



July 16, 2001

Mr. George D. Cato  
Deputy General Counsel  
Texas Department of Health  
1100 West 49<sup>th</sup> Street  
Austin, Texas 78756-3199

OR2001-3078

Dear Mr. Cato:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149482.

The Texas Department of Health ("TDH") received a request for information relating to a complaint about the Palestine Regional Medical Center. You claim that responsive information concerning an investigation of the medical center is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you raise and have reviewed the information you submitted. We also received written comments from the requestor. *See* Gov't Code § 552.304 (permitting interested person to submit comments stating why requested information should or should not be released).

The requestor previously had complained to this office about TDH's handling of her request for information. You address TDH's response to the complaint in a letter to this office dated May 8, 2001. Your letter states:

Upon receipt of the complaint . . . TDH program personnel located some documents which should have been submitted to your office, as well as other documents which were releasable to the requestor. Additional releasable documents have been or will be provided to Ms. Cox by the TDH Health Facility Compliance Division.

Based on your letter, we presume that the submitted documents contain the only information responsive to the request for which TDH claims an exception to disclosure. We also presume that TDH has released any other responsive information to the requestor. If you have not yet released other responsive information, then you must do so immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000).

We next address TDH's failure to comply with section 552.301 in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information may be withheld from public disclosure. Section 552.301(b) provides that "[t]he governmental body must ask for the attorney general's decision and state the exceptions that apply . . . not later than the 10<sup>th</sup> business day after the date of receiving the written request [for information]." Section 552.302 provides that "[i]f a governmental body does not request an attorney general decision as provided by Section 552.301 . . . the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information."

You inform this office that TDH received the request for the information at issue on April 3, 2001. You requested this decision by letter dated May 8, 2001. You concede that TDH thus failed to comply with section 552.301. Consequently, the requested information is presumed to be public and must be released under section 552.302, unless there is a compelling reason to withhold any of the information from public disclosure. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). The presumption that information is public under section 552.302 generally can be overcome by demonstrating that the information is deemed to be confidential by some source of law outside chapter 552 of the Government Code, and therefore is excepted from disclosure under section 552.101, or that third-party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982).*

You claim that most of the information at issue is confidential under section 552.101 of the Government Code in conjunction with section 241.051 of the Health and Safety Code.<sup>1</sup> Chapter 241 of the Health and Safety Code governs licensing of hospitals. Section 241.051 authorizes the department to make any inspection, survey, or investigation of a hospital that the department considers necessary. Section 241.051 also provides in relevant part:

(d) All information and materials obtained or compiled by the department in connection with a complaint and investigation concerning a hospital are confidential and not subject to disclosure under Section 552.001 et seq., Government Code, and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the department or its employees or agents involved in the enforcement action except that this information may be disclosed to:

(1) persons involved with the department in the enforcement action against the hospital;

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<sup>1</sup>Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception protects information that is made confidential by another statute.

- (2) the hospital that is the subject of the enforcement action, or the hospital's authorized representative;
- (3) appropriate state or federal agencies that are authorized to inspect, survey, or investigate hospital services;
- (4) law enforcement agencies; and
- (5) persons engaged in bona fide research, if all individual-identifying and hospital-identifying information has been deleted.

Health & Safety Code § 241.051(d). You have submitted responsive documents that you claim are confidential under section 241.051. You indicate that these documents relate to an investigation under chapter 241 of the Health and Safety Code. You assert that none of the responsive information in these documents comes within any of the exceptions to confidentiality under subsections (d) and (e) of section 241.051. Based on your representations, we conclude that the documents in question are confidential under section 241.051 of the Health and Safety Code. You must withhold these documents, which we have marked, under section 552.101 of the Government Code.

You also have submitted a "Notice of Violation Letter for Administrative Penalties" (the "notice of violation"). We do not understand TDH to claim that the notice of violation is confidential under section 241.051 of the Health and Safety Code. Furthermore, section 241.051(e) provides that

[t]he following information is subject to disclosure *in accordance with Section 552.001 et seq., Government Code*:

- (1) a notice of alleged violation against the hospital, which notice shall include the provisions of law which the hospital is alleged to have violated, and a general statement of the nature of the alleged violation[.]

*Id.* § 241.051(e) (emphasis added). Thus, we believe that TDH must release the notice of violation to the requestor unless there is a compelling reason to withhold this document from public disclosure under chapter 552 of the Government Code. *See* Gov't Code §§ 552.006, .301, .302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); Open Records Decision No. 630 at 3 (1994).

You indicate that some of the information in the notice of violation comes within the scope of the Medical Practice Act (the "MPA"), as codified at subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in relevant 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 . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

*Id.* § 159.002(b), (c). The MPA includes provisions that govern the disclosure of information that it encompasses. *See id.* §§ 159.003, .004, .005, .006. This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code.<sup>2</sup> We have reviewed the notice of violation and marked the information that we conclude is governed by the MPA. TDH must withhold the marked information under section 552.101 of the Government Code unless the MPA permits the disclosure of the information.<sup>3</sup>

In summary, most of the information at issue is confidential under section 241.051(d) of the Health and Safety Code and must be withheld from the requestor under section 552.101 of the Government Code. The notice of violation is not confidential under section 241.051; however, some of the information in the notice is governed by the Medical Practice Act. This information may be disclosed only if the MPA permits TDH to do so. The remaining information in the notice 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.

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<sup>2</sup>*See* Open Records Decision No. 598 (1991). The Seventy-sixth Legislature repealed the predecessor statute, article 4495b of Vernon's Texas Civil Statutes, in enacting the Occupations Code. *See* Act of May 13, 1999, 76<sup>th</sup> Leg., R.S., ch. 388, §§ 6, 7, 1999 Tex. Gen. Laws 1431, 2439-40. The legislation was a non-substantive codification.

<sup>3</sup>We note the requestor's representation that she submitted an "Authorization for Release of Medical Records and Other Records" to TDH in making her request for information. We do not understand TDH to claim, however, and we do not believe that the MPA governs any of the references to the requestor's client in the notice of violation.

*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).

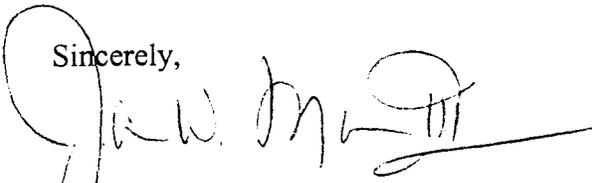
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



James W. Morris, III  
Assistant Attorney General  
Open Records Division  
JWM/sdk

Ref: ID# 149482

Enc: Marked documents

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(w/o enclosures)