



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 28, 2005

Mr. Marc Allen Connelly
Assistant General Counsel
Texas Department of State Health Services
1100 West 49th Street
Austin, Texas 78756

OR2005-01734

Dear Mr. Connelly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 219589.

The Texas Department of State Health Services (the "department") received a request for all paperwork relating to two specified investigations. You state that the department has released some responsive information to the requestor. However, you claim that the remaining requested information is excepted from disclosure pursuant to 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 Governmental Code in requesting this ruling. *See* Gov't Code § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law or affects third party interests. *See* Open Records Decision No. 150 (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.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses information made confidential by other statutes. You contend that a portion of the submitted information is confidential pursuant to section 241.051 of the Health and Safety Code. Chapter 241 of the Health and Safety Code governs the licensing of hospitals. Section 241.051 authorizes the department to make any inspection, survey, or investigation that it considers necessary, and provides in pertinent part:

(d) All information and materials obtained or compiled by the [Texas Department of Health¹] 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 [Texas Department of Health] 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;

(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.

(e) The 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;

¹ We note that the Texas Department of Health became part of the Texas Department of State Health Services on September 1, 2004. See [http:// www.tdh.state.tx.us](http://www.tdh.state.tx.us); see also Acts 2003, 78th Leg., R.S., ch. 198, eff. Sept. 1, 2003.

- (2) the pleadings in the administrative proceeding; and
- (3) a final decision or order by the department.

Health & Safety Code § 241.051(d), (e). You indicate that the department obtained and compiled the documents you have clipped in connection with the investigation of a complaint concerning a hospital. You also state that the clipped information does not contain any information that falls within the exceptions to confidentiality outlined in sections 241.051(d) and (e). Based on your representations and our review, we conclude that the submitted information you have clipped is confidential under section 241.051(d) of the Health and Safety Code and must be withheld under section 552.101 of the Government Code.

The remaining submitted information consists of a CMS Form 2567 Statement of Deficiencies and Plan of Correction. Federal regulations require the department to release completed CMS 2567 forms containing a statement of deficiencies and plan of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 U.S.C. 1306(e), (f); 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 at 5 (1988); *see also* Health & Safety Code § 142.009(d)(6). Because the signature of the agency representative on the form indicates that the provider has had a reasonable opportunity to review the report and offer comments, the department must withhold the information you have marked identifying individual patients, physicians, other medical practitioners, or other individuals from the CMS 2567 form prior to its release under section 552.101 in conjunction with federal law.

In summary, the department must withhold the information you have clipped under section 552.101 in conjunction with section 241.051 of the Health and Safety Code. The department must withhold the identifying information you have marked from the CMS 2567 form prior to its release under section 552.101 in conjunction with federal law. The remaining 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 219589

Enc. Submitted documents

c: Ms. Mary Walton
5704 Firewood Drive
Arlington, Texas 76016
(w/o enclosures)