



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 4, 1998

Ms. Linda Wiegman  
Supervising Attorney  
Office of General Counsel  
Texas Department of Health  
1100 West 49<sup>th</sup> Street  
Austin, Texas 78756-3199

OR98-0587

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 112999.

The Texas Department of Health (the "department") received a request for information about Land of Encouragement Home Health, Inc., of Houston. You contend that a portion of the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with various state statutes and federal regulations. We have considered the exception you claim and have reviewed the documents at issue.

You note that you did not submit your request for a decision to this office within ten business days of receiving the request for information. Chapter 552 of the Government Code imposes a duty on a governmental body seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general within ten business days after the governmental body's receipt of the request for information. The time limitation found in section 552.301 is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. *See* Gov't Code § 552.302. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. *See, e.g.*, Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests).

In accordance with sections 552.301 and 552.302, the information at issue is presumed public. However, section 552.101 protects information that is confidential by law. Because the presumption of openness is overcome by a showing that information is confidential by law, we must consider your section 552.101 claim.

Portions of the requested information consist of reports about the home health agency's compliance with federal law as a Medicare provider. Federal regulations require the department to release the HCFA form 2567, statements of deficiencies and plans of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 (1988) at 5. Assuming the providers have had an opportunity to review and comment on the reports, you must release these reports, but with deletions of information that identifies the persons specified in the regulation. In this regard, we note you have included a roster sheet of patients and personnel. You inform us that the enumerated personnel correspond to the named and numbered personnel referenced in the HCFA 2567 statements of deficiencies. We also note that the numbered patients correspond with those referenced in the HCFA 2567 statements of deficiencies. Thus, this roster must be withheld in accordance with federal regulations. The remaining information in these reports must be released.

Some of the submitted documents are subject to chapter 142 of the Health and Safety Code, which regulates the licensing of home and community support services agencies. Section 142.009(d) provides as follows:

(d) the reports, records, and working papers used or developed in an investigation<sup>1</sup> made under this section are confidential and may not be released or made public except:

- (1) to a state or federal agency;
- (2) to federal, state, or local law enforcement personnel;
- (3) with the consent of each person identified in the information released;
- (4) in civil or criminal litigation matters or licensing proceedings as otherwise allowed by law or judicial rule; or

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<sup>1</sup>An "investigation" is defined as "an inspection or survey conducted by a representative of the department to determine if a licensee is in compliance with this chapter." Health & Safety Code § 142.001(18).

(5) on a form developed by the department that identifies deficiencies found without identifying a person, other than the home and community support services agency.

The submitted state form falls within the scope of section 142.009(d)(5) and, therefore, is not confidential under that section. However, we must consider whether any of the information contained in this form is made confidential by the common-law right to privacy or the Medical Practice Act (the "MPA"), V.T.C.S. article 4495b.

Information is excepted from disclosure under section 552.101 of the Government Code, in conjunction with the common-law right to privacy, if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Because we conclude the patient/personnel roster must be withheld in accordance with federal regulations, certain information that might otherwise be considered private in the state form must be released, as no corresponding patient identities will be disclosed, and thus, no privacy interests are violated.

Section 5.08 of the MPA provides:

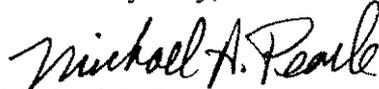
(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are 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.

V.T.C.S. art. 4495b, § 5.08. Section 5.08(j)(3) also requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 (1990) at 7. Thus, access to medical records is not governed by chapter 552 of the Government Code, but rather the MPA. Open Records Decision No. 598 (1991). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* V.T.C.S. art. 4495b, § 5.08(a), (b), (c), (j); Open Records Decision No. 598 (1991). We have marked the information on the state form that is subject to the MPA. The department may only release this information in accordance with the MPA.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/ch

Ref: ID# 112999

Enclosures: Marked documents

cc: Mr. Henry P. Guillory  
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(w/o enclosures)