



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 18, 2004

Mr. Carey Smith  
General Counsel  
Texas Department of Human Services  
P.O. Box 149030  
Austin, Texas 78714-9030

OR2004-1209

Dear Mr. Smith:

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# 195560.

The Department of Human Services (the "department") received a request for copies of two investigation reports concerning Atria Assisted Living Facility and any information relating to the investigations and underlying complaints. You state that some of the requested information has been released to the requestor. You claim that the remaining 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 must address the department's obligations under the Act. In accordance with section 552.301(e) of the Government Code, a governmental body receiving a request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the 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 acknowledge that you did not submit written comments or a copy of the specific information requested to this office within fifteen business days as required by section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *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 section 552.302); Open Records Decision No. 319 (1982). Because section 552.101 of the Government Code can provide a compelling reason for withholding information, we will address your arguments under that exception.

You claim that certain information contained within the submitted documents 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." Gov't Code § 552.101. 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 ("Privacy Rule"); *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. 45 C.F.R. § 164.502(a).

This office recently addressed the interplay of the Privacy Rule and the Act. Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov't Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the department may withhold requested protected health information from the public only if an exception

in subchapter C of the Act applies. You claim no other exception with respect to most of the information you have marked in conjunction with HIPAA. Therefore, we conclude this information may not be withheld under section 552.101 and must be released. Because you have marked some information in conjunction with both HIPAA and provisions of state law, we will consider whether this marked information is excepted from disclosure under section 552.101 in conjunction with state law.

You claim that some of the submitted information is excepted from disclosure under section 552.101 in conjunction with section 48.101 of the Human Resources Code. Section 48.101 provides in relevant part:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

- (1) a report of abuse, neglect, or exploitation made under this chapter;
- (2) the identity of the person making the report; and
- (3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

Hum. Res. Code § 48.101(a). You inform this office that the department is responsible for licensing assisted living facilities. You further state that, as the licensing agency, the department is also responsible for investigating complaints of abuse, neglect, or exploitation involving these types of facilities. *See id.* § 48.301. Based on your representations, we conclude that the submitted information constitutes files, reports, records, communications, and working papers used or developed in an investigation made under chapter 48 of the Human Resources Code or in providing services as a result of an investigation.

Section 48.101 further provides that “[c]onfidential information may be disclosed only for a purpose consistent with this chapter and as provided by [Department of Family and Protective Services] or investigating state agency rule and applicable federal law.” *Id.* § 48.101(b). You inform this office that the rules adopted by the department for the release of information used or developed in an investigation are found at section 92.106 of title 40 of the Texas Administrative Code. Section 92.106 provides in relevant part:

(a) Confidentiality. All reports, records, and working papers used or developed by the Texas Department of Human Services (DHS) in an investigation are confidential, and may be released only as provided in this subsection.

...

(2) Completed written investigation reports are open to the public, provided the report is deidentified. The process of deidentification means removing all names and other personally identifiable data, including any information from witnesses and others furnished to the department as part of the investigation.

40 T.A.C. § 92.106(a)(2). The submitted documents consist of both working papers and completed reports from investigations conducted pursuant to chapter 48 of the Human Resources Code. We have marked the personally identifiable information in the completed reports that is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code and section 92.106 of title 40 of the Texas Administrative Code. We further conclude that the working papers used or developed during the course of the underlying investigations are confidential under section 48.101 and must be withheld in their entirety. We have marked the documents accordingly. Because we are able to make this determination, we need not address your other arguments for withholding information contained in these working papers.

You assert that portions of the completed reports contain medical information subject to the Medical Practice Act ("MPA"). *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

- (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 § 159.002(a)-(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). 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 have marked the portions of

the completed reports that constitute information taken from medical records. This marked information may be released only in accordance with the MPA.

In summary, we have marked information that is confidential under section 48.101 of the Human Resources Code and therefore must be withheld from disclosure under section 552.101 of the Government Code. We have also marked information that may be released only in accordance with the MPA. The remaining 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,



Karen Hattaway  
Assistant Attorney General  
Open Records Division

KEH/sdk

Ref: ID# 195560

Enc. Submitted documents

c: Ms. Jennifer Leahy  
Observer Newspapers  
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(w/o enclosures)