



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 23, 2003

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

OR2003-6671

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# 188145.

The Texas Department of Human Services (the "department") received a request for "the 5 year or comprehensive deficiencies reports and complaint investigation reports and any other reports you may have for: Innovative Nurses and Sitters [(the "agency")]." (Emphasis omitted.) You state that "[t]he majority of the requested information is being released to the requestor" but inform us that the department will withhold some responsive information from the requestor pursuant to the previous determination issued in Open Records Letter No. 2001-5348 (2001). See Gov't Code § 552.301(a); see also Open Records Decision No. 673 at 6-9 (2001) (criteria of previous determination regarding specific categories of information). You claim that other requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

You claim that certain information that is contained within the submitted state Statements of Licensing Violations and Plans of Correction forms (the "state forms") is confidential under federal law. 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. You claim that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8, governs some of the submitted information.

¹Although you did not timely raise section 552.130 or certain confidentiality statutes, we will nevertheless address your arguments on these issues because these provisions implicate the rights of third parties and statutory confidentiality. See Gov't Code § 552.007; Open Records Decision No. 630 at 3 (1994).

At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164; *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. Pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. *See* 45 C.F.R. § 164.502(a).

Section 160.103 defines a covered entity as a health plan, a health clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction covered by subchapter C, Subtitle A of Title 45. *See* 45 C.F.R. § 160.103. In this instance, you explain that the department is a health plan under HIPAA because as an administrator of part of the Medicaid program, the department is considered a health plan. Based on your representations, we conclude the department is a covered entity under HIPAA. Therefore, we will next determine whether the information at issue is protected health information under the federal law.

Section 160.103 of title 45 of the Code of Federal Regulations defines the following relevant terms as follows:

Health information means any information, whether oral or recorded in any form or medium, that:

- (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual, and:

- (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and

(2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and

- (i) That identifies the individual; or
- (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

Protected health information means individually identifiable health information:

(1) Except as provided in paragraph (2) of this definition, that is:

- (i) Transmitted by electronic media;
- (ii) Maintained in electronic media;
- (iii) Transmitted or maintained in any other form or medium.

45 C.F.R. § 160.103. You contend that portions of the submitted records constitute protected health information. Having reviewed the information at issue, we agree that all of this information constitutes protected health information as contemplated by HIPAA. However, we note that a covered entity may use protected health information to create information that is not individually identifiable health information, i.e., information that is de-identified. *See* 45 C.F.R. § 164.502(d)(1). The privacy standards that govern the uses and disclosures of protected health information do not apply to information that is de-identified in accordance with sections 164.514(a) and (b) of the Code of Federal Regulations. *See* 45 C.F.R. § 164.502(d)(2).

Under HIPAA, a covered entity may determine health information is not individually identifiable only under certain circumstances. One method requires a person with specialized knowledge of generally accepted statistical and scientific principles and methods for rendering information de-identifiable to apply and document such methods and principles to determine release of protected health information would result in a very small risk of individual identification. *See* 45 C.F.R. § 164.514(b)(1). The other method requires the covered entity to meet the following two criteria: 1) remove specific identifiers, including but not limited to, names, dates directly related to an individual, telecommunication numbers, vehicle identifiers, and any other unique identifying number, characteristic, or code and 2) have no actual knowledge that the information could be used alone or in combination with other information to identify an individual who is a subject of the information. *See* 45 C.F.R. § 164.514(b)(2)(i), (ii).

You assert that the department can de-identify the protected health information in the state form by redacting the month and day of any dates that relate directly to the referenced individuals. You state that “[t]he department has no knowledge that the remaining information being released could be used alone or in combination with other information to identify the subjects of the health information.” Based on our review of your representations and the information at issue, we agree that the redaction of the dates, i.e. specific months and days, that you have marked properly de-identifies the protected health information under HIPAA. *See* 45 C.F.R. §§ 164.514(b)(2)(i)(A)-(R). We note, however, that the HIPAA privacy rules do not require the redaction of general references to the passage of time that do not relate to a specific date. We have marked this information, which may not be withheld on the basis of HIPAA.

