



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 28, 2007

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

OR2007-11181

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# 287715.

The Texas Department of State Health Services (the "department") received a request for "any and all records and documents, including notes, correspondence, and memoranda pertaining to North Central Baptist Hospital's ["NCBH"] water system, including communications or other records between [NCBH] and Bexar Metropolitan Water District." You state that you will release some of the requested information to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.101 and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, you acknowledge, and we agree, that you failed to request a ruling from our office within ten business days after the date of receipt of the written request for information as required by section 552.301 of the Government Code. A governmental body's failure to

¹ We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *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). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Because the applicability of sections 552.101 and 552.137 of the Government Code can provide a compelling reason for non-disclosure, we will consider your arguments under these exceptions.

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. Gov't Code § 552.101. 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 Health²] 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;
- (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

² 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.

(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;

(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 state that the information at issue pertains to an investigation of a complaint concerning a hospital. You also state that these documents do 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 we have marked 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. As we are able to make this determination, we need not address your remaining argument against disclosure of this information.

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). The signature of the agency representative on the submitted form indicates that the provider has had a reasonable opportunity to review the report and offer comments. You state that the department will withhold identifying information of patients and health care providers from the submitted CMS Form 2567 pursuant to the previous determination issued to the department in Open Records Letter No. 2005-04917 (2005). *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under Gov't Code § 552.301(a)). You seek to withhold additional information contained in the form under section 552.101 in conjunction with section 81.046 of the Health and Safety Code. Section 81.046 provides in part:

(a) Reports, records, and information furnished to a health authority or the [Texas Department of Health] that relate to cases or suspected cases of diseases or health conditions are confidential and may be used only for the purposes of this chapter.

(b) Reports, records, and information relating to cases or suspected cases of diseases or health conditions are not public information under Chapter 552, Government Code, and may not be released or made public on subpoena or otherwise except as provided by Subsections (c), (d), and (f).

Health & Safety Code § 81.046(a)-(b). In Open Records Decision No. 577 (1990), this office concluded that any information acquired or created during an investigation under chapter 81 of the Health and Safety Code is confidential and may not be released unless an exception set out in the statute applies. You claim that the submitted CMS 2567 form contains information that was furnished to or created by the department and relates to cases or suspected cases of diseases or health conditions. However, withholding information from the submitted CMS 2567 form under section 552.101 in conjunction with section 81.046 would directly conflict with the federal regulations requiring disclosure of completed CMS 2567 forms. *See* 42 U.S.C. § 1306(e), (f); 42 C.F.R. §§ 401.126, .133; ORD 487 at 5; *see also* Health & Safety Code § 142.009(d)(6). As a general rule, the exceptions to disclosure found in the Act do not apply to information that is made public by other statutes. *See* Open Records Decision No. 623 at 3 (1994), 525 at 3 (1989). Further, a state statute is preempted by federal law to the extent it conflicts with that federal law. *See English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (noting that state law is preempted to extent it actually conflicts with federal law); *cf.* Open Records Decision No. 431 (1985) (when conflict arises between provisions of Act and FERPA, federal statute prevails); *see also* ORD 623 at 3, 525 at 3. Therefore, we conclude that the department may not withhold the information at issue under section 552.101 of the Government Code in conjunction with section 81.046 of the Health and Safety Code.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 241.051(d) of the Health and Safety Code. Except for the information to be withheld pursuant to Open Records Letter No. 2005-04917, the CMS 2567 form must be released.

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 Office of the Attorney General 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/ma

Ref: ID# 287715

Enc. Submitted documents

c: Mr. George B. Butts
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(w/o enclosures)