



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 23, 2002

Mr. Steve Aragón
General Counsel
Texas Health & Human Services Commission
P.O. Box 13247
Austin, Texas 78711-3247

OR2002-7377

Dear Mr. Aragón:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#174178.

The Texas Health and Human Services Commission (the "commission") states that it received a request for fourteen items relating to its investigation of Choice Homecare. You claim that Open Records Letter No. 2002-1605 (2002) represents a previous determination with respect to items 1, 2, 3, 5, 9, and 11, that items 1, 2, 3, 4, and 12 are inappropriate requests for a governmental body to perform legal research, that the commission does not maintain information responsive to items 6 and 14, and finally, that information responsive to items 7, 8, and 13 is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. Because the commission does not object to the release of information responsive to item 10, the commission must release this information. Gov't Code §§ 552.301, .302. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

You indicate that this office previously determined in Open Records Letter No. 2002-1605 that the same information requested in items 1, 2, 3, 5, 9, and 11 was excepted from disclosure under section 552.108 of the Government Code. Because the information ruled upon in Open Records Letter No. 2002-1605 encompasses the same information responsive to the requests in items 1, 2, 3, 5, 9, and 11, and the facts and circumstances surrounding that ruling do not appear to have changed, you may rely upon Open Records Letter No. 2002-1605 as a previous determination to withhold the information requested in items 1, 2, 3, 5, 9, and 11. With regard to items 1, 2, 3, 4, and 12, we agree that the commission is not required to perform legal research. Open Records Decision No. 563 (1990).

We next address the commission's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Further, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general 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. You state that the present request for information was made on September 30, 2002. The commission did not send its request for a decision from this office until October 17, 2002, and did not submit a copy of the specific information requested or a representative sample thereof until October 25, 2002. Moreover, to date the commission has not submitted to this office a copy of the written request for information. Consequently, the commission failed to comply with the requirements of both section 552.301(b) and section 552.301(e) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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 contend that the information requested in items 7, 8, and 13 is excepted under sections 552.101, 552.103, and 552.108 of the Government Code. However, you have not demonstrated a compelling reason for withholding this information under section 552.103 or 552.108. *See Open Records Decision No. 473 at 2 (1987)* (discretionary exceptions under the Public Information Act can be waived); *but see Open Records Decision No. 586 (1991)* (when a governmental body fails to timely seek an attorney general decision under the Public Information Act, the need of another governmental body may provide a compelling reason for withholding the requested information). Nevertheless, portions of the submitted information must be withheld under section 552.101 of the Government Code. *See Open Records Decision No. 150 (1976)* (confidentiality provisions and exceptions designed to protect the interests of third parties can provide compelling reasons for overcoming presumption of openness).

Section 552.101 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. You claim that section 12.003 of the Human Resources Code makes confidential the documents Bates numbered 0002-0005, 0008-0013, 0017-0035, and 0042-0094. Section 12.003 of the Human Resources Code provides:

(a) Except for purposes directly connected with the administration of the [Department of Human Service'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 of Human Services] or acquired by employees of the [Department of Human Services] in the performance of their official duties.

Hum. Res. Code § 12.003(a). In Open Records Decision No. 584 (1991), this office concluded that “[t]he inclusion of the words “or any information” juxtaposed with the prohibition on disclosure of the names of the [Department of Human Service's] clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients' names and addresses.” Consequently, it is the specific information pertaining to individual clients, and not merely the clients' identities, that is made confidential under section 12.003. *See* Hum. Res. Code § 21.012 (department shall provide safeguards restricting use or disclosure of information concerning applicants for or recipients of department's assistance programs to purposes directly connected with administration of programs); *see also* Open Records Decision No. 166 (1977). In this instance, it appears that release of the documents Bates numbered 0002-0005, 0008-0011, 0017-0035, and 0042-0094, would not be for purposes directly connected with the administration of the Department of Human Service's assistance programs. Therefore, this information is confidential under sections 12.003 and 21.012 of the Human Resources Code and must be withheld from disclosure under section 552.101 of the Government Code. However, portions of the documents Bates numbered 0012 and 0013 pertain to private pay clients and not Medicaid recipients. The information regarding private pay clients is not confidential under section 12.003. We have marked the portions of these documents that must be withheld on that basis, as well as an additional document that contains the name of a Medicaid recipient.

You claim that the documents Bates numbered 0121-0126 are covered by the Medical Practice Act (the “MPA”), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides, in relevant part, as follows:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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 § 159.004. Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370(1983), 343 (1982). Upon review of the submitted information, we conclude that some of the submitted information, which we have marked, constitutes medical records subject to the MPA.

In summary, the commission must withhold the documents Bates numbered 0002-0005, 0008-0011, 0017-0035, and 0042-0094, as well as the marked portions of the documents Bates numbered 0012, 0013, and 142A under section 552.101 in conjunction with section 12.003 of the Human Resources Code. The commission must also withhold the marked portions of the documents Bates numbered 0123-0125, 0128, and 0129, under the MPA. The commission must release the remaining documents.

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,



Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/seg

Ref: ID# 174178

Enc: Submitted documents

c: Mr. Mark Kennedy
Attorney & Counselor at Law
12225 Greenville Avenue, Suite 700
Dallas, Texas 75243
(w/o enclosures)