



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 25, 2008

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

OR2008-05588

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# 308348.

The Texas Department of State Health Services (the "department") received a request for information relating to two dialysis facilities. You state that some of the responsive information has been released to the requestor. You claim that the remaining information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you raise and have reviewed the information you submitted.

Initially, we note, and you acknowledge, that the department failed to comply with the time periods prescribed by section 552.301 of the Government Code in seeking an open records decision from this office. *See* Gov't Code § 552.301(a), (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 requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 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). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will consider your arguments regarding this exception.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception protects information that another statute makes confidential.

Chapter 251 of the Health and Safety Code relates to end stage renal disease facilities. Section 251.015 provides as follows:

- (a) A medical review board shall advise the department on minimum standards and rules to be adopted under this chapter.
- (b) The medical review board shall review the information on quality of care provided in the annual report filed under Section 251.013(f) and other appropriate information provided to or compiled by the department with respect to an end stage renal disease facility. Based on the review, the medical review board may advise the department about the quality of care provided by a facility and recommend an appropriate corrective action plan under Section 251.061 or other enforcement proceedings against the facility.
- (c) Information concerning the quality of care provided to or compiled by the department or medical review board and a recommendation of the medical review board are confidential. The information or recommendation may not be made available for public inspection, is not subject to disclosure under Chapter 552, Government Code, and is not subject to discovery, subpoena, or other compulsory legal process.
- (d) The department, in its discretion, may release to a facility information relating to that facility that is made confidential under Sub-section (c). Release of information to a facility under this subsection does not waive the confidentiality of that information or the privilege from compulsory legal process.

Health & Safety Code § 251.015. Section 251.061 of the Health and Safety Code provides in part:

- (g) A corrective action plan is not confidential. Information contained in the plan may be excepted from required disclosure under Chapter 552, Government Code, in accordance with that chapter or other applicable law.

Id. § 251.061(g). You state that the information in question relates to end stage renal disease facilities licensed by the department. You state that the submitted documents contain information concerning quality of care that was provided to or compiled by the department or a medical review board and a recommendation of the medical review board. You inform us that the state surveyor created the submitted State Forms upon inspection of the facilities. You explain that the left column of the State Forms contains the deficiencies cited, much of which is quality of care information. You have marked information in the State Forms that you claim is confidential under section 251.015(c). Based on your representations and our review of the submitted documents, we agree that the information you have marked, as well as the additional information we have marked, is confidential under section 251.015(c) of

the Health and Safety Code. Therefore, this information must be withheld from disclosure under section 552.101 of the Government Code.

You also state that the information in the right column of the State Forms consists of plan of correction information, as submitted by the facilities, that may be released under section 251.061(g). Based on your representation and our review of the plan of correction information, we find that this information is not made confidential by law, pursuant to section 251.061(g). Furthermore, we do not find that any other compelling reason exists to withhold this information. Accordingly, the department must release the information in the right column of the State Forms under section 251.061(g).

Section 552.101 also encompasses section 1306 of title 42 of the United States Code. Section 1306 provides in part:

(a) Disclosure prohibited, exceptions

(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 42 C.F.R. § 401.101(a)(1), (b), and (c), 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 conclude that the information you have marked is confidential under section 1306 of title 42 of the United States Code and must be withheld under section 552.101 of the Government Code.

In summary, the department must withhold the marked information under section 552.101 of the Government Code in conjunction with section 251.015(c) of the Health and Safety Code. The department must also 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. 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 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 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,



Benjamin A. Diener
Assistant Attorney General
Open Records Division

BAD/jb

Ref: ID# 308348

Enc: Submitted documents

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(w/o enclosures)