



September 19, 2001

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

OR2001-4195

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# 152159.

The Texas Department of Human Services (the "department") received two requests for information pertaining to a named hospice. We have combined these two requests into one ruling with the identification number listed above. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with various state and federal statutes. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You assert that both sets of documents submitted to this office as Attachment C are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code. Section 142.009(d) provides as follows:

The reports, records, and working papers used or developed in an investigation made under [Chapter 142] 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;

(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;

(6) on a form required by a federal agency if:

(A) the information does not reveal the identity of an individual, including a patient or a physician or other medical practitioner;

(B) the service provider subject to the investigation had a reasonable opportunity to review the information and offer comments to be included with the information released or made public; and

(C) the release of the information complies with any other federal requirement; or

(7) as provided by Section 142.0092.

Health & Safety Code § 142.009(d). You state that Hospice Preferred Choice is a home and community support services agency regulated by the department under chapter 142 and that the documents in both sets of documents labeled Attachment C constitute reports, records, and working papers that were used or developed during a complaint investigation made under section 142.009(c) of the Health and Safety Code. You have provided no information that would allow us to conclude that any of the exceptions to confidentiality in section 142.009(d) apply in this instance. Based on your representations and our review of the submitted information, we conclude that the department must withhold the information in both sets of documents submitted as Attachment C pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code.

Next, you contend that certain information in the federal Form HCFA 2567, Statement of Deficiencies and Plan of Correction, is excepted from disclosure under section 552.101 of the Government Code in conjunction with federal regulations and section 142.009(d)(6) of the Health and Safety Code. Federal regulations require the department to release the HCFA 2567 forms, which contain a statement of deficiencies and plan 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);

*see also* Health & Safety Code § 142.009(d)(6). You explain that the facility has offered comments in response to each evaluation and, therefore, has had a reasonable opportunity to review the report. We agree that the signature of the facility's representative on the forms, together with the facility's comments, indicate that the facility has had a reasonable opportunity to review the report and offer comments. You claim that the identifying information of the individual found in the federal form is confidential under section 142.009(d)(6). Based on your representations and our review of the submitted information, we conclude that the department must withhold the name of the individual highlighted in the federal Form HCFA 2567 under the federal regulations and section 142.009(d)(6).

Next, you contend that certain information in the state form, Statement of Licensing Violations and Plan of Correction, is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 142.009(d)(5) of the Health and Safety Code. As noted above, section 142.009(d) states that "reports, records, and working papers used or developed in an investigation . . . are confidential and may not be released or made public except: (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." Health & Safety Code § 142.009(d)(5). You acknowledge that section 142.009(d)(5) requires the department to release this state form; however, you contend the department must withhold the name of the individual contained within the form under section 142.009(d)(5). Based on your representations and our review of the submitted information, we conclude that the department must withhold the names of the individuals highlighted in the state forms under section 142.009(d)(5).

You also contend that some of the information in the state forms is made confidential under the Medical Practice Act, (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is 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.

The MPA governs access to medical records. Open Records Decision No. 565 at 7 (1990). The MPA 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. 598 (1991). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code § 159.002(a),

(b), (c); Open Records Decision No. 598 (1991). We have marked the information in the state forms that the department may release only in accordance with the MPA.

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 Attachment G 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, the department must withhold the information in Attachment G under common law privacy as encompassed by section 552.101 of the Government Code. See *id.*

The submitted information 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.

In addition, you seek to withhold the submitted federal W-9 form under section 552.101. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term "return information" to include "a taxpayer's identity." See 26 U.S.C. 6103(b)(2)(A). The term "taxpayer identity" "means the name of a person

with respect to whom a return is filed, his mailing address, his taxpayer identifying number (as described in section 6109), or a combination thereof." See 26 U.S.C. 6103(b)(6). On this basis, we conclude that the submitted W-9 form is made confidential pursuant to federal law in its entirety, and it is therefore excepted from disclosure under section 552.101.

In summary, the department must withhold both sets of documents submitted as Attachment C pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code. The department must withhold the name of the individual highlighted in the federal Form HCFA 2567 under federal regulations and section 142.009(d)(6) of the Health and Safety Code. The department must withhold the individual's name in the submitted state forms under section 142.009(d)(5) of the Health and Safety Code. We have marked the information within the submitted state forms that the department may release only in accordance with the MPA. The department must withhold the criminal history compilation information in Attachment G 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 submitted W-9 form is made confidential pursuant to federal law in its entirety, and it is therefore excepted from disclosure under section 552.101. 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,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/seg

Ref: ID# 152159

Enc. Submitted documents

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