



November 19, 2001

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

OR2001-5348

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# 155094.

The Texas Department of Human Services (the "department") received a request for the following information:

1. Any documents pertaining to complaints lodged with [the department] regarding GBR Home Health Care, Inc. d/b/a Prestige Home Health Care ("Prestige");
2. Any documents pertaining to an investigation by [the department] into alleged misconduct by Prestige regarding . . . a resident at the following assisted-living facility: The Westbrae, 10680 Westbrae Parkway, Houston, Texas 77031; and
3. Any correspondence or documents reflecting communications between [the department] and Prestige.

You state that some of the requested information has been released to the requestor. You claim that a portion of the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with the informer's privilege,

common law privacy, and various state and federal statutes. We have considered the exceptions you claim and reviewed the submitted information.

Pursuant to section 552.301(e)(1), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). As you acknowledge, the department failed to submit the written comments and the requested information within the fifteen business day period required by section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301(e) results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You argue that the submitted information is excepted under section 552.101 of the Government Code. Section 552.101 of the Government Code provides a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Therefore, we will address your asserted exceptions.

Initially, we note that the submitted information includes information that is subject to section 552.022. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. The information that you submitted to us for review in Attachment C appears to be a completed investigation, which falls into one of the categories of information made expressly public by section 552.022. *See* Gov't Code section 552.022(a)(1). Section 552.022(a)(1) states that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Because you argue section 552.101, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," we will address your claims.

Section 552.101 encompasses information protected by other statutes. You assert that the documents in 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 the documents in Attachment C constitute reports, records, and working papers that were used or developed during an 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 Attachment C pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code.<sup>1</sup>

Next, you contend that certain information in the state forms submitted as Attachment D, 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 any identifying information of an individual contained within the form. You claim that the identifying information of the representatives of the facility in the forms is confidential under section 142.009(d)(5). We agree that the identifying information of most of the agency's representatives are confidential under section 142.009(d)(5). However, two of the representatives are owners of the agency. A "home and community support services agency" is defined as "a person who provides home health, hospice, or personal assistance services for pay or other consideration in a client's residence, an independent living environment, or another appropriate location." *Id.* § 142.001(12). "Person" is defined as "an individual, corporation, or association." *Id.* § 142.001(21). As a corporation or association, a home and community support services agency is a person who provides home health, hospice, or personal assistance services for pay or other consideration. We believe that the owner of an agency is a person who falls within the purview of the "home and community support services agency" definition. Thus, the name of an agency's owner is not protected under section 142.009(d)(5) and must be released because the section requires the release of information identifying a home and community support services agency from the state form.

In addition, you contend that a portion of the information in Attachment D is made confidential under the Medical Practice Act, (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 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

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<sup>1</sup>We therefore need not address the remaining arguments pertaining to Attachment C.

information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002( b), (c). 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. 565 at 7 (1990). Thus, the MPA governs access to medical 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). Based on our review of Attachment D and your arguments, we agree that a portion of the highlighted information in Attachment D is subject to the MPA. We have marked the information that may be released by the department only in accordance with the MPA.

Although you argue that the information submitted in Attachment D contains criminal history information, we find that the submitted information does not comprise a compilation by the department of an individual's criminal history. Thus, none of the information in Attachment D may be withheld under section 552.101 in conjunction with *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989).

Next you contend that the documents in Attachment E, together with a portion of those in Attachment F, are records provided to the department by the healthcare facilities as required under section 142.004 of the Health and Safety Code, and that these records are confidential under section 142.004. Section 142.004(d) provides:

Information received by the department relating to the competence and financial resources of the applicant or controlling person with respect to the applicant is confidential and may not be disclosed to the public.

Health & Safety Code § 142.004(d). Based on your representations and our review of the submitted information, we agree that the information in Attachment E and the information we have marked in Attachment F is confidential and must be withheld by the department under section 142.004(d).

The documents in Attachment F also contains e-mail addresses obtained from the public. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential.<sup>2</sup> Senate Bill 694, as passed May 14, 2001, signed by the Governor May 26, 2001, and made effective immediately, provides in relevant part:

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<sup>2</sup>House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. See Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.137). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The department must, therefore, withhold the marked e-mail addresses in Attachment F under section 552.137.

The submitted information also contains social security numbers, which you have highlighted. 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 and 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.* We have no basis for concluding that any of the social security numbers in the submitted documents 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 in the submitted documents, 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 summary, the department must withhold the information in Attachment C and the marked information in Attachment D 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 individuals' identifying information in Attachment D under section 142.009(d)(5). However, the department must release the identifying information of the facility's owners under section 142.009(d)(5). The marked information in Attachment D may be released by the department only in accordance with the MPA. The department must withhold the information in Attachment E and the marked information in Attachment F pursuant to section 552.101 of the Government Code in conjunction with section 142.004 of the Health and Safety Code. The marked e-mail addresses in Attachment F must be withheld from disclosure under section 552.137. In addition, prior to releasing any social security number in Attachment F, the department 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. 42 U.S.C. § 405(c)(2)(C)(viii).

Finally, you request that this office issue a previous determination for the following categories of information:

1. reports, records, and working papers that were used or developed during Home and Community Support Services Agency ("HCSSA") investigations conducted under section 142.009 of the Health and Safety Code;
2. financial information received by the department pursuant to Health and Safety Code §142.004(c)(1) relating to the competence and financial resources of the applicant or a controlling person with respect to the applicant;
3. Health Care Financing Administration ("HCFA") 2567 Forms; and
4. State Forms, Statements of Licensing Violations and Plan of Correction, Identifying Information of an Individual.

At this time, we decline to issue a previous determination for categories 2 and 4. However, you may rely on this ruling as a previous determination to withhold any requested reports, records, and working papers that were used or developed during HCSSA investigations conducted under section 142.009 of the Health and Safety Code, and any identifying information of individuals contained in requested Health Care Financing Administration ("HCFA") 2567 Forms. *See Gov't Code § 552.301(a)*. Therefore, the department need not seek a decision from this office as to future requests for reports, records, and working papers that were used or developed during HCSSA investigations conducted under section 142.009 of the Health and Safety Code, and for Health Care Financing Administration ("HCFA") 2567 Forms, as long as the elements of law, fact, and circumstances of this ruling do not change so as to no longer support the findings set forth above. *See Open Records Decision No. 673 at 7 (2001)*.

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 Texas Building and Procurement 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/seg

Ref: ID# 155094

Enc. Submitted documents

c: Mr. Gregory P. Sapire  
Hughes Luce, LLP  
111 Congress Avenue, Suite 900  
Austin, Texas 78701  
(w/o enclosures)