



March 5, 2002

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

OR2001-1079

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# 159367.

The Texas Department of Human Services (the "department") received a request for copies of the two most recent surveys of two home and community support services agencies, the Lifecare Home Health of Northeast Texas and Interlink Home Health Services. You state that you have released to the requestor portions of the requested information. However, you claim that portions of the requested information are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

You inform us that the department has withheld from the requestor, among other things, the complaint investigation files and identifying information in the Health Care Financing Administrative ("HCFA") forms. In Open Records Letter No. 2001-5348 (2001), we concluded that the department could withhold from disclosure any requested reports, records, and working papers that were used or developed during home and community support services agency investigations conducted under section 142.009 of the Health and Safety Code without the necessity of requesting a decision from our office with respect to this type of information. In that ruling, we also concluded that the department could withhold from disclosure any identifying information of individuals contained in requested HCFA 2567 Forms when the service provider has had a reasonable opportunity to review and comment on the reports. Because the facts, law, and circumstances surrounding this ruling do not appear to have changed, the department may rely on this ruling as a previous determination to withhold from disclosure based on section 552.101 of the Government Code and section 142.009 of the Health and Safety Code any requested reports, records, and working papers that were used or developed during home and community support services agency investigations. As you state that, in this case, the service provider has had a reasonable

opportunity to review and comment on the reports, you may also rely on this ruling to withhold any identifying information of individuals contained in requested HCFA 2567 forms. *See* Gov't Code § 552.301(a); *see also* Open Records Decision No. 673 (2001).

As for the remaining information at issue, 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 exception.

You contend that information in the state forms that identifies any individual other than the investigated agency 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. 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 representative of the facility in the form is confidential under section 142.009(d)(5). As we understand that the representative here is not the agency owner, we agree that the identifying information of the agency's representatives is confidential under section 142.009(d). *See* Health & Safety Code §142.001(12) (defining "home and community support services agency").

In addition, you contend that a portion of the information 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 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 the information and your arguments, we agree that a portion of the information is subject to the MPA. We agree with the department's MPA markings. Furthermore, we have marked a small portion of additional information that the department may release only in accordance with the MPA.

In summary, the department has properly withheld from the requestor portions of the requested information in accordance with a previous determination of this office concerning the type of information at issue. *See* Open Records Letter No. 2001-5348 (2001). Based on section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code, the department must not release to the requestor the agency's representative's identifying information on the state form. The department may release the marked medical information only in accordance with the MPA.

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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Kay Hastings
Assistant Attorney General
Open Records Division

KH/seg

Ref: ID# 159367

Enc. Submitted documents

c: Mr. David Jones
6720 Lamar Road
Paris, Texas 75462
(w/o enclosures)