



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

OR98-0603

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 113001.

The Texas Department of Health (the "department") received a request for information concerning Cameo Home Health Care of Houston, Texas, a home and community support services agency licensed by the department. You assert that portions of the requested information are made confidential by state statute or by the common-law right to privacy and therefore are excepted from required public disclosure under section 552.101 of the Government Code. We have reviewed the information you have submitted to this office for review.

Initially, we note that you received a request for information under the Open Records Act on October 25, 1997. You requested a decision from this office on December 8. Consequently, you failed to request a decision within the 10 days required by section 552.301(a) of the Government Code. Accordingly, we note that sections 552.301 and 552.302 require a governmental body to release requested information or to request a decision from the attorney general within 10 days of receiving a request for information the governmental body wishes to withhold. When a governmental body fails to request a decision within 10 days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (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). The governmental body must show a compelling interest to overcome this presumption. *See id.*

Consequently we note that in accordance with the necessity for showing a compelling interest, you raise section 552.101 of the Government Code which excepts from disclosure information that is deemed confidential, including information that is made confidential by statute.

Initially, we observe that some of the information submitted to this office consists 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 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). As the reports are signed by a provider representative and the "provider's plan of correction" portion of the report appears to contain the provider's comments to the report, we believe the provider has had a reasonable opportunity to review and comment on the report. Accordingly, you must release these reports, but with deletions of information that identify the persons specified in the regulation.

Next, we note that you raise section 142.009(d) of the Health and Safety Code regarding a group of documents submitted for our review. Health and Safety Code 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:

The reports, records, and working papers used or developed in an investigation made under [section 142.009 of the Health and Safety Code] 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 any deficiencies found without identifying a person, other than the home and community support services agency.

We have reviewed the documents for which you assert section 142.009(d) of the Health and Safety Code in conjunction with section 552.101 of the Government Code. You state that the submitted documents are "files, reports, records, communications, and working papers" used or developed in an investigation made under § 142.009. We conclude that section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code excepts the roster/keys and the record of telephone contact from required public disclosure, but you must release the federal form HCFA 2567 as noted above.

Finally, some documents are state forms which fall within the scope of section 142.009(d)(5) and, therefore, are 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). Having carefully reviewed the information in the state form, we find that none of it is excepted from disclosure under section 552.101 in conjunction with the common-law right to privacy.

However, 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.

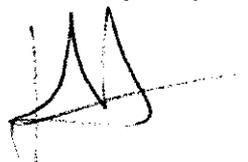
(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with 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 reviewed your markings and agree that the marked information on the state forms are subject to the MPA. The department may only release this information in accordance with the MPA.

We are resolving this matter with this 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 may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Janet I. Monteros', with a horizontal line extending to the right.

Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/glg

Ref: ID# 113001

Enclosures: Submitted documents

cc: Ms. Debbie Denaple
31 Roxy Avenue
Edison, New Jersey 08820
(w/o enclosure)