Dear Mr. Richards:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 108399.

The Texas Department of Health (the "department") received a request from a representative of Home Town Home Health ("HTHH") for investigative documents relating to HTHH. You contend that the requested documents are excepted from disclosure based on section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code.¹ We have considered the exception you claim and have reviewed the documents at issue.

You state that HTHH is a home and community support agency licensed by the department pursuant to chapter 142 of the Health and Safety Code. Section 142.009 of the Health and Safety Code authorizes the department to conduct investigations of complaints regarding the provision of home health, hospice, or personal assistance services.

Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses confidentiality provisions such as Health and Safety Code section 142.009(d), which provides:

(d) the reports, records, and working papers used or

¹The department failed to request an open records decision from this office within ten days of receiving HTHH's request, a fact that generally results in the presumption that the requested information is presumed public. See Gov't Code 552.302. However, the applicability of a confidentiality provision is sufficient to overcome that presumption. See *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). Therefore, we will consider your argument that the requested documents are confidential by law.

(d) 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 deficiencies found without identifying a person, other than the home and community support services agency.

We agree that the documents used or developed during a department investigation under chapter 142 are generally confidential with limited exceptions.

We note, however, that an agency that has been investigated by the department has a statutory right of access to certain information relating to the investigation. Section 142.009(g) provides as follows:

- (g) After a survey of a home and community support services agency by the department, the department shall provide to the chief executive officer of the agency:
 - (1) specific and timely written notice of the preliminary findings of the survey; including
 - (A) the specific nature of the survey;
 - (B) any alleged violation of a specific statute or rule;
 - (C) the specific nature of any finding regarding an alleged violation or deficiency; and
 - (D) if a deficiency is alleged, the severity of the deficiency;
 - (2) information on the identity, including the signature, of each department representative conducting, reviewing, or approving the results of the survey and the date on which the department representative acted on the matter; and

- (3) if requested by the agency, copies of all documents relating to the survey maintained by the department or provided by the department to any other state or federal agency that are not confidential under state law.

It appears that the department has completed its investigation of HTHH. Therefore, we conclude that section 142.009(g) requires the department to provide HTHH with copies of the requested documents to the extent that the release of the information contained in these documents is not prohibited by the Medical Practice Act (the "MPA"), article 4495b, V.T.C.S., as discussed below. *See also* 25 T.A.C. § 155.51(h).

Section 5.08(b) of the MPA provides as follows:

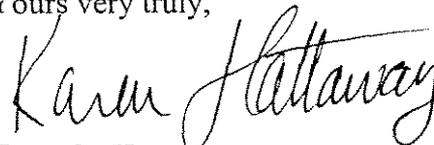
- (b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

We have marked information in the requested documents that appears to be covered by section 5.08(b) of the MPA. This information may be released only in accordance with the MPA. Open Records Decision No. 598 (1991). *See* V.T.C.S. art. 4495b, §§ 5.08(c), (j).

Finally, you indicate by markings on one of the submitted documents that an individual's name and address is excepted from disclosure under section 552.101 in conjunction with the common-law right to privacy. We disagree. Information is protected by the doctrine of common-law privacy if (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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The marked information is not highly intimate and embarrassing and, therefore, is not excepted from disclosure under section 552.101 in conjunction with common-law privacy.²

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 regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/rho

Ref: ID# 108399

Enclosures: Marked documents

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