



ATTORNEY GENERAL OF TEXAS

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November 10, 2003

Mr. William T. Buida
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OR2003-8105

Dear Mr. Buida:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190908.

The Texas Department of Human Services (the "department") received a request for information relating to two alleged assaults on a named individual and several categories of information relating to Pecan Tree Manor and Maxim Healthcare Services. You inform us that a portion of the requested information is being released to the requestor and that the department will withhold other responsive information pursuant to the previous determination issued in Open Records Letter No. 2001-5348 (2001). *See* Gov't Code § 552.301(a); *see also* Open Records Decision No. 673 at 6-9 (2001) (criteria of previous determination regarding specific categories of information). You also indicate that the department does not maintain some of the requested information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received). You claim that other requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

¹The department originally submitted documents to this office on September 11, 2003. On November 5, the department submitted a second set of documents, which duplicated the first set but did not include information that is subject to the previous determination issued in Open Records Letter No. 2001-5348 (2001). This ruling only addresses the applicability of the claimed exceptions to the second set of documents that was submitted on November 5. Although you claimed that a portion of the September 11 documents was excepted from disclosure pursuant to section 552.107 and Texas Rule of Evidence 503, those records were not included in the November 5 set of documents. We therefore do not address those arguments in this ruling.

We next note that, other than a small amount of information pertaining to licensing, the submitted information consists entirely of completed investigations made of, for, or by the department. Section 552.022 of the Government Code provides that “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body” constitutes “public information . . . not excepted from required disclosure . . . unless . . . expressly confidential under other law” or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). You do not claim that the submitted information is excepted under section 552.108. You assert instead that it may be withheld pursuant to section 552.103 of the Government Code. This section is a discretionary exception to disclosure that protects a governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *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 No. 522 (1989) (discretionary exceptions in general). Thus, none of the submitted information may be withheld pursuant to section 552.103.

We turn now to your claim that certain information contained in the submitted documents is confidential under federal law. 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, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. *See* 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. *See* 45 C.F.R. § 160.103. In this instance, you explain that the department 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. 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 portions of the submitted records constitute protected health information. Having reviewed the information at issue, we agree that some of this information constitutes protected health information as contemplated by HIPAA. However, 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. *See* 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 that is de-identified in accordance with sections 164.514(a) and (b) of the Code of Federal Regulations. *See* 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. *See* 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 submitted documents by redacting the information that you have highlighted. Based on our review of your representations and the information at issue, we agree that the redaction of the information that we have marked properly de-identifies most of the protected health information under HIPAA. *See* 45 C.F.R. §§ 164.514(b)(2)(i)(A)-(R).

We note, however, that the requestor is aware of the identity of one of the individuals whose protected health information is at issue. Therefore, we conclude that using either of the methods of de-identification described above would be insufficient to protect this individual's identity as required under HIPAA. Accordingly, we find that the information relating to this individual constitutes protected health information under HIPAA in its entirety. *See* 45 C.F.R. § 164.514(b)(2)(ii)(R). Thus, under section 552.101 of the Government Code in conjunction with HIPAA, the department must withhold in its entirety the information we have marked.

We turn now to your arguments for the remaining information, which does not relate to the specified individual and which you do not contend is personally identifiable health information protected under HIPAA. You contend that certain identifying information must be withheld under section 552.101 because it is confidential under section 142.009(d) of the Health and Safety Code. Section 142.009(d) states that "reports, records, and working papers

used or developed in an investigation . . . 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 have informed this office that the submitted documents are those that must be released under section 142.009(d)(5). You claim, however, that this section dictates that the department withhold the identifying information that you have marked in these records. Assuming that none of the identified individuals whose information you have highlighted is an owner of the agency, we agree that their identifying information is confidential under section 142.009(d). *See* Health & Safety Code §142.001(12) (defining “home and community support services agency”). Therefore, pursuant to section 552.101 of the Government Code and section 142.009(d)(5) of the Health and Safety Code, you must withhold the identifying information that we have marked.

You also assert that certain social security numbers are confidential pursuant to section 56.001 of the Occupations Code. Section 552.101 also encompasses section 56.001, which 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 indicate that the individuals at issue provided these social security numbers to the department in order to receive their licenses. Accordingly, we find that the social security numbers are confidential under section 56.001 of the Occupations Code and must therefore be withheld pursuant to section 552.101 of the Government Code.

We turn now to your arguments regarding section 552.103 for the licensing information, which is the only submitted information that is not subject to section 552.022. Section 552.103 provides in part:

(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 that section 552.103 is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the governmental body received the request, 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).

In this case, you inform us that “[a]s a result of investigation of this nursing facility conducted by the department during the period of October 2002, the department determined that violations of the Health & Safety Code had occurred and [the department] referred this matter to the Office of the Attorney General (“the OAG”) for the imposing civil penalties.” Based on your representations, we agree that litigation was reasonably anticipated on the date that the department received this request. We therefore find that you have met the first prong of the section 552.103 test. Furthermore, after reviewing your arguments and the licensing information, we agree that this information relates to the anticipated litigation for the purposes of section 552.103(a).

Generally, however, 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 to which all parties in the anticipated litigation have had access is not excepted from disclosure under section 552.103(a), and it must be disclosed. 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 addition, we note that a portion of the submitted information is excepted from disclosure under section 552.130 of the Government Code. This section excepts from disclosure “information [that] relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state.” Pursuant to section 552.130, the department must withhold the information we have marked.

We also note that the submitted information includes a bank account number. Section 552.136 of the Government Code states that “[n]otwithstanding 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. Thus, pursuant to this section the department must withhold the bank account number we have marked.

Finally, we note that the remaining information includes 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. 909, § 1, 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov’t Code § 552.137). We note that section 552.137 does not apply to a government employee’s work e-mail address because such address is not that of the employee as a “member of the public” but is instead the address of the individual as a government employee. We also note that section 552.137 does not apply to a business’s

general e-mail address or website address. We have marked the e-mail addresses that the department must withhold under section 552.137 unless their owners have affirmatively consented to their release. *See* Gov't Code § 552.137(b).

In summary, pursuant to section 552.101 and the HIPAA privacy rules, the department must redact the information we have marked. In accordance with section 552.101 and section 142.009(d)(5) of the Health and Safety Code, the department must also withhold information that identifies any individual other than the owner of the agency at issue. Licensees' social security numbers are confidential under section 56.001 of the Occupations Code and must also be withheld pursuant to section 552.101. The submitted licensing information may be withheld under section 552.103 unless all parties in the anticipated litigation have had access to it. We have marked Texas driver's license information that must be withheld under section 552.130. The marked bank account number must be withheld in accordance with section 552.136. You must withhold the marked e-mail addresses under section 552.137. As our ruling on these issues disposes of the submitted information, we need not address your other 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).

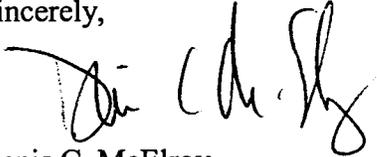
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

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,



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Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 190908

Enc. Submitted documents

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(w/o enclosures)