



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 20, 2004

Mr. Carey Smith
Assistant General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2004-3180

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 200130.

The Texas Department of Human Services (the "department") received a request for documents pertaining to a specific license, including a plan of corrections for a survey conducted July 15, 1998. You state that the "majority of the requested information is being released" but inform us that the department will withhold some responsive information from the requestor 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). In addition, you claim that portions of the submitted records 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 complied with the procedural requirements of section 552.301 of the Government Code in requesting this ruling. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). 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.

We next note that some of the information you seek to withhold is the same type of information at issue in four pending lawsuits between the Office of the Attorney General and the department, *Texas Department of Human Services v. Abbott*, No. GN 302639, 53rd District Court, Travis County, Texas; *Texas Department of Human Services v. Abbott*, No. GN 302695, 126th District Court, Travis County, Texas; *Texas Department of Human Services v. Abbott*, No. GN 302802, 126th District Court, Travis County, Texas; and *Texas Department of Human Services v. Abbott*, No. GN 304028, 53rd District Court, Travis County, Texas. Furthermore, your arguments with regard to that information are similar to your arguments in the litigation of the prior rulings. Accordingly, we do not address your arguments with regard to that information and will allow the trial court to resolve the issue of whether records of the type at issue must be released to public requestors.

However, we note that you have also submitted information in the instant request for a ruling that is not the type of information that was at issue in the ruling that is the subject of the pending lawsuit. Therefore, we will address this information.

You claim that certain information that is contained within the submitted Statement of Licensing Violations and Plan of Correction form (the "state form") constitutes medical records subject to the Medical Practice Act ("MPA"). See Occ. Code §§ 151.001-165.160. 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.

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). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). You inform us that the information you have marked "was obtained from a medical record created by a physician." Based on your representations and our review of the information at issue, we agree that the portions of the submitted state form that you have marked as being subject to the MPA constitute information taken from medical records and may only be released in accordance with the MPA.

In summary, we do not address your arguments with regard to the type of information at issue in the pending lawsuits between the Office of the Attorney General and the department and instead allow the trial court to resolve the issue of whether such records must be released. The marked medical record information may only be released in accordance with the MPA. The remaining submitted information must be released.

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).

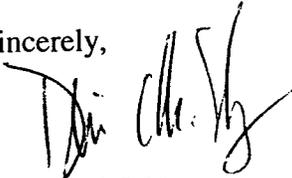
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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

A handwritten signature in black ink, appearing to read "Denis C. McElroy". The signature is written in a cursive style with a large, stylized initial "D".

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 200130

Enc. Submitted documents

c: Ms. Erika Galindo
InHome Care, Inc.
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Midland, Texas 79701
(w/o enclosures)