



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 21, 2003

Ms. Margaret A. Roll  
Assistant General Counsel  
Texas Department of Human Services  
P.O. Box 149030  
Austin, Texas 78714-9030

OR2003-5900

Dear Ms. Roll:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186360.

The Texas Department of Human Services (the "department") received two requests for certain annual state surveys and "all surveys, complaints and investigation documents" regarding a specified assisted living facility. You state that you will be releasing most of the requested records but claim that portions of the responsive 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.

Initially, we note, and you acknowledge, that the department has not sought an open records decision from this office within the time periods prescribed by section 552.301 of the Government Code. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. See Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). To overcome this presumption, the governmental body must show a compelling interest to withhold the information. See Gov't Code § 552.302; *Hancock*, 797 S.W.2d at 381. 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 the presumption of openness can be overcome by a showing that information is confidential by law, we will consider your arguments under section 552.101.

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

section encompasses information protected by other statutes. You claim that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8, governs some of the submitted information. 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, except 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 submitted information contains individually identifiable protected health information, which you have marked. Upon review of the marked and highlighted information, we agree that most of it is protected health information as contemplated by HIPAA. We have marked the information that is not protected health information under HIPAA. In regard to the protected health information, 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).

In regard to the first method of de-identification, you state that “no statistician, mathematician, or other similar professional has concluded that the risk is very small that the information, alone or in combination with other reasonably available information, could be used to identify an individual.” Thus, de-identification under this method is not applicable in this instance.

Consistent with the second method of de-identification, we have marked for redaction the specific identifiers in the submitted protected health information. *See* 45 C.F.R. § 164.514(b)(2)(i)(A)-(R). In regard to the second method of de-identification, you explain that the “name of the facility reveals the street address, city, and zip code of the individuals who reside in the facility,” and that de-identification would require the removal of this information. In this case, we disagree that de-identification under section 164.514(b)(2)(i) requires that facility names be removed from the submitted information. You also contend that de-identification “would be impossible in circumstances like this one where a requestor asks for reports regarding particular facilities.” If the department has actual knowledge that the de-identified information, as we have marked it, could be used alone or in combination with other information to identify the subject of the health information, then the department must withhold the protected health information in its entirety under section 552.101 of the Government Code in conjunction with HIPAA. To the extent that the department has no actual knowledge that the de-identified information, as we have marked it, could be used alone or in combination with other information to identify the subject of the health information, the department must withhold under section 552.101 of the Government Code in conjunction with HIPAA only the types of information that we have marked.

We next address the applicability of sections 12.003, 21.012, and 48.101 of the Human Resources Code to the de-identified information and other information that is not subject to HIPAA. 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 these provisions of the Human Resources Code and HIPAA, and none of these sections is an obstacle to the

accomplishment and execution of the full purposes and objectives of HIPAA. In fact, one of the purposes of these provisions is to protect patient privacy. Therefore, HIPAA does not preempt sections 12.003, 21.012, and 48.101.

You assert that portions of the submitted information are confidential under sections 12.003 and 21.012 of the Human Resources Code, which govern information concerning clients of a state plan for medical assistance. These sections prohibit the disclosure of information concerning clients of such a plan, except for a purpose directly connected with the administration of the plan. *See* Hum. Res. Code §§ 12.003, 21.012; *see also* 40 T.A.C. §§ 71.4 (information may be released if it is for the purposes reasonably necessary for administering the assistance program); Open Records Decision Nos. 584 (1991), 166 (1977).

Section 12.003 of the Human Resources Code provides in relevant part:

(a) Except for purposes directly connected with the administration of the department's assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, *or any information concerning*, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties.

