



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 5, 1998

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

OR98-0601

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 112998.

The Texas Department of Health (the "department") received a request for a variety of information concerning "all Home and Community Support Services Agencies: . . . Analyses, reports or other compilations of complaint files," prepared by the department from September 1, 1996 to the present. In response to the request, you submitted to this office for review a representative sample of the information which you assert is responsive.¹ You contend that portions of the requested information are excepted from disclosure under section 552.101 of the Government Code in conjunction with various state statutes and federal regulations. We have considered the exceptions you claim and have reviewed the documents at issue.

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

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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. 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.

Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Portions of the requested information consist of reports about home health agencies compliance with federal law as Medicare providers. 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. The remaining information in these reports, subject to federal regulations, must be released in accordance with federal regulations.²

You contend that some of the submitted documents, which you have identified, 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(c) authorizes the department to conduct investigations of complaints regarding the provision of home health, hospice, or personal assistance services. Section 142.009(d) provides as follows:

²As we have concluded in several previous rulings to the department, we believe that federal law requires the department to release deidentified HCFA 2567 documents. See Open Records Letter Nos. 97-2843 (1997), 97-1514 (1997), 97-1492 (1997), 97-1472 (1997), 97-1388 (1997), 97-1230 (1997). In most instances, we do not believe that a patient's medical condition or diagnosis identifies that patient when the name is redacted from the HCFA 2567 forms. As federal provisions govern the public disclosure of the HCFA 2567 forms, we believe that the federal law prevails to the extent it may conflict with the Texas Medical Practice Act and chapter 611 of the Health and Safety Code regarding information obtained from medical and mental health records. See *English v. General Electric Co.*, 110 S.Ct. 2270, 2275 (1990) (state law preempted to extent it actually conflicts with federal law). Furthermore, we believe the deidentification required by federal law is sufficient to protect the privacy interests of the patients.

(d) the reports, records, and working papers used or developed in an investigation³ 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
- (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.

We have tagged the documents that are confidential under section 142.009(d). However, to the extent that the submitted documents consist of state forms, which fall within the scope of section 142.009(d)(5), such records are not confidential under that section. For these state statements of deficiencies, we must next consider whether any of the information contained in these records are 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). Individual determinations are required. *See* Open Records Decision No. 370 (1983). Upon review of the information in the state forms, we do not find information that is protected from disclosure under the common-law right to privacy.

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.

³An "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).

(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 by 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 forms 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,

A handwritten signature in black ink, appearing to read "Sam Haddad". The signature is written in a cursive style with a large, sweeping initial "S".

Sam Haddad
Assistant Attorney General
Open Records Division

SH/rho

Ref: ID# 112998

Enclosures: Marked documents

cc: Mr. James Mark Gentle
P.O. Box 1026
Austin, Texas 78767
(w/o enclosures)