



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 10, 2005

Ms. Karen Hattaway
Open Records Attorney
Legal Services, Administrative Services Unit
Texas Department of Aging and Disability Services
701 West 51st Street
Austin, Texas 78714-9030

OR2005-07240

Dear Ms. Hattaway:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 230000.

The Texas Department of Aging and Disability Services (the "department") received a request for a copy of a specified complaint. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and 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." Section 552.101 encompasses section 595.001 of the Health and Safety Code, which provides that "[r]ecords of the identity, diagnosis, evaluation, or treatment of a person that are maintained in connection with the performance of a program or activity relating to mental retardation are confidential and may be disclosed only for the purposes and under the circumstances authorized under Sections 595.003 and 595.004." Health & Safety Code § 595.001. Subsection 595.003(a)(4) provides that if the confidential records pertain to a deceased individual, the records may be disclosed in accordance with the prior written consent of: "(A) either the executor or administrator of the deceased's estate; (B) or, if an executor or administrator has not been appointed, the deceased's spouse or, if the deceased was not married, an adult related to the deceased within the first degree of consanguinity." *Id.* § 595.003(a)(4). Section 595.004 provides for the release of confidential records to the

person to whom the records pertain, or a parent of a minor or a guardian of the person. *See Id.* § 595.004. Subsection 595.005(d) provides that confidential records may be disclosed without the prior written consent required in subsection 595.003 if disclosure is authorized by a court order granted upon a showing of good cause. *See Id.* § 595.005(d).

You state that the information you have marked consists of “records of the identity, diagnosis, evaluation, and treatment of individuals that are maintained in connection with the provision of [Home and Community-Based Services] to clients with mental retardation.” Furthermore, you state that “the requestor does not have a right of access to any of the marked information under any of the provisions of chapter 595 of the Health and Safety Code.” Having considered your representations and the information at issue, we conclude that this information is confidential under section 595.001 of the Health and Safety Code. Accordingly, the department must withhold the information you have marked under section 552.101 of the Government Code as information made confidential by law.¹

You also claim the informer’s privilege for portions of the submitted information. The informer’s privilege, incorporated into the Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer’s identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer’s privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988).

You state that the complainant reported alleged violations of federal law governing the Medicaid program. You advise us that section 1320a-7b(b)(1)(A) of title 42 of the United States Code prohibits the knowing or willful solicitation of clients receiving services paid for by Medicaid. *See* 42 U.S.C. § 1320a-7b(b)(1)(A). We understand that the alleged violations could result in the imposition of criminal penalties. *See id.* You further represent that the department has the responsibility for identifying and reporting fraud cases. *See* 40 T.A.C. § 100.154. Based upon your representations and our review of the information at issue, we find that the identity of the complainant is protected from disclosure under the informer’s privilege. Therefore, the information that we have marked may be withheld under section 552.101 on that basis.

¹As our ruling is dispositive, we need not address your remaining arguments for this information.

In summary, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 595.001 of the Health and Safety Code. The department may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the informer's privilege. The remaining submitted information must be released to the requestor.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

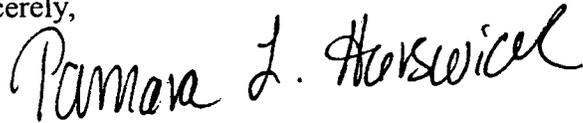
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 that reads "Tamara L. Harswick". The signature is written in a cursive style with a large initial "T".

Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 230000

Enc. Submitted documents

c: Ms. Lilia Vazquez
4121 Montana Avenue
El Paso, Texas 79903
(w/o enclosures)