ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 22, 2005

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

OR2005-05512

Dear Mr. Connelly:

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# 226647.

The Texas Department of State Health Services (the "department") received a request for all records relating to an investigation of McAllen Medical Heart Hospital. 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.

Initially, you acknowledge that the department has not sought an open records decision from this office with regard to the submitted information within the ten-day statutory deadline imposed by section 552.301(b) of the Government Code, nor did the department submit the information required by section 552.301(e) to this office within the fifteen-day period. *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. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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 Gov't Code § 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). Section 552.101 constitutes

such a compelling reason. Therefore, we will consider whether this exception applies to the submitted information.

You state that the submitted information consists of (1) information and materials obtained or compiled by the department in connection with a complaint and investigation concerning a hospital made under section 241.051 of the Health and Safety Code and (2) a CMS Form 2567 Statement of Deficiencies and Plan of Correction. *See* Open Records Decision No. 673 at 7 (2001). In Open Records Letter No. 2005-04917 (2005), issued June 6, 2005, we granted the department a previous determination finding that (1) information and materials obtained or compiled by the department in connection with a complaint and investigation concerning a hospital made under section 241.051 of the Health and Safety Code are excepted from disclosure under section 552.101; and (2) the identifying information of patients, physicians, other medical practitioners, or other individuals contained in a CMS Form 2567 is confidential when the provider being evaluated has had a reasonable opportunity to review the report and offer comments. *See* 42 U.S.C. § 1306(e), (f); 42 C.F.R. §§ 401.126, .133. The previous determination authorizes the department to withhold such information without the necessity of requesting a decision from the attorney general, provided the pertinent facts and circumstances have not changed since the issuance of the prior ruling. The facts and circumstances at issue continue to support the findings set forth in Open Records Letter No. 2005-04917. We therefore determine that the department must withhold the submitted information pursuant to section 552.101 in conjunction with both section 241.051 of the Health and Safety Code and with federal law in accordance with the previous determination of this office in Open Records Letter No. 2005-04917. *See also* Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under Gov't Code § 552.301(a)).

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); *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,

José Vela III
Drafting Attorney
Open Records Division

JV/krl

Ref: ID# 226647

Enc. Submitted documents

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(w/o enclosures)