



July 19, 2001

Ms. Margaret A. Roll  
Assistant General Counsel  
Texas Department of Human Services  
P.O. Box 149030  
Austin, Texas 78714-9030

OR2001-3132

Dear Ms. Roll:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149633.

The Texas Department of Human Services (the “department”) received a request for a complaint made against a home and community support services agency licensed by the department. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you raise and have reviewed the information you submitted.

We first address the department’s failure to comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information may be withheld from public disclosure. Section 552.301(b) provides that “[t]he governmental body must ask for the attorney general’s decision and state the exceptions that apply . . . not later than the 10<sup>th</sup> business day after the date of receiving the written request [for information].” Section 552.302 provides that “[i]f a governmental body does not request an attorney general decision as provided by Section 552.301 . . . the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.”

You inform this office that the department received the request for the information at issue on April 25, 2001. You requested this decision by letter dated May 11, 2001. You concede that the department thus failed to comply with section 552.301. Consequently, the requested information is presumed to be public and must be released under section 552.302, unless there is a compelling reason to withhold any of the information from public disclosure. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ).

The presumption that information is public under section 552.302 generally can be overcome by demonstrating that the information is deemed to be confidential by some source of law outside chapter 552 of the Government Code, and therefore is excepted from disclosure under section 552.101, or that third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982).

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 exception protects information that is made confidential by another statute. You claim that the requested information is confidential under section 142.009 of the Health and Safety Code. Chapter 142 of the Health and Safety Code governs home and community support services. Section 142.009(c) authorizes the department to investigate a complaint regarding the provision of home health, hospice, or personal assistance services. Section 149.002(d) provides as follows:

(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;
- (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 requirement; or

(7) as provided by Section 142.0092.

Health & Safety Code § 142.009(d). You represent to this office that “[t]he [requested] complaint itself is a record used in an investigation” under section 142.009. You also state that none of the exceptions to the confidentiality requirement under section 142.009(d) applies to the information at issue. You acknowledge that under section 142.009(g), the department must provide certain information to the chief executive officer of a home and community support services agency after a survey of the agency unless the information is confidential under state law. You inform this office, however, that the requestor is not the chief executive officer of the agency that was the subject of the requested complaint. Based on your representations, we agree that the requested information constitutes “reports, records, and working papers used or developed in an investigation” under section 142.009 of the Health and Safety Code. We conclude that this information is confidential under section 142.009(d) of the Health and Safety Code and must be withheld from the requestor under section 552.101 of the Government 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).

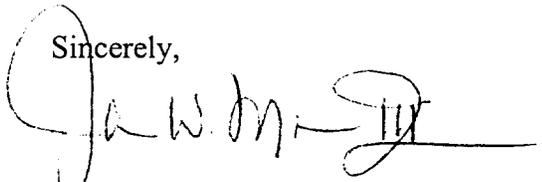
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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

A handwritten signature in black ink, appearing to read "J.W.M. III", with a long horizontal flourish extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 149633

Enc: Submitted documents

c: Ms. Clememte Saenz  
Tristan's Home Health Care, Inc.  
1494 Hillcrest  
San Antonio, Texas 78228  
(w/o enclosures)