OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

June 2, 2003

Ms. Rebecca L. Payne
Assistant General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2003-3716

Dear Ms. Payne:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181991.

The Texas Department of Human Services (the "department") received a written request for "all complaints, statement of deficiencies, and plan of actions, regarding [certain] Odyssey Health Care, Inc. [("Odyssey")] facilities . . . during the time period dated March 1, 2002 through March 12, 2003." You state that some of the responsive information is being released to the requestor. You further state that, in accordance with Open Records Letter No. 2001-5348 (2001), you have withheld from the requestor "reports, records, and working papers" used or developed in the course of an investigation conducted under section 142.009 of the Health and Safety Code and information required to be withheld pursuant to section 142.009(d)(6)(A) of the Health and Safety Code. *See* Open Records Decision No. 673 (2001).[1] Accordingly, we need not further address the public nature of that information. You contend, however, that some of the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

[1]The five criteria for this type of "previous determination" are 1) the requested records or information at issue fall within a specific, clearly delineated category of information about which this office has previously rendered a decision; 2) the previous decision is applicable to the particular governmental body or type of governmental body from which the information is requested; 3) the previous decision concludes that the specific, clearly delineated category of information is or is not excepted from disclosure under the Act; 4) the elements of law, fact, and circumstances are met to support the previous decision's conclusion that the requested records or information at issue is or is not excepted from required disclosure; and 5) the previous decision explicitly provides that the governmental body or bodies to which the decision applies may withhold the information without the necessity of again seeking a decision from this office.

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 section encompasses information protected by other statutes. Section 142.009(d) of the Health and Safety Code provides as follows:

> The reports, records, and working papers used or developed in an investigation made under [section 142.009 of the Health and Safety Code] are confidential and may not be released or made public except:
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> (1) to a state or federal agency;
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> (2) to federal, state, or local law enforcement personnel;
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> (3) with the consent of each person identified in the information released;
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> (4) in civil or criminal litigation matters or licensing proceedings as otherwise allowed by law or judicial rule; or
>
> (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) (emphasis added). You have submitted to this office a number of "state forms" contemplated by section 142.009(d)(5) of the Health and Safety Code. We agree that the department must withhold the identifying information you have marked on the submitted state forms pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d)(5) of the Health and Safety Code.

You also contend that certain information contained in the submitted state forms is made confidential under the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part as follows:

> (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). 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). Information subject to the MPA must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). The submitted medical record information may be released only as provided under the MPA. Open Records Decision No. 598 (1991). You have highlighted information contained in the submitted records that you contend is confidential pursuant to the MPA. We agree that the information you highlighted may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

You also contend that certain information contained in the submitted documents is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the doctrines of common-law and constitutional privacy. Section 552.101 also protects information coming within the common-law and constitutional right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 678, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). We note, however, that because the remaining submitted information does not reveal the identity of any individual, no individual's privacy interest is implicated in this instance. Accordingly, we conclude that none of the submitted information may be withheld under section 552.101 in conjunction with the doctrines of common-law or constitutional privacy.

In summary, the department must withhold the information you have marked 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 may only release the highlighted medical record information in accordance with the MPA. The remainder of the submitted information must be released to the requestor, to include portions of the highlighted information that we have marked for release.

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 Dep't of Pub. 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,

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/RWP/seg

Ref: ID# 181991

Enc: Submitted documents

c: Mr. Mike Hernandez
3765 Armer Avenue
Boulder, Colorado 80305
(w/o enclosures)