



1DA# 12597
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Texas Department of Health

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RD-91

May 24, 1991

The Honorable Dan Morales
Attorney General of Texas
Supreme Court Building
Austin, Texas

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Opinion Committee

Re: Open Records Request

Dear General Morales:

On May 15, 1991, the Texas Department of Health received three requests for copies of investigations of complaints filed against three licensed home health agencies. The requests were made by the two individuals who forwarded the initial complaints to the department. The complaints pertained to the home health services provided to the minor child of the two individuals. The investigations did not substantiate the allegations in the complaints.

The department licenses and regulates home health agencies pursuant to the Health and Safety Code, Chapter 142. Class A home health agencies are Medicare-certified under the Social Security Act while Class B home health agencies are not. The agencies investigated in this case are Class B home health agencies. Section 142.009 of the Health and Safety Code requires that the department investigate each complaint received regarding the provision of home health services. Subsection (d) states that the "reports, records, and working papers used or developed in an investigation made under this section are confidential". In Open Records Decision No. 507(1988) the Attorney General determined that documents covered by this subsection are excepted from public disclosure under the Open Records Act by Section 3(a)(1) of that Act.

Since that opinion was issued, the Open Records Act has been amended by the addition of Section 3B which provides a person or the authorized representative of a person a special right of access to records held by a governmental body that contain information relating to the person that is protected from public disclosure by laws intended to protect that person's privacy interests. Section 3B also provides that laws and provisions of the Open Records Act, other than ones intended to protect that person's privacy interests, may still form the basis for denial of access to the person or the person's representative to whom

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the information relates. The issue is whether Section 142.009(d) of the Health and Safety Code is intended to only protect the privacy interests of a person to whom the information relates who might make an open records request or is intended to protect the privacy and other interests of other persons.

It is the department's position that Subsection (d) is intended to protect not only the privacy interests of a person who might make an open records request but also the privacy interests of other patients of the home health agency being investigated; the medical records of any patients; personnel records of employees; privacy interests of employees involved in the investigation; opinions of persons interviewed during the investigation; the investigator's own opinions, recommendations, and advice; and other matters deemed confidential by any law which may be unrelated to the privacy of an individual making an open records request. Subsection (d) provides no exception to the requirement that the records remain confidential. Subsection (d) encourages full disclosure by individuals interviewed by the investigator. Such individuals include not only the patient or patient's representative making the complaint but may also include other patients, employees of the home health agency, other health care providers involved with patients of the agency, relatives of patients, and any other person who might have knowledge of the allegations contained in the complaint. In addition the investigator will look for all violations of the law or the appropriate rules when investigating a specific complaint; the complaint investigation is not limited to only the allegations articulated in the complaint. Because of the language in Section 142.009(d) and because that subsection is intended to protect interests other than the requestor's privacy interest, it is the department's position that the information requested in this case is not disclosable.

I have enclosed a copy of the information requested as well as a copy of the original complaint made by the two individuals. If you require any further information, please contact Linda Wiegman, attorney with the Office of General Counsel, Texas Department of Health, at (512) 458-7236. Thank you for your attention to this matter.

Sincerely,


Robert Bernstein, M.D., F.A.C.P.
Commissioner of Health