



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 3, 2008

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

OR2008-00113

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# 298608.

The Texas Department of State Health Services (the "department") received a request for investigation results pertaining to the death of a specified individual at West Oaks Hospital. You claim that the submitted 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. We have also received and considered comments submitted by the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

Initially, we note that the submitted information contains a Centers for Medicare and Medicaid Services ("CMS") Form 2567 Statement of Deficiencies and Plan of Correction. In Open Records Letter No. 2005-04917 (2005), we granted the department a previous determination finding, in part, that 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 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 identifying information of patients, physicians, other medical practitioners, or other individuals contained in the submitted CMS Form 2567 pursuant to section 552.101 of the Government Code in conjunction with federal law in accordance with the previous determination issued by 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 section 552.301(a)). The remaining information contained in the CMS 2567 form must be released.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses section 577.013(d) of the Health and Safety Code, which provides:

(d) All information and materials obtained or compiled by the department in connection with a complaint and investigation concerning a mental hospital licensed under this chapter are confidential 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 licensed mental hospital;
- (2) the licensed mental hospital that is the subject of the enforcement action, or the licensed mental hospital’s authorized representative;
- (3) appropriate state or federal agencies that are authorized to inspect, survey, or investigate licensed mental hospital services;
- (4) law enforcement agencies; and
- (5) persons engaged in bona fide research, if all individual-identifying information and information identifying the licensed mental hospital has been deleted.

Health & Safety Code § 577.013(d). In addition, subsection (e) of section 577.013 provides that notice of the alleged violation against the licensed mental hospital, pleadings in the administrative hearing, and the final decision or order by the department are subject to disclosure under the Act.

You indicate that the information at issue was obtained or compiled by the department as a result of a complaint and investigation concerning a death at West Oaks Hospital. Furthermore, you state that the documents do not contain any information that falls within the exceptions listed in subsections (d)(1) through (5) or (e)(1) through (3). Based on your arguments and our review of the responsive information, we agree that the department must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 577.013(d) of the Health and Safety Code.

In summary, the department must withhold the identifying information of patients, physicians, other medical practitioners, or other individuals in the CMS 2567 form pursuant to section 552.101 of the Government Code in conjunction with federal law in accordance with the previous determination issued by this office in Open Records Letter No. 2005-04917. The remaining information in the CMS 2567 form must be released. The department must withhold the remaining submitted information under section 552.101 of the Government Code in conjunction with section 577.013(d) of the Health and Safety Code.

Finally, you ask that this ruling serve as a previous determination that information and materials obtained or compiled by the department as a result of a complaint and investigation concerning a mental health hospital are confidential in their entirety and may only be released to statutorily authorized persons. *See* Gov't Code § 552.301(a) (allowing governmental body to withhold information subject to previous determination); ORD 673. After due consideration, we have decided to grant your request.

With regard to section 577.013(d), this previous determination allows the department to withhold only information and materials obtained or compiled by the department as a result of a complaint and investigation concerning a mental health hospital made under section 577.013 of the Health and Safety Code. *See* ORD 673 at 7. We note that you may only withhold this type of information when none of the release provisions of section 577.013(d) and (e) apply. In addition, this previous determination is not applicable to information to which the requestor may have a right of access under any other provision of law. *See, e.g.,* Occ. Code § 159.002 *et seq* (medical records). So long as the elements of law, fact, and circumstances do not change so as to no longer support the findings set forth above, the department need not ask for a decision from this office again with respect to this type of information. *See* ORD 673 at 7.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. 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 challenge 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 of 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. 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,



Chanita Chantaplin-McLelland
Assistant Attorney General
Open Records Division

CC/mcf

Ref: ID# 298608

Enc. Submitted documents

cc: Mr. Margaret Downing
Editor, Houston Press
1621 Milam, Suite 100
Houston, Texas 77002
(w/o enclosures)