



August 30, 1999

Ms. Katherine Mintor Cary
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR99-2443

Dear Ms. Cary:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 126519.

The Medicaid Fraud Control Unit of the Office of the Attorney General ("MFCU") received a request for records and investigative material pertaining to named nursing facilities and individuals. You seek to withhold the responsive information under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. You have submitted representative samples of the information at issue.¹

Section 552.101 of the Government Code protects from public disclosure information that is made confidential by law. You contend that some of the submitted information is made confidential by section 242.127 of the Health and Safety Code. That section provides that "[a] report, record, or other working paper used or developed in an investigation under [subchapter E, chapter 242 of the code] is confidential and may be disclosed only for purposes consistent with rules adopted by the Texas Board of Human Services or the "designated agency." *See* Health & Safety Code § 242.126 (investigation of complaint of abuse or neglect by Department of Human Services or designated agency). This office has

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

determined in prior decisions that the confidentiality provision in section 242.127 extends to MFCU's reports, records, or working papers used or developed in an investigation under subchapter E. *See, e.g.*, Open Records Letter No. 95-1415 (1995). We agree that the information for which you claim the protection section 242.127 is subject to that section. Since you have not advised of any rules permitting disclosure of the information at issue, we conclude that the information is confidential under section 242.127 and must be withheld in its entirety.

We consider your other claims only with respect to the submitted information which we have not determined may be withheld under section 242.127 of the Health and Safety Code. Section 552.103(a) of the Government Code, known as the litigation exception, excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986) and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

You have not, in our opinion, established that the information at issue relates to pending or anticipated litigation. Therefore, you may not withhold the information under this provision.

Section 552.108 of the Government Code excepts from required public disclosure

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state [and]

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

In our opinion, you have not established that the release of the information at issue would interfere with law enforcement or that the information otherwise falls within the scope of section 552.108.

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). 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 our opinion, you have not established that any of the information at issue contains advice, opinion or recommendation such as to be within the scope of section 552.111. None of the information may be withheld under that provision.

We note, however, that the information at issue contains social security numbers. This office concluded in Open Records Decision No. 622 (1994) that amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(vii), make confidential any social security number obtained or maintained by any “authorized person” pursuant to any provision of law, enacted on or after October 1, 1990, and that any such social security number is therefore excepted from required public disclosure by section 552.101 of the Government Code, which excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Therefore, you must withhold the social security numbers that were obtained or maintained by an “authorized person” pursuant to any provision of law, enacted on or after October 1, 1990. Except for such social security numbers, you must release the portions of the submitted information which we have not found to be protected under section 242.127 of the Health and Safety Code.

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 questions about this ruling, please contact our office.

Sincerely,



William Walker
Assistant Attorney General
Open Records Division

WMW/ch

Ref: ID# 126519

Encl. Submitted documents

cc: Ms. Jo Allison Stasney
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(w/o enclosures)