



July 8, 2002

Mr. Tim Molina  
Assistant Attorney General  
Assistant Public Information Coordinator  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

OR2002-3665

Dear Mr. Molina:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 165270.

The Office of the Attorney General (the "OAG") received a request for four categories of information pertaining to a named nursing facility, as well as for information pertaining to a named individual who was a resident of the facility. You have submitted a brief to this office on behalf of the Elder Law and Public Health Division of the OAG ("Elder Law"). Elder Law informs us that the OAG has released to the requestor some of the information responsive to this request. However, you have submitted to our office the following exhibits as representative samples of the records that the OAG seeks to withhold: Exhibit 2 (handwritten surveyor notes); Exhibit 3 (a resident identifier key); Exhibit 4 (medical records); Exhibit 5 (internal investigatory documents); Exhibit 6 (facility records copied by the surveyors during their investigation); Exhibit 7 (correspondence between the Texas Department of Human Services (the "department") and the facility); and Exhibit 8 (correspondence between the department and the OAG). Elder Law contends that these records are excepted from public disclosure pursuant to sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions claimed and reviewed the submitted representative sample of information.<sup>1</sup>

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open

Section 552.101 of the Government Code protects from public disclosure information that is made confidential by law. Section 242.127 of the Health and Safety Code provides that “[a] report, record, or other working paper used or developed in an investigation under [subchapter E, chapter 242] is confidential and may be disclosed only for purposes consistent with rules adopted by the Texas Board of Human Services or the “designated agency.” See Health & Safety Code § 242.126 (investigation of complaint of abuse or neglect by department or designated agency). In addition, the department adopted section 19.2010 of title 40 of the Texas Administrative Code, which applies to investigations of complaints of abuse, neglect, and exploitation at nursing facilities and related institutions. Section 19.2010 provides in part as follows:

(a) Confidentiality. All reports, records, and working papers used or developed by the [department] in an investigation are confidential and may be released to the public only as provided below.

(1) Completed written investigation reports are open to the public, provided the report is de-identified. The process of de-identification means removing all names and other personally identifiable data, including any information from witnesses and others furnished to [the department] as part of the investigation.

Elder Law informs us that the submitted records are working papers, records, and/or reports that were created or used in an investigation of a nursing home conducted by the department. We therefore agree that the documents submitted as Exhibits 2, 3, 4, 5, 6, and 7 are subject to section 242.127 of the Health and Safety Code. Because Elder Law states that no regulation has been adopted permitting disclosure of these exhibits, we conclude that these exhibits are made confidential under section 242.127 and therefore must be withheld in their entirety pursuant to section 552.101 of the Government Code.<sup>2</sup>

Elder Law also argues that the information in submitted Exhibit 8 is excepted under section 552.107. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by

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records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

<sup>2</sup>Because we resolve this part of your request under section 242.127 of the Health and Safety Code, we need not address the applicability of the other exceptions you raised for this information.

a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). Upon review of the information submitted as Exhibit 8, we conclude that this information comes within the attorney-client privilege, and thus, it is excepted from disclosure under section 552.107(1).

To summarize, the OAG must withhold the information in submitted Exhibits 2 through 7 under section 552.101 in conjunction with section 242.127 of the Health and Safety Code. The information submitted as Exhibit 8 may be withheld under section 552.107(1). As we are able to make these determinations, we need not consider the applicability of section 552.103.

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,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/jh

Ref: ID# 165270

Enc. Submitted documents

c: Mr. J. Greg Coontz  
The Law Office of J. Greg Coontz  
217 Market Street  
Burleson, Texas 76028  
(w/o enclosures)