



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

July 3, 2003

Ms. Rebecca L. Payne
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Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2003-4608

Dear Ms. Payne:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 183027.

The Texas Department of Human Services (the "Department") received a request for "[c]opies of any and all information related to [a named individual] and CT Corporation System/Sultan Medical Center from 1997 to [the] present[.]" You inform us that the Department will release some of the requested information to the requestor. You assert a portion of the requested information is excepted from disclosure under sections 552.101 and 552.137 of the Government Code. We reviewed the information you submitted and considered the exceptions you claim.

Initially, we note the Department's acknowledgment of its failure meets its obligations under section 552.301 of the Government Code. 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 (1) general 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. In this case, the Department received the present request for information on March 31, 2003. Accordingly, the Department should have submitted its general written

comments and either the requested information or a representative sample no later than April 21, 2003. We received your arguments and the requested information on June 12, 2003. Consequently, we conclude the Department failed to comply with the requirements of section 552.301(e) of the Government Code.

According to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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). Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 at 2 (1977). As section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will address your arguments under this exception. *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).

Also, we note the Department may rely on Open Records Letter No. 2001-5348 (2001) as a previous determination issued by this office to withhold reports, records, and working papers associated with an investigation conducted under section 142.009 of the Health and Safety Code. *See* Open Records Decision No. 673 (2001). Further, Open Records Letter No. 2001-5348 authorizes the Department to withhold the identifying information of individuals contained in a Health Care Financing Administration 2567 form, currently known as a Center for Medicare & Medicaid Services 2567 form. *See id.*

Next, we address your arguments under section 552.101 of the Government Code, which excepts from disclosure "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 Health Insurance Portability and Accountability Act of 1996 ("HIPAA") governs some of the information in the state form titled "Statement of Licensing Violations and Plan of Corrections" and dated February 25, 2002. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164; *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R.

Pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

Section 160.103 defines a covered entity as a health plan, a health clearinghouse, or a healthcare provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter. 45 C.F.R. § 160.103. In this instance, the Department explains that it is a health plan under HIPAA because as an administrator of part of the Medicaid program, the Department is considered a health plan. Based on your representations, we conclude the Department is a covered entity under HIPAA.

Under these standards, a covered entity may not use or disclose protected health information, except as provided by the Code of Federal Regulations, parts 160 and 164. 45 C.F.R. § 164.502(a). Section 160.103 of title 45 of the Code of Federal Regulations defines the following relevant terms as follows:

Health information means any information, whether oral or recorded in any form or medium, that:

- (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual, and:

- (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
 - (i) That identifies the individual; or

- (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

Protected health information means individually identifiable health information:

- (1) Except as provided in paragraph (2) of this definition, that is:
 - (i) Transmitted by electronic media;
 - (ii) Maintained in electronic media;
 - (iii) Transmitted or maintained in any other form or medium.

45 C.F.R. § 160.103. You contend the state form dated February 25, 2002 contains individually identifiable protected health information, which you have marked. Upon review of the marked information, we agree that some of the numbered paragraphs contain protected health information as contemplated by HIPAA. We have marked information in these paragraphs that we do not consider within the purview of HIPAA. Further, you neither inform us nor are we aware of an exception which would permit the Department to disclose protected health information to the requestor.

However, a covered entity may use protected health information to create information that is not individually identifiable health information, i.e., de-identified. 45 C.F.R. § 164.502(d)(1). The privacy standards that govern the uses and disclosures of protected health information do not apply to information de-identified in accordance with subsections 164.514(a) and (b) of the Code of Federal Regulations. 45 C.F.R. § 164.502(d)(2).

Under HIPAA, a covered entity may determine health information is not individually identifiable only under certain circumstances. One method requires a person with specialized knowledge of generally accepted statistical and scientific principles and methods for rendering information de-identifiable to apply and document such methods and principles to determine release of protected health information would result in a very small risk of individual identification. 45 C.F.R. § 164.514(b)(1). The other method requires the covered entity to meet the following two criteria: 1) remove specific identifiers, including but not limited to, names, dates directly related to an individual, telecommunication numbers, vehicle identifiers, and any unique identifying number, characteristic, or code and 2) the covered entity must not have actual knowledge that the information could be used alone or in combination with other information to identify an individual who is a subject of the information.. See 45 C.F.R. § 164.514(b)(2)(i), (ii). De-identification of individually identifiable protected health information includes removing “[a]ll elements of dates (except

year) for dates directly related to an individual, including birth date, admission date, discharge date, date of death” See 45 C.F.R. § 164.514(b)(2)(i)(C).

You assert that the Department can de-identify the protected health information in the state form by redacting the dates that relate directly to the referenced individuals. You explain that the Department has no knowledge that release of the remaining de-identified information could be used or alone or in combination with other information to identify the subject of the health information. Based on our review of your representations and the information at issue, we agree that redaction of the dates you have marked properly de-identifies the protected health information under HIPAA. Upon de-identification of the information, the Department must disclose the information, subject to the Medical Practice Act (“MPA”).

We note the applicability of the MPA, chapter 159 of the Occupations Code, to the de-identified health information on the state form. Generally, HIPAA preempts a contrary provision of state law. See 45 C.F.R. § 160.203. For purposes of HIPAA, “contrary” means the following:

- (1) A covered entity would find it impossible to comply with both the State and federal requirements; or
- (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act or section 264 of Pub. L. 104-191, as applicable.

