



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

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

OR2003-4750

Dear Ms. Payne:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 183204.

The Department of Human Services (the "department") received a request for information relating to Right At Home, Inc. for a certain period. You state that information that constitutes reports, records, and working papers used or developed in an investigation under section 142.009 of the Health and Safety Code will be withheld 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 at 6-9 (2001) (delineating instances in which attorney general decision constitutes previous determination under Gov't Code § 552.301). Accordingly, we need not further address the public nature of that information. You state that you will release other requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by addressing section 552.007 of the Government Code. This section provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See* Gov't Code 552.007; Open Records Decision No. 518 at 3 (1989). The submitted documents and our records indicate that a

portion of the information at issue, submitted as Attachment D, was previously released to a member of the public. Because the department voluntarily disclosed this information to a member of the public, the department may not now withhold such information unless its release is expressly prohibited by law. *See* Gov't Code § 552.007.

You assert that the submitted information in Attachment D is excepted under sections 552.103, 552.107, and 552.111 of the Government Code. These sections are discretionary exceptions and do not constitute law prohibiting the release of this information. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 663 (1999) (governmental body may waive sections 552.103 and 552.111), 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive section 552.111). Thus, the information in Exhibit D may not be withheld under section 552.103, 552.107, or 552.111, and must be released to the requestor.

You claim that certain information in the state Statements of Licensing Violations and Plans of Correction forms (the “state forms”) is not subject to release pursuant to regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), and that the information is therefore excepted from disclosure under section 552.101 of the Government Code in conjunction with these regulations.¹ 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 health care provider who transmits any health information in electronic form in connection with a transaction covered by subchapter C, Subtitle A of Title 45. 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.

¹Section 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 another statute makes confidential.

Therefore, we will next determine whether the information at issue is protected health information under the federal law.

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 that a portion of the information in the state forms constitutes individually identifiable protected health information. Upon review of the information at issue, we agree that most of it is protected health information as contemplated by HIPAA. However, the remainder of the information you appear to contend is protected health information either (1) does not relate 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 or (2) does not identify an individual and can not reasonably be used to identify an individual. Therefore, that information is not protected health information. See 45 C.F.R. § 160.103. In regard to the protected health information, we note that a covered entity may use protected health information to create information that is not individually identifiable health information, i.e., information that is 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 sections 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 other unique identifying number, characteristic, or code and 2) have no 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). 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. We understand you to assert 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 most of the dates you have marked and some additional information we have marked properly de-identifies the protected health information under HIPAA. See 45 C.F.R. § 164.514(b)(2)(i)(A)-(R). The remaining dates that you have marked either are not part of protected health information under HIPAA, or are not identifiers as enumerated in section 164.514(b)(2)(i). See 45 C.F.R. § 164.514(b)(2)(i)(C) (dates directly related to an individual are among identifiers to be removed from individually identifiable health information). 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 in the state forms. 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 provides in 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). Information that is 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). Based on our review of the submitted information, we have marked the information in the state forms that is subject to the MPA. In this case, this marked information must be withheld from disclosure under section 552.101 of the Government Code. However, the remaining information in the state forms was not created or maintained by a physician or someone under the supervision of a physician and does not contain information obtained from medical records. Therefore, the MPA is inapplicable to the remainder of the state forms.

You claim that some of the submitted information is confidential under section 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 submitted state forms under section 142.009(d)(5). You claim, however, that this section requires the department to withhold the identifying information contained in the state forms. You have marked that information. We agree that you must withhold the marked portions of 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.

Next, you assert that some of the remaining submitted information 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 at issue 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 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 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.

We also note that some of the submitted information is subject to 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). You indicate that the department obtained the social security numbers at issue from license applicants during the licensing process pursuant to section 232.001 of the Family Code. 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.

You assert that the remaining submitted information, which you have labeled "Enforcement Action," is excepted from disclosure under section 552.103 of the Government Code, which provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under 552.103(a). Contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation under section 552.103. See Open Records Decision No. 588 at 7 (1991).

You state that the information at issue pertains to a pending enforcement action, Cause No. 02-607-K, initiated by the department against Right At Home, Inc., the subject of the request for information. You state that the enforcement action may be resolved through settlement, administrative hearing, or trial. You further inform us that a hearing on the matter, which will be conducted under the APA, was requested and docketed at the State Office of Administrative Hearings. This is sufficient to demonstrate that litigation is pending in this matter. Having reviewed the documents at issue, we conclude that they are related to the pending litigation for the purposes of section 552.103(a). Therefore, the department may withhold the information that we have marked under section 552.103.

We note, however, that generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to *that* information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party is not excepted from disclosure under section 552.103(a). Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, because the information submitted as Attachment D was previously released, it must be released to the requestor. 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. We have marked the information in the state forms that is subject to the MPA, and it must be withheld under section 552.101 of the Government Code. The department must withhold the information that we have marked under section 552.101 of the Government Code in conjunction with section 142.004 of the Health and Safety Code. The social security numbers that you have highlighted must be withheld pursuant to section 552.101 in conjunction with section 231.302(e) of the Family Code. The department may withhold the information that we have marked under section 552.103. The remaining submitted information must be released to the requestor.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.

²As our ruling is dispositive, we do not address your remaining arguments.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 183204

Enc. Submitted documents

c: Mr. Marcus L. Stevenson
Grady, Schneider & Newman, L.L.P.
801 Congress Avenue, 4th Floor
Houston, Texas 77002
(w/o enclosures)