



October 29, 2001

Ms. Julie Reagan Watson  
Assistant General Counsel  
Texas Department of Human Services  
P.O. Box 149030  
Austin, Texas 78714-9030

OR2001-4946

Dear Ms. Watson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154067.

The Texas Department of Human Services (the "department") received a request for information pertaining to a specified home health care agency. You claim that the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code. We have considered the exception you claim and have reviewed the submitted information.

Initially, we note that you did not comply with the procedural requirements of section 552.301 of the Government Code. Section 552.301 provides that a governmental body that requests an attorney general decision must, within a reasonable time but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general written comments stating the reasons why the stated exceptions apply that would allow the requested information to be withheld from disclosure. *See Gov't Code* § 552.301(e)(1)(A). The department received the requestor's written request for information on August 9, 2001. However, as you acknowledge, the department did not submit written comments to us pursuant to section 552.301(e)(1)(A) until September 10, 2001, more than fifteen business days after the department received the written request. Therefore, we conclude that the department failed to meet its fifteen business day deadline under section 552.301 of the Government Code.

When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g 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 demonstrate a compelling interest why the requested information must be withheld from disclosure to overcome this presumption. *See id.* Normally, a compelling interest is some other source of law that makes the information confidential or a demonstration that third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Since you claim that the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code, we will address your claims under that exception.

You claim that Attachment C is excepted from disclosure in its entirety pursuant to section 552.101 in conjunction with section 142.009(d) of the Health and Safety Code.<sup>1</sup> Section 142.009(d) provides:

The reports, records, and working papers used or developed in an investigation made under [Chapter 142] 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;

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<sup>1</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by other statutes.

(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 state that the documents in Attachment C are records and working papers used or developed in an investigation under Chapter 142 of the Health and Safety Code. We have no basis for concluding that any of the exceptions to confidentiality in section 142.009(d) apply to these documents. Therefore, based on your representation and our review of Attachment C, we conclude that you must withhold Attachment C from disclosure in its entirety as confidential information pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code.

You claim that portions of Attachment D are excepted from disclosure pursuant to section 552.101 in conjunction with federal regulations and section 142.009(d)(6) of the Health and Safety Code. Federal regulations require the department to release the submitted HCFA 2567 forms in Attachment D, which contain 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; *see also* Open Records Decision No. 487 at 5 (1988); Health & Safety Code § 142.009(d)(6). You explain that a representative of the investigated agency has offered comments in response to each evaluation and, therefore, has had a reasonable opportunity to review the report. We agree that the signature of the agency's representative on the forms, together with the comments, indicate that the investigated agency has had a reasonable opportunity to review the report and offer comments. Based on your representations and our review of Attachment D, we conclude that the department must withhold the name of the individual highlighted in the federal Forms HCFA 2567 from disclosure pursuant to section 552.101 of the Government Code in conjunction with federal regulation and section 142.009(d)(6) of the Health and Safety Code. The department must release the remaining information in Attachment D to the requestor.

You claim that a portion of the information in Attachment E is excepted from disclosure pursuant to section 552.101 in conjunction with section 142.009(d)(5) of the Health and Safety Code. You acknowledge that section 142.009(d)(5) requires the department to release the state forms in Attachment E. However, you contend that the department must withhold the name of the individual contained within each form from disclosure pursuant to

section 142.009(d)(5). Based on your representations and our review of Attachment E, we conclude that the department must withhold the names of the individuals highlighted in the state forms from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d)(5) of the Health and Safety Code.

You claim that a portion of the information in Attachment E is made confidential under the Medical Practice Act, (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002. The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. *See* Open Records Decision No. 598 (1991). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991). Based on our review of Attachment E and your arguments, we conclude that Attachment E contains no information that is subject to the MPA. Accordingly, the department must release the remaining portions of Attachment E to the requestor.

Finally, you claim that Attachment F is excepted from disclosure in its entirety pursuant to section 552.101 in conjunction with section 142.004(d) of the Health and Safety Code. Section 142.004 provides the requirements for applying "for a license to provide home health, hospice, or personal assistance services." Section 142.004(d) provides that "[i]nformation received by the department relating to the competence and financial resources of the applicant or controlling person with respect to the applicant is confidential and may not be disclosed to the public." You claim that the submitted information in Attachment F pertains to the financial resources of the specified home health care agency and that the department received this information pursuant to the requirements of section 142.004. Based on our review of Attachment F and your arguments, we agree that the submitted information in Attachment F is confidential and, thus, is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 142.004(d) of the Health and Safety Code.

In summary, the department must withhold Attachment C from disclosure in its entirety pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code. The department must withhold the name of the individual highlighted in the federal Forms HCFA 2567 in Attachment D from disclosure pursuant to section 552.101 in conjunction with federal regulation and section 142.009(d)(6) of the Health and Safety Code. The department must release the remaining portions of Attachment D to the requestor. The department must withhold the names of the individuals highlighted in the state forms in Attachment E from disclosure pursuant to section 552.101 in conjunction with section 142.009(d)(5) of the Health and Safety Code. The department must release the remaining portions of Attachment E to the requestor. The department must withhold Attachment F from disclosure in its entirety pursuant to section 552.101 in conjunction with section 142.004(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).

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,



Ronald Bounds  
Assistant Attorney General  
Open Records Division

RJB/seg

Ref: ID# 154067

Enc: Submitted documents

cc: Ms. Erin Hillier  
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(w/o enclosures)