



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 7, 2007

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

OR2007-14613

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# 294554.

The Texas Department of State Health Services (the "department") received two requests for information pertaining to Premier Ambulatory Surgery of Austin, LLP. You state that some of the requested information will be or has been released, but claim that some of the submitted information is excepted from disclosure under sections 552.101 and 552.147 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 1306(a) of title 42 of the United States Code provides the following:

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<sup>1</sup>We note that, although you assert that some of the submitted information is excepted under section 552.137 of the Government Code, you did not identify any information to be withheld under that section; therefore, we assume you no longer wish to assert that exception. See Gov't Code § 552.137 (e-mail addresses of members of the public excepted from disclosure).

(1) No disclosure of any return or portion of a return (including information returns and other written statements) filed with the Commissioner of Internal Revenue under Title VIII of the Social Security Act [42 U.S.C.A. § 1001 et seq.] or under subchapter E of chapter 1 or subchapter A of chapter 9 of the Internal Revenue Code [of 1939], or under regulations made under authority thereof, which has been transmitted to the head of the applicable agency by the Commissioner of Internal Revenue, or of any file, record, report, or other paper, or any information, obtained at any time by the head of the applicable agency or by an officer or employee of the applicable agency in the course of discharging the duties of the head of the applicable agency under [chapter 7 of title 42 of the United States Code], and no disclosure of any such file, record, report, or other paper, or information, obtained at any time by any person from the head of the applicable agency or from any officer or employee of the applicable agency shall be made except as the head of the applicable agency may by regulations prescribe and except as otherwise provided by federal law.

(2) For purposes of this subsection . . . the term “applicable agency” means—

(A) the Social Security Administration, with respect to matter transmitted to or obtained by such administration or matter disclosed by such administration; or

(B) the Department of Health and Human Services, with respect to matter transmitted to or obtained by such Department or matter disclosed by such Department.

42 U.S.C. § 1306(a). You also cite to subsections 401.101(a)(1), (b), and (c) of title 42 of the Code of Federal Regulations and the Health Care Financing Administration (“HCFA”) State Operations Manual for the proposition that section 1306(a)(1) applies to survey agencies. You explain that the department is the Medicare state survey agency pursuant to an agreement with the HCFA. Based upon your representations and our review, we agree that the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 1306 of title 42 of the United States Code.

Section 552.101 also encompasses sections 401.126 and 401.133 of title 42 of the Code of Federal Regulations. You indicate that the information you have highlighted in the submitted Centers for Medicare & Medicaid Services Forms CMS-2567, which consists of identifying information of a representative of the facility and initials of other individuals, is confidential under sections 401.126 and 401.133. These federal regulations require the department to release the Forms CMS-2567 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 C.F.R. §§ 401.126, 401.133; Open Records Decision No. 487 (1988). We note that the signature of the agency representative on the Forms CMS-2567 indicates that the provider has had a reasonable opportunity to review the report and offer comments. Accordingly, we find that the information you have marked in these forms identifies individual patients, physicians, other medical practitioners or other individuals. Accordingly, we agree that the department must withhold the information marked in the Forms CMS-2567 under section 552.101 in conjunction with sections 401.126 and 401.133 of title 42 of the Code of Federal Regulations.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides the following:

(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, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). You inform us that the submitted information contains records about patients that the department received pursuant to section 159.004(1) of the MPA. *See* Occ. Code § 159.004(1) (confidential information made be disclosed by physician to governmental agency if disclosure is required or authorized by law). You do not inform us that the release provisions of the MPA are applicable to the requestor. *See id.* §§ 159.004, 159.005. Thus, with the exception of the information that we have marked for release, the department must withhold the information you have marked under section 552.101 in conjunction with section 159.002 of the MPA. We have marked additional information that is also confidential under section 552.101 in conjunction with section 159.002. You have not established that any of the remaining information consists of medical records that are confidential under the MPA; therefore, the department may not withhold the remaining information under section 552.101 on that ground.

You assert that some of the remaining information is excepted under section 552.147 of the Government Code, which provides that "[t]he social security number of a living person is

excepted from” required public disclosure under the Act. The department may withhold the social security numbers in the submitted information under section 552.147.<sup>2</sup>

To conclude, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 1306 of title 42 of the United States Code and sections 401.126 and 401.133 of title 42 of the Code of Federal Regulations. The department must also withhold the information marked under section 552.101 in conjunction with section 159.002 of the Occupations Code, except for the information that we have marked for release. The department may withhold the social security numbers under section 552.147 of the Government Code. The department must release the remaining information. As our ruling is dispositive, we do not address your other argument to withhold the information at issue.

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).

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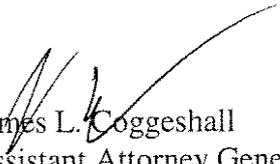
<sup>2</sup>We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/jh

Ref: ID# 294554

Enc. Submitted documents

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