Hum. Res. Code § 12.003(a) (emphasis added). The term "assistance" in sections 12.003 and 21.012 of the Human Resources Code includes "all forms of assistance and services for needy persons authorized by Subtitle C." *Id.* § 11.001(4). In Open Records Decision No. 584 (1991), this office concluded that "[t]he inclusion of the words 'or any information' juxtaposed with the prohibition on disclosure of the names of the department's clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients' names and addresses." Open Records Decision No. 584 at 3. Consequently, it is the specific information pertaining to individual clients, and not merely the clients' identities, that is made confidential under section 12.003. *See also* Hum. Res. Code § 21.012(a) (requiring provision of safeguards that restrict use or disclosure of information concerning applicants for or recipients of assistance programs to purposes directly connected with administration of programs).

Based on your arguments and markings, we understand you to represent that the portions of the submitted information that you assert are protected under section 12.003 are directly or indirectly derived from the records, papers, files, or communications of the department or acquired by department employees in the performance of their official duties. The release of this information in this instance would not be for purposes directly connected with the administration of the department's assistance programs. We have reviewed your markings and indicated those portions that constitute "information concerning" persons applying for

or receiving assistance. This information is confidential under section 12.003 of the Human Resources Code and therefore must be withheld pursuant to section 552.101 of the Government Code.

We turn now to your claim that portions of the submitted information are confidential under section 48.101 of the Human Resources Code. This section provides in relevant part:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

- (1) a report of abuse, neglect, or exploitation made under this chapter;
- (2) the identity of the person making the report; and
- (3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

Hum. Res. Code § 48.101(a). You inform us office that the department is responsible for licensing assisted living facilities. You further state that, as the licensing agency, the department is also responsible for investigating complaints of abuse, neglect, or exploitation involving these types of facilities. *See id.* § 48.301. Based on your representations, we believe that the submitted documents constitute files, reports, records, communications, and working papers used or developed in an investigation made under chapter 48 of the Human Resources Code or in providing services as a result of an investigation. The submitted documents are therefore confidential under section 48.101 of the Human Resources Code.

Section 48.101 further provides that “[c]onfidential information may be disclosed only for a purpose consistent with this chapter and as provided by [Department of Protective and Regulatory Services] or investigating state agency rule and applicable federal law.” *Id.* § 48.101(b). You inform this office that the rules adopted by the department for the release of information used or developed in an investigation are found at section 92.106 of title 40 of the Texas Administrative Code. Section 92.106 provides in relevant part:

(a) Confidentiality. All reports, records, and working papers used or developed by the Texas Department of Human Services (DHS) in an investigation are confidential, and may be released only as provided in this subsection.

...

(2) Completed written investigation reports are open to the public, provided the report is deidentified. The process of deidentification means removing all names and other personally identifiable data, including any information from witnesses and others furnished to the department as part of the investigation.

40 T.A.C. § 92.106(a)(2). You indicate that the submitted documents have been marked to note the information that the department believes it must withhold under sections 48.101 and 92.106. We have reviewed your markings and indicated those portions that must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code and section 92.106 of title 40 of the Texas Administrative Code.

In summary, to the extent that the department has no actual knowledge that the de-identified information, as we have marked it, could be used alone or in combination with other information to identify the subject of the health information, the department must withhold under section 552.101 of the Government Code in conjunction with HIPAA only the types of information that we have marked. In addition, pursuant to section 552.101, the department must withhold the information we have marked as being made confidential under section 12.003 of the Human Resources Code. We have also marked other information that the department must withhold pursuant to section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code and section 92.106 of title 40 of the Texas Administrative Code. As our ruling on these issues is dispositive, we need not address your remaining arguments.

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

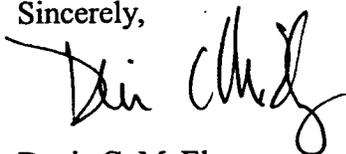
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge 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,



Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/lmt

Ref: ID# 186360

Enc. Submitted documents

c: Mr. Darren Wilcox  
Packard, Packard & LaPray  
87 I-H 10 North, Suite 225  
Beaumont, Texas 77707  
(w/o enclosures)