



April 26, 2000

Mr. William T. Buida
Supervising Attorney
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2000-1621

Dear Mr. Buida:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 134636.

The Texas Department of Human Services (the "department") received a request for a complete copy of the investigative file and related documents concerning the termination of Eldercare Home Health's Provider Agreement. You claim that the information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.¹

Section 552.301 of the Government Code requires a governmental body to release requested information or to request a decision from the Attorney General within 10 business days of receiving a request for information the governmental body wishes to withhold. It appears from the documents submitted to this office that the department received the request for information on January 26, 2000. You did not request a decision from this office until February 28, 2000. Consequently, you failed to request a decision within the 10 business days required by section 552.301(b) of the Government Code. When a governmental body fails to request a decision within 10 business days of receiving a request for information, the information at issue is presumed public. Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest

¹You have cited, on a portion of the submitted information, the exception from disclosure which you claim is applicable to that document. We have marked your notations in accordance with our ruling. The remaining documents must be released to the requestor.

to withhold the information to overcome this presumption. *See id.* Exception from disclosure under section 552.101 is such a compelling interest.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. You assert that some of the documents at issue are excepted from disclosure under section 142.009(d) of the Health and Safety Code, in conjunction with section 552.101 of the Government Code. You indicate that the records you marked are reports, records, and working papers that were used or developed during the investigation made under section 142.009. Based upon our understanding that there has been no consent for release and that no other exception to disclosure is applicable, we agree that the documents in question are confidential in their entirety under section 142.009(d).

In addition, some of the information at issue is made confidential by other statutes. Section 159.002(b) of the Texas Occupations Code protects from disclosure “[a] record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician.” The documents you submitted to this office include medical records, access to which is governed by provisions outside the Public Information Act. Medical records may only be released as provided by chapter 159 of the Occupations Code. Open Records Decision No. 598 (1991). The Occupations Code provides for both confidentiality of medical records and certain statutory access requirements. *Id.* at 2. We agree that some of the submitted documents fall within the protection of chapter 159 and have marked the records accordingly.

Section 12.003 of the Human Resources Code provides:

(a) Except for purposes directly connected with the administration of the department’s assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, or any information concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties.

(b) An offense under this section is a Class A misdemeanor.

In your brief, you assert that if any of the clients of the Chapter 142 organization are receiving Medicaid services from the organization, information concerning these persons is confidential under section 12.003 in conjunction with section 552.101 of the Government Code. We agree. Therefore, you must withhold such information from disclosure.

The disclosure of one of the responsive documents is governed by federal regulation. Section 431.115 of title 42 of the Code of Federal Regulations requires that the state survey agency make publicly available the findings from surveys of health care facilities in which Medicaid recipients may receive services. 42 C.F.R. § 431.115(a), (b). The pertinent parts of written documents furnished by the health care provider to the survey agency that relate to the reports and findings of the survey must not be released, however, until the provider has had a reasonable opportunity to comment on the reports, those comments have been incorporated into the reports and the reports have been de-identified as to individual patients, individual health care practitioners or other individuals. 42 C.F.R. § 431.115(h)(2). Assuming all statutory requirements have been met, the document at issue, titled “Response to Inaccurate Listing of Deficiencies for Survey Completed December 1, 1999 by the Texas Department of Human Services,” appears to be a document that must be released under the disclosure provisions of 42 C.F.R. § 431.115. We have marked the portions of the document that must be redacted prior to release.

Finally, we note that the submitted records include some documents that are public. Federal regulations require the department to release the HCFA 2567, statement of deficiencies and plan of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 at 5 (1988). These forms must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be

provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/nc

Ref: ID# 134636

Encl. Submitted documents

cc: Ms. Rebecca Hernandez
Administrator
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P.O. Box 2028
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(w/o enclosures)