45 C.F.R. § 160.202. It is not impossible for the Department to comply with both section 159.002 and HIPAA. Furthermore, section 159.002 is not an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA. In fact, one of the purposes of section 159.002 is to protect patient privacy. Therefore, HIPAA does not preempt section 159.002.

Section 159.002 of the MPA reads, in part, as follows:

- (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.

Occ. Code § 159.002(a), (b), (c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). You inform us that the state form contains information obtained from medical records created by physicians. Moreover, you explain disclosure of the highlighted information would not be consistent with the purposes for which the Department obtained that information. Based on your representations and our review of the information, we conclude the Department must withhold the information you have marked as MPA information. *See* Open Records Decision No. 598 (1991).

Next, as you assert, section 6103(a) of title 26 of the United States Code makes federal tax return information confidential. *See* 26 U.S.C. § 6103(a). Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return . . . or the determination of the existence, or possible existence, of liability . . . for any tax, . . . penalty, . . . , or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A) (emphasis added). We find Form W-9 and Form SS-4 do not fall within the purview of section 6103 because they do not constitute return information as contemplated by section 6103. Therefore, the Department may not withhold Form W-9 or Form SS-4 under section 552.101 in conjunction with section 6103 of title 26 of the United States Code.

Also, you claim section 142.004 of the Health & Safety Code governs some of the submitted licensing information. Section 142.004(d) provides as follows:

Information 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 inform us that the Department obtained some of the submitted information in connection with the licensing process. Based on your representations and our review of the documents at issue, we agree that the information relating to criminal convictions and financial resources of the applicant constitutes confidential information as it relates to the competence and financial resources of the applicant. *See* Health & Safety Code § 142.004(d). However, we find Form W-9 and Form SS-4 do not relate to the competence or financial resources of the applicant. Rather, these forms provide a formal mechanism for the Department to ensure it has the applicant's correct social security number and taxpayer identification number. Therefore, with the exception of Form W-4 and Form SS-4, the Department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 142.004(d) of the Health and Safety Code.

Additionally, you assert section 142.009(d) of the Health and Safety Code, which provides, in pertinent part, as follows:

(d) the 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 assert that the identifying information of individuals contained in the state forms titled Statement of Licensing Violations and Plan of Correction is confidential under section 142.009(d)(5) of the Health and Safety Code. Upon reviewing the documents, we agree that you must withhold the identifying information of individuals you have marked on the state forms in accordance with section 552.101 of the Government Code in conjunction with section 142.009(d)(5) of the Health and Safety Code.

Further, you contend that the social security numbers contained in the submitted information are confidential under section 552.101 in conjunction with section 231.302 of the Family Code. In relevant part, section 231.302 states the following:

(c) To assist in the administration of laws relating to child support enforcement under Parts A and D of Title IV of the federal Social Security Act (42 U.S.C. Sections 601-617 and 651-669):

(1) each licensing authority shall request and each applicant for a license shall provide the applicant's social security number[.]

....

(e) Except as provided by Subsection (d), a social security number provided under this section is confidential and may be disclosed only for the purposes of responding to a request for information from an agency operating under the provisions of Part A or D of Title IV of the federal Social Security Act (42 U.S.C. Sections 601 et seq. and 651 et seq).

....

(g) In this section, "licensing authority" has the meaning assigned by Section 232.001.

Fam. Code § 231.302(c)(1), (e), (g). You inform us that the Department is a licensing authority as defined by section 232.001 of the Family Code. *See* Fam. Code § 232.001(2) (defining "licensing authority" as a department . . . of the state . . . that issues a license). Further, you explain that, in this instance, disclosure of the social security numbers would not be for a permitted purpose under section 231.302(e) of the Family Code. *See* Fam. Code § 231.302(e). Based on your representations and a review of the information, we conclude the Department must withhold the social security numbers you have highlighted in accordance with section 552.101 in conjunction with section 231.302(e) of the Family Code.

Last, we note the submitted information contains an e-mail address subject to section 552.137 of the Government Code. Specifically, section 552.137 states the following:

(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.

Gov't Code § 552.137. This provision makes certain e-mail addresses confidential. *See* Gov't Code § 552.137. You do not inform us that the member of the public has affirmatively consented to the release of the e-mail address contained in the submitted materials. Therefore, the Department must withhold the e-mail address of the member of the public, which we have marked, under section 552.137 of the Government Code.

In summary, upon de-identification of the individually identifiable protected health information, the Department must disclose the de-identified information in the state form subject to the MPA. Also, under section 552.101, the Department must withhold the information you have marked as MPA information. The Department must withhold the

following information, which you have marked, under section 552.101 in conjunction with the specified provision: 1) the identifying information of individuals contained in the state forms titled Statement of Licensing Violations and Plan of Correction in accordance with section 142.009(d)(5) of the Health and Safety Code, 2) the information relating to criminal convictions and financial resources under section 142.004(d) of the Health and Safety Code, and 3) the social security numbers under section 231.302(e) of the Family Code. Last, the Department must withhold the e-mail address we have marked under section 552.137 of the Government Code. The Department must release the remaining information to the requestor, including the submitted Form W-9 and Form SS-4.

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,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 183027

Enc: Submitted documents

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