



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 22, 2008

Mr. Marc Allen Connelly  
Deputy General Counsel  
Texas Department of State Health Services  
P.O. Box 149347  
Austin, Texas 78714-9347

OR2008-09959

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# 316477.

The Texas Department of State Health Services (the "department") received four requests from three requestors for information relating to a specified dialysis facility. You state that some of the responsive information has been or will be released to the requestors. You claim that portions of the submitted information are 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 considered comments submitted by one of the requestors. *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 Centers for Medicare and Medicaid Services ("CMS") 2567 federal deficiency forms. 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 2567 form is confidential when the provider being evaluated has had a reasonable opportunity to review the report and other comments. *See 42 U.S.C. § 1306(e), (f); 42 C.F.R. §§ 401.126, .133*. You inform us that the department is withholding the identifying information of patients, physicians, other medical practitioners, or other individuals in the CMS 2567 forms pursuant to section 552.101 of the Government Code in conjunction with federal law in accordance with this previous determination. *See also Open*

Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under section 552.301(a)).

In addition, you claim that medical information contained in the CMS 2567 forms should be withheld under section 552.101 of the Government Code in conjunction with the Medical Practices Act (the "MPA").<sup>1</sup> You also assert that section 3308 of the CMS State Operations Manual sets guidelines for disclosure of CMS 2567 forms, including the requirement that state agencies withhold from disclosure "medical information about any identifiable patient[.]" We note, however, that the department has already deidentified the medical information in the CMS 2567 forms in accordance with federal regulations. Furthermore, we note that information that is specifically made public by statute may not be withheld from the public under any of the exceptions to public disclosure under chapter 552 of the Government Code. *See, e.g.*, Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Thus, the department may not withhold any of the information you have marked in the CMS 2567 forms under the MPA.

Section 552.101 also encompasses Chapter 251 of the Health and Safety Code, which 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).

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<sup>1</sup>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.

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 submitted State Forms, Record of Complaint (the “complaint”), and Report of Contact (the “report”) relate to an end stage renal disease facility licensed by the department. You state that these 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 facility. You explain that the left column of the State Forms contains the deficiencies cited, much of which is quality of care information. You contend that the complaint, report, and the information you have marked in the State Forms is confidential under section 251.015(c). Based on your representations and our review of the submitted documents, we agree that the complaint, report, and the information you have marked in the State Forms, except as we have marked for release, 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.<sup>2</sup>

In summary, except for the information to be withheld pursuant to Open Records Letter No. 2005-04917, the CMS 2567 forms must be released. The department must withhold the complaint, report, and the information you have marked in the State Forms, except as we have marked for release, under section 552.101 of the Government Code in conjunction with section 251.015(c) of the Health and Safety Code. The remaining information 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

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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). If the governmental body does not file suit over 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,



Bill Dobie  
Assistant Attorney General  
Open Records Division

WJD/jh

Ref: ID# 316477

Enc. Submitted documents

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