



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 1, 2004

Mr. William T. Buida
Deputy General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2004-5391

Dear Mr. Buida:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 203579.

The Texas Department of Human Services (the "department") received a request for information concerning Mariner Health of Fort Worth. You claim that the requested information is excepted from disclosure under sections 552.103 of the Government Code and that portions of the requested information are excepted from disclosure under section 552.136 of the Government Code and under a prior ruling of this office concerning the required public disclosure of nursing facility information.¹ You also raise section 242.126 of the Health and Safety Code. We have considered your claims and reviewed the submitted information.

You state that the department will follow a previous determination of this office with regard to the disclosure of portions of the requested information. We understand you to refer to Open Records Letter No. 01-5348 (2001), in which this office concluded, among other things, that the department may rely on that ruling as a previous determination to withhold any identifying information of individuals contained in requested Health Care Financing Administration ("HCFA") 2567 Forms. As long as the elements of law, fact, and circumstances of that ruling have not changed so as to no longer support the ruling's findings, the department may withhold the identifying information in the HCFA 2567 Forms

¹In your first correspondence to this office regarding this matter, you also raised sections 552.101, 552.107, 552.111, 552.117, 552.130, and 552.136 of the Government Code as well as Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. As you provide no argument to support these claims, we understand that these claims are withdrawn, and we do not address them.

in accordance with Open Records Letter No. 2001-5348.² See Open Records Decision No. 673 (2001).

You indicate that section 242.126 of the Health and Safety Code requires the department to delete certain information from completed reports. Section 242.126(g) states that the department must make public on request investigation reports of abuse or neglect pertaining to a facility licensed under chapter 242, 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." *Id.* § 242.127. 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.

²The five criteria for this type of "previous determination" are: 1. the requested records or information at issue fall within a specific, clearly delineated category of information about which this office has previously rendered a decision; 2. the previous decision is applicable to the particular governmental body or type of governmental body from which the information is requested; 3. the previous decision concludes that the specific, clearly delineated category of information is or is not excepted from disclosure under the Act; 4. the elements of law, fact, and circumstances are met to support the previous decision's conclusion that the requested records or information at issue is or is not excepted from required; and 5. the previous decision explicitly provides that the governmental body or bodies to which the decision applies may withhold the information without the necessity of again seeking a decision from this office. See Open Records Decision No. 673 (2001).

You indicate that the submitted information pertains to investigations of complaints of abuse or neglect of nursing facility residents conducted under the authority of chapter 242 of the Health and Safety Code. Therefore, we agree that all personally identifiable information in those reports is confidential under section 242.126 of the Health and Safety Code and section 19.2010 of title 40 of the Texas Administrative Code. Section 552.101 of the Government Code excepts from disclosure information made confidential by statute. Accordingly, you must withhold the personally identifiable information in the reports based on section 552.101.

We turn to your section 552.103 claim. We note that the submitted information includes information that is subject to section 552.022. *See* Gov't Code §§ 552.022(a)(1)(completed reports and investigations), .022(a)(15)(information regarded as open to public under agency's policies), .022(a)(17) (information in court record). Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. These documents must therefore be released under section 552.022 unless the information is expressly made confidential under other law. Section 552.103 of the Government Code is a discretionary exception under the Public Information Act and does not constitute "other law" for purposes of section 552.022. Thus, the department may not withhold from disclosure based on section 552.103 the information that is subject to section 552.022.

Moreover, as discussed above, with the exception of certain identifying information, the completed reports are made public by statute. *See* 42 U.S.C § 1396r(g); 42 C.F.R. §§ 431.115, 483.10, 488.325; Health and Safety Code §§ 242.042(a)(3), (8), .043(h), .126(g); 40 T.A.C. §§ 19.1921(e), (h), (j), .2010(a)(1). Statutes governing access to a specific subset of information held by a governmental body prevail over the generally applicable exceptions in the Act. *See* Open Records Decision Nos. 598 (1991) (litigation exception inapplicable to medical records when requestor has right of access under Medical Practices Act), 478 (1987) at 2-3 (Act does not govern special rights of access granted under other statutes); 451 (1986) (litigation exception inapplicable to investigative file to which subject is granted access by other statute); 43 (litigation exception inapplicable to report made public by statute). Thus, for the additional reason that the completed reports are made public by statute, section 552.103 does not apply.

Furthermore, section 552.103 does not apply to information that has either been obtained from or provided to the opposing party in the anticipated litigation when the potential opposing party has seen the information at issue. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, the department may not rely on section 552.103 to withhold the information that has been obtained from or provided to Mariner Health of Fort Worth.

We now consider your section 552.103 claim for 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.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, 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 department must meet both prongs of this test for information to be excepted under 552.103(a).

You argue that the information relates to reasonably anticipated litigation. To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). You state that section 242.065 of the Health and Safety Code

authorizes the department to refer a nursing facility to the attorney general for a civil penalty when a facility violates chapter 242 [of the Health and Safety Code] or rules promulgated thereunder. The department referred Mariner Health of Fort Worth to the attorney general for a civil penalty based upon violations found during an inspection, exit date November 19, 2001. The attorney general has informed the department that it is prepared to file a lawsuit against Mariner and has requested the department not release documents regarding the November 19, 2001, inspection and other inspections that the attorney general expects to use in the lawsuit.

Based on these representations, we find that the department has established that litigation is reasonably anticipated in this case. Furthermore, we find that the information at issue is related to the anticipated litigation. We therefore conclude that the department has

established the applicability of section 552.103 to the information at issue.³ Therefore, the department may withhold the remaining information based on section 552.103.

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. You state that you raise this provision for an access number on two copies of a check. However, you have not marked an access number on the check and we are unable to find on the submitted copies of the check any information that appears to be an access device number protected from disclosure by section 552.136. Therefore, the department may not withhold any information based on section 552.136.

In summary, the department must withhold the identifying information in the HCFA 2567 Forms based on a previous determination of this office. The department must withhold all personally identifiable information in the reports of investigations of complaints of nursing facility abuse or neglect based on section 242.126 of the Health and Safety Code and section 19.2010 of title 40 of the Texas Administrative Code. With the exception of the information subject to section 552.022, the information made public by statute and the information seen or obtained by the potential opposing party, the department may withhold the information based on section 552.103. The department must release the remaining information.

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

³Once the litigation is concluded, section 552.103 no longer applies to the information. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

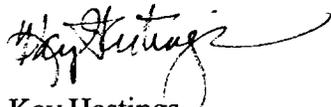
records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these 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,



Kay Hastings
Assistant Attorney General
Open Records Division

KH/seg

Ref: ID# 203579

Enc: Submitted documents

c: Mr. Stephen Gordon
Beasley Cureton & Gordon
101 Summit Avenue, Suite 610
Fort Worth, Texas 76102
(w/o enclosures)