



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 24, 2003

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

OR2003-8463

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# 191665.

The Texas Department of Human Services (the "department") received a request for "any surveys conducted at Health Touch Services, Inc. [(the "agency")] . . . for the time frame after July 5th, 2002." You state that the "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 section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note, and you acknowledge, that the department has not sought an open records decision from this office within the ten business day time period prescribed by section 552.301 of the Government Code. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). To overcome this presumption, the governmental body must show a compelling interest to withhold the information. *See* Gov't Code § 552.302; *Hancock*, 797 S.W.2d at 381. Normally, a compelling interest exists where some other source of law makes the information confidential or where third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). As the presumption of openness can be overcome by a showing that information is confidential by law, we will consider your arguments under section 552.101.

You claim that certain information that is contained within the submitted 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.

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 “the department has no knowledge that the remaining information being released in the state form could be used alone or in combination with other information to identify the subject of the health information.” Based on our review of your representations and the information at issue, we agree that the redaction of the dates 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 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”). *See* 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 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. Based on your representation that “the agency representative who signed the responsive state form is not the owner of the agency,” we agree that the identifying information you have marked 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.

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 section 142.009(d)(5) of the Health and Safety Code. All other submitted information must be released.

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

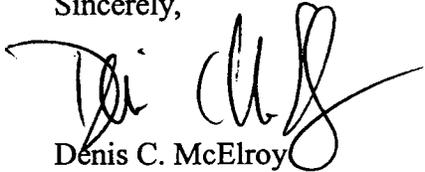
of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 191665

Enc. Submitted documents

c: Lora L. Mayes, R.N.
1814 Pine Hollow Drive
Missouri City, Texas 77489
(w/o enclosures)