



February 28, 2002

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

OR2002-0977

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# 159101.

The Texas Department of Human Services (the "department") received a request for copies of the most recent surveys/complaints registered with the State of Texas for five named hospice providers in the greater Dallas area. You state that some of the requested information has been released to the requestor. However, you claim that portions of the requested information are excepted from disclosure under section 552.101 of the Government Code in conjunction with common law privacy, and various state and federal statutes. We have considered the exceptions you claim and reviewed the submitted information.

Among other things, you have withheld from the requestor the complaint investigation files and identifying information in the Health Care Financing Administrative ("HCFA") forms. In Open Records Letter No. 2001-5348 (2001), we concluded that the department could withhold from disclosure any requested reports, records, and working papers that were used or developed during Home and Community Support Services Agency investigations conducted under section 142.009 of the Health and Safety Code without the necessity of requesting a decision from our office with respect to this type of information. In that ruling, we also concluded that the department could withhold from disclosure any identifying information of individuals contained in requested HCFA 2567 Forms. Because the facts, law, and circumstances surrounding this ruling do not appear to have changed, we find that you may rely on this ruling as a previous determination to withhold from disclosure based on section 552.101 of the Government Code and section 142.009 of the Health and Safety

Code any requested reports, records, and working papers that were used or developed during Home and Community Support Services Agency investigations. You may also rely on this ruling to withhold any identifying information of individuals contained in requested HCFA 2567 Forms. *See* Gov't Code § 552.301(a); *see also* Open Records Decision No. 673 (2001).

As for the remaining information at issue, pursuant to section 552.301(e)(1), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). As you acknowledge, the department failed to submit the written comments and the requested information within the fifteen business day period required by section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301(e) results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You argue that the submitted information is excepted under section 552.101 of the Government Code. Section 552.101 of the Government Code provides a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Therefore, we will address your asserted exceptions.

You state that you have released the signed HCFA 2567 forms with redaction of any information that identifies individuals in accordance with Open Records Letter Ruling No. 5348 (2001). You claim, however, that the unsigned HCFA 2567 forms, submitted as Attachment B, must be withheld from public disclosure under section 552.101 in conjunction with section 142.009 of the Health and Safety Code. Section 552.101 encompasses information protected by other statutes. Section 142.009(d) provides as follows:

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;
 - (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). In addition, federal law requires the department to release the forms with redaction of any information that identifies an individual after the service provider has had an opportunity to offer comments. *See* 42 C.F.R. §401.126, .133(b). You state that the documents in Attachment B constitute reports, records, and working papers that were used or developed during an investigation made under section 142.009(c) of the Health and Safety Code. You inform us that these forms do not contain the signature of an agency representative and that, therefore, you understand that the service provider has not had an opportunity to review the information and offer comments as provided by section 142.009(d)(6)(B) of the Health and Safety Code. You have provided no information that would allow us to conclude that any other exception to confidentiality in section 142.009(d) applies in this instance. Based on your representations and our review of the submitted information, we conclude that the department must withhold the information in Attachment B pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code.

Next, you contend that certain information in the state forms submitted as Attachment C is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 142.009(d)(5) of the Health and Safety Code. As noted above, section 142.009(d)

states that “reports, records, and working papers used or developed in an investigation . . . are confidential and may not be released or made public except: (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.” Health & Safety Code § 142.009(d)(5). You acknowledge that section 142.009(d)(5) requires the department to release this state form; however, you contend the department must withhold any identifying information of an individual contained within the form. You claim that the identifying information of the representatives of the facility in the forms is confidential under section 142.009(d)(5). As we understand that the representatives here are not the agency owners, we agree that the identifying information of the agency’s representatives are confidential under section 142.009(d)(5). *See* Health & Safety Code §142.001(12) (defining “home and community support services agency”).

In addition, you contend that a portion of the information in Attachment C 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(b), (c). The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Thus, the MPA governs access to medical records. 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); Open Records Decision No. 598 (1991). Based on our review of Attachment C and your arguments, we agree that a portion of the highlighted information in Attachment C is subject to the MPA. We have marked the information that the department may release only in accordance with the MPA.

Finally, you argue that some of the information in Attachment C is protected by section 552.101 in conjunction with common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in

Industrial Foundation included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. We have marked information in Attachment C which contains information subject to common law privacy. Therefore, the marked portions of Exhibit C must be withheld under section 552.101 in conjunction with common law privacy.

In summary, the department must withhold the information in Attachment B 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 identifying information of the agency's representatives, which is located in the forms in Attachment C, pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d)(5) of the Health and Safety Code. The department must withhold the information in Exhibit C, which we have marked, pursuant to section 552.101 in conjunction with common law privacy. Finally, the information which we have marked in Attachment C may be released by the department only in accordance with the MPA. The department must release the remaining information.

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).

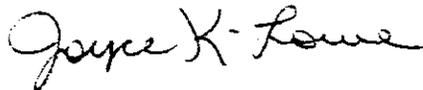
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Joyce K. Lowe
Assistant Attorney General
Open Records Division

JKL/sdk

Ref: ID# 159101

Enc: Submitted documents

c: Mr. Kurt Wiese
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(w/o enclosures)