



November 6, 2000

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

OR2000-4332

Dear Ms. Joe:

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# 140942.

The Elder Law and Public Health Division ("ELD") of the Office of the Attorney General received a request for "any and all surveyor notes and worksheets of surveyor Janet Chris McDaniel, R.N., pertaining to the TDHS survey conducted at Kenwood Nursing Home, entrance date 9/29/98 and exit date 10/12/98." You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. You have submitted the responsive information for our review. We have considered the exception you claim and the arguments submitted by the requestor and the Texas Department of Human Services (the "department").

You assert that the responsive information is excepted from public disclosure pursuant to section 552.101 of the Government Code in conjunction with section 242.127 of the Health and Safety Code. Section 552.101 of the Government Code 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. Subchapter E of chapter 242 of the Health and Safety Code pertains to reports of abuse and neglect in convalescent and nursing home facilities. Section 242.127 of the Health and Safety Code provides that "[a] report, record, or working paper used or developed in an investigation made under [subchapter E, chapter 242] and the name, address, and phone number of any person making a report under [subchapter E] are confidential and may be disclosed only for purposes consistent with the rules adopted by the [Texas Board of Human Services] or the designated agency." *See also id.* § 242.126 (investigation of complaint of abuse or neglect by department or designated agency).

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You explain that the documents at issue are limited to handwritten notes made at or near the time of an investigation conducted by a department surveyor. You state that following the investigation, the department referred the facility to the Office of the Attorney General for civil and injunctive relief. *See* 40 T.A.C. 19.2110. You advise that ELD is handling the matter and that a lawsuit against the subject facility is currently pending. After reviewing the information at issue, we conclude that it is confidential under section 242.127.

Raising Rule 511 of the Texas Rules of Evidence, the requestor asserts that any confidentiality privilege has been waived since the documents at issue have been voluntarily produced to the defendant facility in the pending lawsuit. We disagree. The documents at issue involve residents who receive Medicaid assistance. Federal Medicaid law and regulations require that a state plan for medical assistance must provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the plan. *See* 42 U.S.C. § 1396a(a)(7); 42 C.F.R. § 431.301. In meeting these federal requirements, Texas law provides the following safeguards:

(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.*

Human Resources Code § 12.003 (emphasis added). Federal regulations provide that the purposes directly related to plan administration include “[c]onducting or assisting an investigation, prosecution, or civil or criminal proceeding related to the administration of the plan.” 42 C.F.R. § 431.302(d). Therefore, as the documents at issue were provided to the defendant facility in a civil proceeding related to the administration of the plan, the statutory confidentiality protections attached to the documents have not been waived. Accordingly, the responsive information is excepted in its entirety pursuant to section 552.101 of the Government Code in conjunction with section 242.127 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).

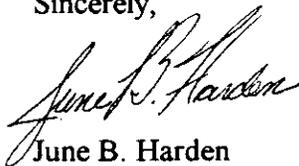
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

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,



June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/er

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Ref: ID# 140942

Encl: Submitted documents

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