ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 25, 2003

Mr. Don Rogers
Communications Director
Texas Department of Mental Health and Mental Retardation
P.O. Box 12668
Austin, Texas 78711-2668

OR2003-6750

Dear Mr. Rogers:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 188342.

The Texas Department of Mental Health and Mental Retardation (the "Department") received a request for information relating to a named individual. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We reviewed the submitted information and considered the exception you claim.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. You claim that the submitted information is not subject to release, pursuant to the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Thus, you contend that the information is excepted from disclosure under section 552.101 of the Government Code in conjunction with these regulations.[1] 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

[1]We note that a federal statute or an administrative regulation enacted pursuant to statutory authority can make information confidential for purposes of section 552.101. *See* Open Records Decision No. 476 (1987) (addressing statutory predecessor).

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, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

Section 160.103 of title 45 of the Code of Federal Regulations defines a covered entity as a health plan, a health clearinghouse, or a health care provider that transmits any health information in electronic form in connection with a transaction covered by subchapter C, subtitle A of title 45. 45 C.F.R. § 160.103. In this instance, you explain that the Department is a health care provider for purposes of section 160.103. Therefore, we next determine whether the submitted information is protected health information made confidential 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 the submitted information constitutes individually identifiable protected health information. Upon review of the information, we agree that it is protected health information as contemplated by HIPAA. We note, however, that a covered entity may create de-identified information, health information that is not individually identifiable, from protected health information. *See* 45 C.F.R. § 164.502(d)(1) (covered entity may use protected health information to create de-identified information). The privacy standards that govern the uses and disclosures of protected health information do not apply to information de-identified in accordance with sections 164.514(a) and (b) of the Code of Federal Regulations. 45 C.F.R. § 164.502(d)(2).[2]

HIPAA specifies two methods by which a covered entity may determine that health information is not individually identifiable. 45 C.F.R. § 164.514(b). First, a person with specialized knowledge of generally accepted statistical and scientific principles and methods for rendering information de-identifiable must apply and document such methods and principles to determine that release of protected health information would result in a very small risk of individual identification. 45 C.F.R. § 164.514(b)(1). Alternatively, the covered entity must meet the following 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).

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[2]We note that a covered entity must comply with the requirements of subpart E of part 164 of title 45 of the Code of Federal Regulations with respect to the protected health information of a deceased individual. *See* 45 C.F.R. § 164.502(f).

In this instance, the requestor knows the identity of the individual whose protected health information is at issue. Therefore, we determine that neither of the two methods of de-identification described above would sufficiently protect the individual's identity as required under HIPAA. Consequently, we find that the submitted information constitutes protected health information under HIPAA in its entirety. *See* 45 C.F.R. § 164.514(b)(2)(ii)(R). Accordingly, we conclude that the Department must withhold the submitted information in its entirety under section 552.101 of the Government Code in conjunction with HIPAA. Based on this finding, we need not address your claim under section 552.101 in conjunction with section 576.005 of the Health and Safety Code.

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).

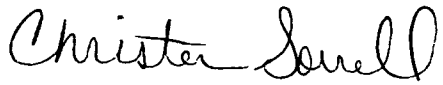
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Christen Sorrell
Assistant Attorney General
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CHS/seg

Ref: ID# 188342

Enc: Submitted documents

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