OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 7, 2003

Ms. Karen Rabon
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2003-4667

Dear Ms. Rabon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 183897.

The Office of the Attorney General (the "OAG") received a request for a copy of the investigation of a near-drowning incident that occurred at the Park Manor Nursing Home. You claim that the requested information, which is maintained by the OAG's Medicaid Fraud Control Unit ("MFCU"), is excepted from public disclosure under section 552.101 of the Government Code in conjunction with various state statutes and the common-law right to privacy. We have considered the claimed exception and have reviewed the submitted sample information.[1]

The OAG states, and we agree, that it has not sought an open records decision from this office within the statutory ten business day period. *See* Gov't Code § 552.301(b). The OAG's delay in this matter results in the presumption that the requested information is public. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ). In order to overcome the presumption of openness, the governmental body

[1]We assume that the "sample" records submitted to this office are truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

must provide compelling reasons why the information should not be disclosed. *Hancock*, 797 S.W.2d at 381. Since the applicability of section 552.101 provides such a compelling reason, we will address the OAG's arguments against disclosure.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. You contend that all of the requested information is confidential under section 242.127 of the Health and Safety Code. Section 242.127 provides, among other things, that a report, record, or other working paper used or developed in an investigation under subchapter E of chapter 242 is confidential and may only be disclosed for purposes consistent with the rules adopted by the Texas Board of Human Services or the designated agency. Health & Safety Code § 242.127.

You explain that the Texas Department of Human Services (the "department") is responsible for investigating reports of abuse and neglect in convalescent and nursing homes and related institutions. *See* Health & Safety Code § 242.126 (authorizing investigation of complaint of abuse or neglect by department or designated agency). You further explain that, pursuant to federal law, MFCU is responsible for reviewing cases of abuse or neglect of patients in health care facilities receiving payments under the State Medicaid plan. *See* 42 U.S.C. § 1396. Based on the close relationship between MFCU and the department in investigating abuse and neglect cases under subchapter E of chapter 242, this office has previously determined that the confidentiality provision in section 242.127 extends to the reports, records, or working papers used or developed by MFCU in such investigations. In this instance, you state that the requested records were obtained from the department or were generated by MFCU in connection with an investigation of abuse under subchapter E. We agree that the requested information is subject to section 242.127. Because you have not advised us of any rules promulgated by the OAG permitting disclosure of the information at issue, we conclude that the requested information is confidential under section 242.127 and must, therefore, be withheld in its entirety under section 552.101 of the Government Code.[2]

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.*

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[2]Because we are able to make a determination under section 242.127, we need not address your additional arguments under section 552.101.

§ 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).

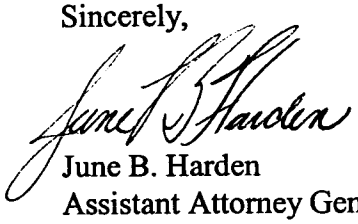
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/seg

Ref: ID# 183897

Enc: Submitted documents

c: Mr. Danny Barnes
Texas Litigation Services
5646 Milton Street, Suite 505
Dallas, Texas 75206
(w/o enclosures)