



August 3, 2000

Mr. William T. Buida
Supervising Attorney
Department of Human Services
701 West 51st. Street
P O Box 149030
Austin Texas 78714-9030

OR2000-2944

Dear Mr. Buida:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 137870.

The Texas Department of Human Services (the "department") received a request for "all information in the possession of [the department] regarding any ownership problems, licensing problems or any other problems with [Great American In-Home Health Care, Inc.] during the period of January 1, 1998 through December 31, 1998." Among other arguments, you assert that some of the responsive information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code. We have considered the exception you assert and reviewed the submitted information.

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 statute. Section 142.009(d) of the Health and Safety Code provides the following:

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;
- (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;
- (6) on a form required by a federal agency if:
 - (A) the information does not reveal the identity of an individual, including a patient or a physician or other medical practitioner;
 - (B) the service provider subject to the investigation had a reasonable opportunity to review the information and offer comments to be included with the information released or made public; and
 - (C) the release of the information complies with any other federal requirements

The information you have provided indicates that the submitted records you seek to withhold constitute reports, records, and working papers that were used or developed during an investigation made under section 142.009(d). Based upon our understanding that there has been no consent for release and that no other exception to confidentiality is applicable in this instance, we agree that the submitted intake sheets, complaint reports, and reports of contact are confidential in their entirety. We also agree that the client identifying information and complainant identifying information that you have marked for redaction is also confidential under section 552.101 in conjunction with section 142.009(d) of the Health and Safety Code.

The submitted records also include draft copies of HCFA 2567 forms, which you indicate were never submitted to the provider for comment. You seek to withhold the draft copies in their entirety. Federal regulations require the department to release completed HCFA 2567 forms containing a 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); *see also* Health & Safety Code § 142.009(d)(6). Based upon your representation that the HCFA 2567 forms at issue constitute drafts that were not submitted to the provider, we understand that the provider has not had a reasonable opportunity to review the drafts and thereby has offered no responsive comments. We also understand that final copies of the HCFA 2567 forms were submitted to the provider and have been released to the requestor. The draft copies of the HCFA forms therefore constitute working papers that were used or developed during an investigation made under section 142.009(d). As such, the drafts copies constitute information that must also be withheld under section 552.101.

In summary, based on your representations to this office, we agree that the information you have not released to the requestor must be withheld under section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code.

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,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/pr

Ref: ID# 137870

Encl. Submitted documents

cc: Mr. Rick L. Powell
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(w/o enclosures)