



July 12, 2001

Ms. Julie Reagan Watson
Assistant General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2001-3020

Dear Ms. Watson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149356.

The Texas Department of Human Services (the "department") received a request for any available information pertaining to Community Home Health Agency. You have released some of the responsive information to the requestor. However, you claim that portions of the requested information in the department's Exhibits C, D, and E are excepted from disclosure under section 552.101 of the Government Code in conjunction with various state and federal provisions. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure information that is made confidential by law, including information made confidential by statute. Section 142.009 of the Health and Safety Code authorizes the department to conduct investigations regarding the provision of home health, hospice, or personal assistance services. Section 142.009(d) provides, in relevant part:

- (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, none of which appear to be applicable in this case. You inform us that Community Home Health Agency is a home and community support service agency regulated by the department, and that Exhibit C contains reports, records, and working papers that were used or developed during complaint investigations. Accordingly, we conclude that Exhibit C, in its entirety, is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code.¹ We next address the information contained in Exhibit D.

Exhibit D contains federal Health Care Finance Administration ("HCFA") 2567 statements of deficiencies and plans of correction. 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 at 5 (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, the provider apparently has had a reasonable opportunity to review and comment on the report. Accordingly, the department must release these reports, but must first redact from the reports the individual identifying information that you have highlighted. *See id.*, *see also* Health and Safety Code § 142.009(d)(6). We next address the information contained in Exhibit E.

Section 552.101 also excepts from disclosure "information considered to be confidential by judicial decision." In *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) the Texas Supreme Court stated that information is confidential under the common law right to privacy if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Contained in Exhibit E is documentation that comprises a compilation by the department of an individual's criminal history information. In this case, we believe that the documentation implicates the individual's right to privacy. Accordingly, we have marked information that the department must withhold under common law privacy as encompassed by section 552.101 of the Government Code. *See id.*

¹Since section 552.101 in conjunction with section 142.009(d) of the Health and Safety Code is dispositive regarding information in Exhibit C, we do not address your alternative claims of exception for that exhibit.

Exhibit E also contains social security numbers, which you have highlighted. Social security numbers may be withheld in some circumstances under section 552.101. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* You assert that the social security numbers are confidential under this provision, but you do not assert any provision of law enacted after October 1, 1990 that authorizes the department to obtain or maintain any of the social security numbers at issue. Accordingly, we have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

Exhibit E also contains corporate tax identification numbers and employer identification numbers which you have highlighted. However, you assert no provision of law which excepts this information from required disclosure, nor are we aware of any. Accordingly, this information must be released. *See* Gov't Code §§ 552.301, .302.

In summary, you must withhold Exhibit C in its entirety under section 552.101 in conjunction with section 142.009(d) of the Health and Safety Code. In Exhibit D, you must withhold from disclosure the highlighted information under section 552.101 in conjunction with sections 401.126 and 401.133 of Title 42 of the Code of Federal Regulations. You must withhold from disclosure the marked criminal history compilation information in Exhibit E in under section 552.101 in conjunction with common law privacy. The highlighted social security numbers must be withheld under section 552.101 in conjunction with federal law, provided they were obtained or maintained by the department pursuant to any provision of law enacted on or after October 1, 1990. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

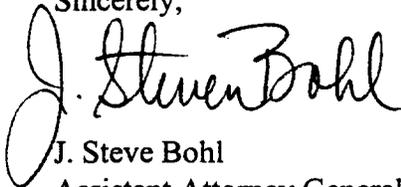
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



J. Steve Bohl
Assistant Attorney General
Open Records Division

JSB/sdk

Ref.: ID# 149356

Enc.: Marked documents

c: Ms. Erin Hillier
Written Deposition Services, Inc.
2964 LBJ Freeway, Suite 475
Dallas, Texas 75234
(w/o enclosures)