



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 28, 1998

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

OR98-1325

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# 115257.

The Texas Department of Health (the "department") received a request for information concerning HealthCor, Inc., 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 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.

Sections 552.301 and 552.302 require a governmental body to release requested information or to request a decision from the attorney general within ten business days of receiving a request for information the governmental body wishes to withhold. When a governmental body fails to request a decision within ten business 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 withhold the information to overcome this presumption. *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).

The department received the request for information on February 4, 1998. You requested a decision from this office on March 9, 1998. Consequently, you failed to request a decision within the ten business days required by section 552.301(a) of the Government

Code. However, as you assert that the requested information is made confidential by other laws, we will examine whether the documents at issue are public and must be disclosed.

Section 552.101 of the Government Code excepts from disclosure information that is deemed confidential, including information that is made confidential by statute. We observe that some of the information submitted to this office references 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).

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:

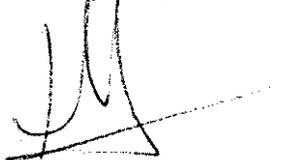
- (1) to a state or federal agency;
- (2) to federal, state, or local law enforcement personnel;
- (3) with the consent of each person identified in the information released;
- (4) in civil or criminal litigation matters or licensing proceedings as otherwise allowed by law or judicial rule; or
- (5) 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 information from required public disclosure. As noted above, however, the statement of deficiencies and plans of correction which were prepared for purposes of a Medicare or Medicaid complaint investigation survey must be released pursuant to federal regulations.

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,



Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/alg

Ref.: ID# 115257

Enclosures: Submitted documents

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