



October 17, 2001

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

OR2001-4703

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# 153507.

The Texas Department of Human Services (the "department") received a request for two specified complaints and other information relating to Amed Home Health and Home Health Providers, Inc. You claim that some of the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you raise and have reviewed the information you submitted. We assume that the department has released the remaining requested information. If not, then the department must do so at this time. *See* Gov't Code §§ 552.301, .302.

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

(d) 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 inform this office that Amed Home Health and Home Health Providers, Inc., are home and community support services agencies regulated by the department under chapter 142 of the Health and Safety Code. You also state that the documents in Attachment C constitute reports, records, and working papers that were used or developed during investigations conducted under section 142.009 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 information at issue, we conclude that the department must withhold the information in Attachment C pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code.¹

Next, you contend that certain information in the federal forms submitted as Attachment D, 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

¹ As section 142.009(d) of the Health and Safety Code is determinative, we do not address your alternative arguments with regard to Attachment C.

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 assert that one of the submitted federal forms must be withheld from disclosure because it does not contain the signature or comments of an agency representative. We note, however, that under section 401.133 of title 42 of the Code of Federal Regulations, “[t]he statement of deficiencies or report and any pertinent written statements furnished by the institution or facility on the statement of deficiencies shall be disclosed within 90 days following the completion of the survey by the State agency, but not to exceed 30 days following the receipt of the report by [the federal Centers for Medicare and Medicaid Services].” 42 C.F.R. § 401.133(a)(2). In this instance, the unsigned federal form reflects that the survey was completed on September 25, 2000. We therefore conclude that the unsigned HCFA 2567 form must be released.

With regard to the other submitted federal forms, you note that the agency has made comments and thus has had a reasonable opportunity to review the report. You state that the only individual identified in these forms is the representative of the agency. You assert that the identity of the agency’s representative must be redacted from these forms prior to their release. We agree that each facility has had a reasonable opportunity to review the report and offer comments. We also agree that the department must withhold the highlighted identifying information in these federal forms under section 552.101 in conjunction with section 142.009(d)(6) of the Health and Safety Code. With the exception of the identifying information, these federal forms must also be released.

Next, you contend that certain information in the state forms submitted as Attachment E, 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 these state forms. You contend, however, that the department must withhold the identifying information contained within the forms 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 highlighted identifying information under section 142.009(d)(5).

You also claim that other information contained in Attachment E is made confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 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.

Occ. Code § 159.002. The MPA governs access to medical records. *See* 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. *See* 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)-(c); Open Records Decision No. 598 (1991). We have marked the information in Attachment E that the department may release only in accordance with the MPA.

In summary, the department must withhold the information in Attachment C in its entirety under 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 identifying information in Attachment D under the federal regulations and section 142.009(d)(6) of the Health and Safety Code. The department must withhold the identifying information in Attachment E under section 142.009(d)(5) of the Health and Safety Code. Attachment E also contains information that the department may release only in accordance with the Medical Practice Act. With these exceptions, the information in Attachments D and E must be released.

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).

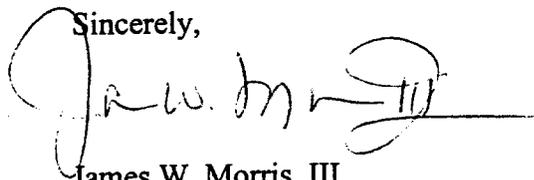
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dept. 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,

A handwritten signature in black ink, appearing to read "J.W. Morris III", with a horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 153507

Enc: Submitted documents

c: Mr. Craig L. White
Leach & White
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(w/o enclosures)