



January 9, 2002

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

OR2002-0163

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# 157191.

The Texas Department of Human Services (the "department") received a request for the complete file concerning Disability Services of the Southwest, Inc ("DSSW"). You advise that some of the requested information is being released. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. As you acknowledge, you have failed to timely submit written comments stating why the claimed exceptions apply and information responsive to the request for information. Under section 552.302 of the Government Code, a governmental body's failure to timely submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. This office has long held that a compelling reason to withhold information exists, sufficient to overcome the section 552.302 presumption of openness, where the information at issue is made confidential by another source of law or

affects third party interests. *See* Open Records Decision Nos. 26 (1974), 150 (1977). The application of sections 552.101, 552.130, and 552.136 constitute such compelling reasons.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You claim that the information included in Attachment C is excepted from disclosure under section 142.009 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 DSSW is a home and community support services agency regulated by the department under chapter 142 and that the 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.

In addition, you advise that, due to the department's concern over DSSW's delivery of services, the department and DSSW entered into a monitoring agreement in which DSSW must employ a mutually agreeable monitor to report to the department concerning DSSW's compliance with all licensure laws and regulations, and to advise as to DSSW's compliance status. Further, you state that if DSSW fails to comply with applicable laws or provisions of the agreement, the department may revoke DSSW's license or take other enforcement action. Although you do not seek to withhold the monitoring agreement, you seek guidance as to whether the consultant report forms submitted as Attachment E are confidential pursuant to section 142.009. As you point out, section 142.009(a) provides that the "department or its representative may enter the premises of a license applicant or license holder at reasonable times to conduct a survey incidental to the issuance of a license and at other times necessary to ensure compliance with this chapter....". Health & Safety Code § 142.009(a). Based on your representations and our review of the monitoring agreement and the submitted consultant report forms, we conclude that the forms constitute reports, records, or working papers used or developed in an investigation under section 142.009, and are therefore made confidential pursuant to section 142.009(d).

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 agency 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 agency's representative on the form, together with any comments, indicate that the agency 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).

You also claim 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 an 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 in both sets of documents labeled as Attachment G under section 142.009(d)(5). There is a name on an additional form, which we have marked, that you must also withhold.

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 that we have marked in Attachment G under common law privacy as encompassed by section 552.101 of the Government Code. *See id.*

Further, Attachment H contains information that is protected by section 552.136. The Seventy-seventh Legislature recently added section 552.136 to the Public Information Act, which makes bank account numbers confidential. Senate Bill 694 was passed on May 14, 2001, and became effective when it was signed by the Governor on May 26, 2001. It provides, in relevant part, as follows:

Sec. 552.136. CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS.

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.136). Thus, pursuant to section 552.136, you must withhold the bank account numbers you have marked.

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 also withhold the consultant report forms submitted as Attachment E under section 142.009(d). 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). The department must withhold the highlighted individuals' names in the submitted state forms in Attachment G under section 142.009(d)(5), as well as an additional name that we have marked. 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 department must also withhold the bank account numbers in Attachment H. The remaining information must be released to the requestor. Although you request a previous determination authorizing the department to withhold four named categories of information, we decline to issue such a previous determination at this time. 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,



Kristen Bates  
Assistant Attorney General  
Open Records Division

KAB/seg

Ref: ID# 157191

Enc. Submitted documents

c: Mr. Toby B. Fullmer  
Mr. W. Douglas Matthews  
Matthews Law Firm  
3200 Southwest Freeway, Suite 1100  
Houston, Texas 77027  
(w/o enclosures)