We turn now to your arguments for the remaining information, which you do not contend is personally identifiable health information protected under HIPAA. You assert that certain identified portions of the submitted information constitute medical records subject to the Medical Practices Act (“MPA”). Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in 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.

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). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Based on your representations and our review of the information at issue, we agree that portions of the submitted records constitute information taken from medical records and are therefore subject to the MPA. We have indicated the information that may be released only in accordance with the MPA.

You also contend that section 142.004 of the Health and Safety Code governs some of the submitted licensing information. Section 142.004(d), which is also incorporated by section 552.101, provides:

Information received by the department relating to the competence and financial resources of the applicant or a controlling person with respect to the applicant is confidential and may not be disclosed to the public.

Health & Safety Code § 142.004(d). Based on your representations and our review of the submitted information, we agree that the portions of the submitted documents that consist of answers to questions concerning criminal convictions constitute confidential information as they relate to the competence of an applicant. *See* Health & Safety Code § 142.004(d). Therefore, the department must withhold the information you have marked as being excepted under section 552.101 of the Government Code in conjunction with section 142.004(d) of the Health and Safety Code.

You also contend that certain identifying information must be withheld under section 552.101 because it is confidential under section 142.009(d) of the Health and Safety Code. 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 the submitted state form. You claim, however, that this section dictates that the department withhold the identifying information that you have marked in the state form. As we understand that the identified representatives are not the agency’s owners, we agree that their identifying information is confidential under section 142.009(d). *See* Health & Safety Code §142.001(12) (defining “home and community support services agency”). Therefore, pursuant to section 552.101 of the Government Code and section 142.009(d)(5) of the Health and Safety Code, you must withhold the identifying information that you have marked in the state forms.

You also assert that a social security number is confidential pursuant to section 56.001 of the Occupations Code. Section 552.101 also encompasses section 56.001, which provides:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

Occ. Code § 56.001. You indicate that the individual at issue provided this social security number to the department in order to receive a home and community support services agency license. Accordingly, we find that the social security number is confidential under section 56.001 of the Occupations Code and must therefore be withheld pursuant to section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses the common law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts

the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 at 685 (Tex. 1976). Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common law privacy but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, information related to an individual's mortgage payments, assets, bills, and credit history is protected by the common law right to privacy. *See* Open Records Decision Nos. 545, 523 (1989); *see also* Open Records Decision No. 600 (finding personal financial information to include choice of particular insurance carrier). We agree that the information you have marked constitutes personal financial information that is protected by the common law right of privacy and must be withheld under section 552.101 of the Government Code.

You also assert that portions of the submitted information are excepted under section 552.107(1), which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the

privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). Having considered your arguments and the information you wish to withhold, we agree that these documents constitute privileged attorney-client communications that may be withheld under section 552.107(1).

In addition, you claim that some of the remaining information must be withheld pursuant to section 552.130 of the Government Code. This section excepts from disclosure information pertaining to "a motor vehicle title or registration issued by an agency of this state." Thus, under section 552.130 of the Government Code, the department must withhold the marked vehicle identification number.

You also note that the submitted information includes a bank account number. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. Thus, pursuant to this section the department must withhold the bank account number you have marked.

In summary, pursuant to section 552.101 and the HIPAA privacy rules, the department must redact the specific months and days that it has marked. We have indicated the medical record information that may be released only in accordance with the MPA. Pursuant to section 552.101, the department must withhold the information it has marked as being confidential under sections 142.004(d) and 142.009(d)(5) of the Health and Safety Code. The licensee's social security number is confidential under section 56.001 of the Occupations Code and must also be withheld pursuant to section 552.101. In addition, the personal financial information must be withheld pursuant to section 552.101 in conjunction with common law privacy. The marked attorney-client communications may be withheld under section 552.107(1). The department must withhold the marked vehicle identification number pursuant to section 552.130. Finally, the marked bank account number must be withheld in accordance with section 552.136. As our ruling on these issues is dispositive, we need not address your other arguments.

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).

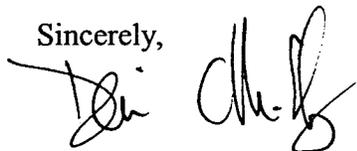
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



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Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 188145

Enc. Submitted documents

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(w/o enclosures)