



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 15, 2003

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

OR2003-9010

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# 192814.

The Texas Department of Human Services (the "department") received a request for information pertaining to two licensed home and community support services agencies for a specified period of time. You state that some responsive information is being released to the requestor. You also state that the department will withhold some responsive information from the requestor pursuant to the previous determination issued to the department 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) (delineating instances in which attorney general decision constitutes previous determination under Gov't Code § 552.301). You claim, however, that portions of the submitted information are excepted from disclosure pursuant to sections 552.101 and 552.137 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

You claim that portions of the submitted information are not subject to release under regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), and, thus, are excepted from disclosure pursuant to section 552.101 in conjunction with these regulations.<sup>1</sup> At the direction of Congress, the Secretary of Health

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<sup>1</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section

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 portions of the submitted information constitute 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

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552.101 encompasses information that is protected from disclosure by other statutes.

(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 information constitute protected health information. Based on your arguments and our review of this information, we agree that 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 state form by redacting the month and day of any dates that relate directly to the referenced individuals. You state that the requestor "has not given the department the necessary information that would allow the department to conclude that the requestor has the necessary authority and a valid purpose for getting information under the HIPAA privacy rules." Based on your representations and our review of the submitted information, we agree that the redaction of the information that you have marked pursuant to HIPAA properly de-identifies the protected health information. *See* 45 C.F.R. §§ 164.514(b)(2)(i)(A)-(R).

In addition, you claim that portions of the submitted information are excepted from disclosure pursuant to section 552.101 in conjunction with section 142.009(d)(5) of the Health and Safety Code. Section 142.009(d)(5) 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 assert that the identifying information of individuals contained in the submitted state forms is confidential under section 142.009(d)(5). Based on your representations and our review of this particular information, we agree that the department must withhold this particular information pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d)(5) of the Health and Safety Code.

You also claim that portions of the submitted information are excepted from disclosure pursuant to section 552.101 in conjunction with section 142.004 of the Health & Safety Code. Section 142.004 provides in part:

Information 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). Based on your representations and our review of the information at issue, we agree that most of the information that you have marked is confidential under section 142.004(d) of the Health and Safety Code. Accordingly, we conclude that the department must withhold most of this information pursuant to section 552.101 of the Government Code. We note, however, that the document titled "Criminal History Check HCSSA Licensure" does not contain any criminal history information and, therefore, must be released to the requestor, except as discussed below.

Further, you contend that social security numbers that are contained within the submitted information are excepted from disclosure pursuant to section 552.101 in conjunction with section 231.302 of the Family Code. Section 231.302 provides in part:

(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 under section 232.001 of the Family Code. *See* Fam. Code § 232.001(2) (defining "licensing authority" as department of state that issues license). You explain that, in this instance, release of the submitted social security numbers would not be for a permitted purpose under section 231.302(e) of the Family Code. *See id.* § 231.302(e). Based on your representations and our review of the information at issue, we agree that the department must withhold the social security numbers that you have marked under section 552.101 of the Government Code in conjunction with section 231.302(e) of the Family Code.<sup>2</sup>

Finally, you claim that an e-mail address that is contained within the submitted information is excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 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.

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<sup>2</sup> Because we resolve this aspect of your request for this decision under section 231.302 of the Family Code, we need not address your other arguments with regard to these social security numbers.

(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 this e-mail address, we agree that this address is excepted from disclosure under section 552.137(a). You state that the department has not received affirmative consent from the person with whom this e-mail address is associated for its release. Accordingly, we conclude that the department must withhold this address pursuant to section 552.137 of the Government Code.

In summary, the department must withhold the information that you have marked pursuant to section 552.101 of the Government Code in conjunction with HIPAA, section 142.009(d)(5) of the Health and Safety Code, and section 231.302 of the Family Code. The department must also withhold the information that you have marked pursuant to section 552.101 in conjunction with section 142.004 of the Health and Safety Code, with the exception of the document titled "Criminal History Check HCSSA Licensure," which must generally be released. The department must also withhold the e-mail address that you have marked pursuant to section 552.137 of the Government Code. The department must release the remaining submitted information to the requestor to the extent that it has not already done so.

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).

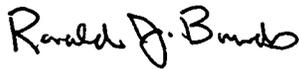
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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

RJB/lmt

Ref: ID# 192814

Enc. Marked documents

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