



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

March 13, 2003

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

OR2003-1703

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# 177870.

The Texas Department of Human Services (the "department") received a request for information regarding Camp Wood Convalescent Center, Camp Wood Community Clinic, Camp Wood Community Care, Premiere Care Health Services, and two named individuals, including records relating to complaints, licensing, investigations, and financial disclosures and regulations pertaining to physician access to nursing homes. You state that the department will withhold information constituting reports, records, and working papers used or developed during investigations conducted under section 142.009 of the Health and Safety Code, as well as identifying information of an individual contained in federal Health Care Financing Administration ("HCFA") 2567 forms, in accordance with the previous determination issued to the department in Open Records Letter No. 2001-5348 (2001). *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001) (delineating circumstances under which attorney general decision constitutes previous determination under Gov't Code § 552.301). You also inform us that the department will release information contained in HCFA forms, State forms, and information submitted to the department in connection with licensing. You claim that other requested information is excepted from disclosure under sections 552.101 and 552.136 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted. We assume that the department has released any other information encompassed by this request for information that was in existence on the date of the department's receipt of the request. If not, then the department must do so at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000). We note that chapter 552 of the Government Code does not require the department to release information that did not exist when it received this request or to create responsive information. *See* Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

You concede that the department failed to comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to request an attorney general decision and state the exceptions to disclosure that apply not later than the tenth business day after the date of its receipt of the written request for information. Section 552.302 provides that if the governmental body does not request an attorney general decision as provided by section 552.301, the requested information is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information from the public. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

You state that the department received this request for information on November 26, 2002. The department requested this decision by letter dated January 3, 2003. Thus, as the department did not request this decision within the ten-business-day period prescribed by section 552.301, the department did not comply with section 552.301. Therefore, the information at issue is presumed to be public and must be released under section 552.302 unless there is a compelling reason to withhold the information. The presumption that information is public under section 552.302 can generally be overcome by a demonstration that the information is confidential by law or that third-party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982)*. Sections 552.101 and 552.136, which the department raises, can provide compelling reasons for non-disclosure under section 552.302. Accordingly, we will address your arguments.

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 encompasses information that other statutes make confidential. You claim that some of the submitted information is confidential under 142.009(d)(5) of the Health and Safety Code. This section provides that “reports, records, and working papers used or developed in an investigation made under this section 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 the department is required to release the state forms submitted as Attachment B under section 142.009(d)(5). You claim, however, that section 142.009(d)(5) requires the department to withhold the identifying information that you have marked in the state forms. We agree that the marked identifying information in the state forms is confidential under section 142.009(d)(5). We have marked additional identifying information in the state forms that also is confidential under this section. You must withhold all of the marked identifying information in the state forms under section 552.101 of the Government Code in conjunction with section 142.009(d)(5) of the Health and Safety Code.

You also contend that the state forms contain information that is subject to the Medical Practice Act (the “MPA”), as codified at subtitle B of title 3 of the Occupations Code. *See*

Occ. Code § 151.001. The MPA governs the disclosure of medical records. Section 159.002 of the MPA provides in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (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.

Id. § 159.002(a)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Section 159.002(c) requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. *See* Open Records Decision No. 598 (1991). You have marked the information contained in the state forms that you contend is governed by the MPA. You state that disclosure of the marked information would not be consistent with the purposes for which the department obtained the marked information. Upon review of the marked information, we agree that the department must withhold most of the information in accordance with the MPA. We have marked other information that the department also must withhold under the MPA. We find that the remaining information that you have marked is not governed by the MPA. As you claim no other exception to the disclosure of that information, it must be released. The information that you must release also has been marked accordingly.

You also assert that information submitted as Attachment C is confidential under section 142.004 of the Health and Safety Code. This section provides in part that "[i]nformation received by the department relating to the competence and financial resources of the applicant or a controlling person with respect to the applicant is confidential and may not be disclosed to the public." Health & Safety Code § 142.004(d). You explain that the information submitted as Attachment C was submitted to the department during the licensing process. You inform us that the department obtained this information under section 142.004.

You state that portions of this information relate to the competence of the applicant or a controlling person with respect to the applicant. You state that other information in Attachment C relates to the financial resources of the applicant. Based on your representations and our review of the information in question, we have marked the information in Attachment C that the department must withhold under section 552.101 of the Government Code in conjunction with section 142.004 of the Health and Safety Code.

You also note that the information in Attachment C includes social security numbers. A social security number may be excepted from disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that any social security number contained in Attachment C is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that authorizes the department to obtain or maintain a social security number. Thus, we have no basis for concluding that any social security number in Attachment C was obtained or is maintained pursuant to such a law and is therefore confidential under the federal law. We caution the department, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing a social security number, the department should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

Lastly, we address your claim under section 552.136 of the Government Code. This exception to disclosure provides as follows:

(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.

Gov't Code § 552.136. You state that the information in Attachment C also includes a bank account number. We have marked the account number information that the department must withhold under section 552.136.

In summary, the department must withhold some of the submitted information under section 552.101 of the Government Code in conjunction with sections 142.009 and 142.004 of the Health and Safety Code. The department also must withhold the information that is confidential under the MPA. A social security number may be excepted from disclosure under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. The department must withhold the account number information under section 552.136. The rest of the submitted information 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).

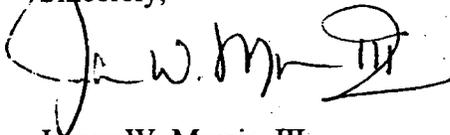
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is stylized and written over a large, faint circular mark.

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

JWM/sdk

Ref: ID# 177870

Enc: Submitted documents

c: Ms. Gail D.C. Dorn
P.O. Box 23064
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(w/o enclosures)