



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 49<sup>th</sup> Street  
Austin, Texas 78756-3199

OR98-0605

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# 113592.

The Texas Department of Health (the "department") received a request for copies of statements of deficiencies and reports of contact for Westar Health Services, Inc. ("Westar") from June 1996 to June 1997. You assert that portions of the records, which you have marked, are made confidential by various state statutes or by the common-law right to privacy and therefore are excepted from required public disclosure under section 552.101 of the Government Code.<sup>1</sup> Government Code section 552.101 excepts from disclosure information that is made confidential by law, including information made confidential by statute.

We observe that the submitted information consists of the state and federal HCFA 2567 statements of deficiencies and plans of correction. First, we will consider the federal HCFA 2567 reports. 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.

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<sup>1</sup>The department failed to request an open records decision from this office within ten days of receiving the request for information, a fact that generally results in the presumption that the requested information is presumed public. *See* Gov't Code 552.302. However, because the privacy rights of third parties and the applicability of confidentiality provisions are implicated, these reasons are compelling and sufficient to overcome that presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). Therefore, we will consider your argument that the requested documents are confidential by law.

§§ 401.126, .133; Open Records Decision No. 487 (1988) at 5. 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 identifies the persons specified in the regulation.

As 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.

Next, we will consider the reports of contact and state forms detailing the deficiencies and plans of correction for Westar. You assert that the submitted records are confidential pursuant to section 142.009 of the Health and Safety Code. Section 142.009 authorizes the department to conduct investigations regarding the provision of home health, hospice, or personal assistance services. Section 142.009(d) of the Health and Safety Code provides:

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

The documents used or developed during a department investigation under chapter 142 are generally confidential with limited exceptions.

However, an agency that has been investigated by the department has a statutory right of access to certain information relating to the investigation. Section 142.009(g) provides as follows:

- (g) After a survey of a home and community support services agency by the department, the department shall provide to the chief executive officer of the agency:
  - (1) specific and timely written notice of the preliminary findings of the survey; including
    - (A) the specific nature of the survey;
    - (B) any alleged violation of a specific statute or rule;
    - (C) the specific nature of any finding regarding an alleged violation or deficiency; and
    - (D) if a deficiency is alleged, the severity of the deficiency;
  - (2) information on the identity, including the signature, of each department representative conducting, reviewing, or approving the results of the survey and the date on which the department representative acted on the matter; and
  - (3) if requested by the agency, copies of all documents relating to the survey maintained by the department or provided by the department to any other state or federal agency that are not confidential under state law.

It appears from the submitted records that the department has completed those particular investigations of Westar. You inform us that the requestor has purchased the assets of Westar but is not the owner of Westar. If the requestor is a representative of Westar, section 142.009(g) requires the department to provide the chief executive officer of the agency with the requested information to the extent that the release of the information is not prohibited by other state law. If the requestor is not Westar's chief executive officer or the chief executive officer's representative, the reports of contact are confidential pursuant to section 142.009(d).

Lastly, the submitted state forms fall within the exception to confidentiality provided by section 142.009(d)(5). Thus, the department must release the state forms after they have been deidentified as required by subsection (d)(5). However, we note that the state forms contain information made confidential by the Medical Practice Act (the "MPA"), V.T.C.S. article 4495b. Section 5.08 of the MPA provides:

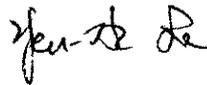
(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/rho

Ref.: ID# 113592

Enclosures: Marked documents

cc: Ms. Thu Le  
Principal HomeHealth, Inc.  
15915 Katy Freeway, #428  
Houston, Texas 77094  
(w/o enclosures)