



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 22, 2003

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

OR2003-6629

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# 188031.

The Texas Department of Human Services (the "department") received a request for certain information relating to "Pine Haven Nursing Home/Stoneleigh Estates" for a specified period of time. You advise that the department is releasing a portion of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.130, and 552.136 of the Government Code, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5. We have considered the exceptions you claim and have reviewed the submitted information.

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, such as sections 242.126 and 242.127 of the Health and Safety Code. Subchapter E of chapter 242 of the Health and Safety Code concerns reports of abuse and neglect at convalescent and nursing homes and related institutions. *See* Health & Safety Code §§ 242.121 *et seq.* Section 242.126(g) states that the department must make investigation reports of abuse or neglect pertaining to a facility licensed under chapter 242 public on request, but that the names of the following individuals must be withheld:

- (1) any resident, unless the department receives written authorization from a resident or the resident's legal representative requesting the resident's name be left in the report;
- (2) the person making the report of abuse or neglect or other complaint; and
- (3) an individual interviewed in the investigation.

Health & Safety Code § 242.126(g). Section 242.127 provides as follows: “A report, record, or other working paper used or developed in an investigation and the name, address, and phone number of any person making a report under [subchapter E, chapter 242] are confidential and may be disclosed only for purposes consistent with rules adopted by the Texas Board of Human Services or the designated agency.” Health & Safety Code § 242.127. In addition, the department adopted section 19.2010 of title 40 of the Texas Administrative Code, which applies to investigations of complaints of abuse, neglect, and exploitation at nursing facilities and related institutions. Section 19.2010 provides in part as follows:

(a) Confidentiality. All reports, records, and working papers used or developed by [the department] in an investigation are confidential and may be released to the public only as provided below.

(1) Completed written investigation reports are open to the public, provided the report is de-identified. The process of de-identification 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.

Many of the records you submitted to this office pertain to investigations conducted under the authority of chapter 242 of the Health and Safety Code into complaints of abuse or neglect of nursing facility residents. You state that reports among these documents were created pursuant to section 242.126. Therefore, we agree that all personally identifiable information in those reports is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 242.126 of the Health and Safety Code and section 19.2010 of title 40 of the Texas Administrative Code. We further conclude that the remaining documents used or developed during the course of the underlying investigations are made confidential under section 242.127 and therefore must be withheld in their entirety. We have marked the documents accordingly. Because we are able to make this determination, we need not address your other arguments for withholding information contained in these documents.

We next address your claim in relation to social security numbers contained in other documents. Section 56.001 of the Occupations Code provides:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

Occ. Code § 56.001. You state that the department obtained the social security numbers at issue as part of the licensing process under chapter 242. Accordingly, we conclude that the department must withhold from disclosure the social security numbers that you have highlighted pursuant to section 552.101 in conjunction with section 56.001 of the

Occupations Code. Therefore, we do not address your remaining arguments for this information.

Further, you state that additional information is excepted under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Thus, we agree that the Texas driver's license numbers that you have highlighted must be withheld under section 552.130.

The submitted information also contains bank account numbers. Section 552.136 of the Government Code makes certain account numbers confidential. It provides as follows:

Sec. 552.136. CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS.

(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. We find that the department must withhold the bank account information we have marked pursuant to section 552.136.

We note that the submitted documents also contain an e-mail address of a member of the public. Section 552.137 of the Government Code provides:

(a) Except as otherwise provided by this section, 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.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78th Leg., R.S., ch. 1089, § 1 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov't Code § 552.137). Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. E-mail addresses that are encompassed by subsection 552.137(c) are also not excepted from disclosure under section 552.137. Based on our review of the submitted information, we find that the e-mail address contained within this information is excepted from disclosure under section 552.137(a). Accordingly, unless the department has received affirmative consent for the release of the e-mail address, the department must withhold the e-mail address we have marked pursuant to section 552.137(a) of the Government Code.

We now address your claim under section 552.103 with respect to the remaining information. Section 552.103 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.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a showing that (1) litigation is pending or reasonably anticipated on the date that the governmental body received the request for information, 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 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). The department must meet both prongs of this test for information to be excepted under section 552.103(a).

To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). You represent that the department investigated the Pine Haven Nursing Home during the time period referenced in the request, and determined that violations of the Health and Safety Code occurred. You state, and the submitted documents reflect, that the department referred the matter to the Public Health and Elder Law Division of the Office of the Attorney General for the imposition of civil penalties. Based on your arguments and our review of the submitted information, we conclude that you have shown that litigation was reasonably anticipated on the date the department received the present request for information. We further find that the information at issue relates to the anticipated litigation for purposes of section 552.103.

We note, however, that once information has been obtained by all parties to the anticipated 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, any information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be

disclosed.¹ Otherwise, the department may withhold the information at issue under section 552.103. As section 552.103 is dispositive, we do not address your other claims for this information.

In summary, the department must withhold all identifying information contained in reports created pursuant to section 242.126(g) of the Health and Safety Code. The department must also withhold in their entirety all other records used or developed in the investigations pursuant to section 242.127. Social security numbers in the submitted licensure information must be withheld under section 552.101 in conjunction with section 56.001 of the Occupations Code. Texas driver's license numbers must be withheld under section 552.130, and bank account numbers must be withheld under section 552.136. The e-mail address we have marked must be withheld under section 552.137 unless the department has received an affirmative consent to release it. The remaining submitted information may be withheld under section 552.103.

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).

¹ Further, the applicability of section 552.103(a) ends once litigation has been concluded or litigation is no longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/lmt

Ref: ID# 188031

Enc. Submitted documents

c: Ms. Sara Stevens
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(w/o enclosures)