



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 24, 2008

Mr. Brett Norbraten
Texas Department of Aging and Disability Services
P.O. Box 149030
Austin, Texas 78714

OR2008-10043

Dear Mr. Norbraten:

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# 315537.

The Texas Department of Aging and Disability Services (the "department") received a request for three categories of information pertaining to the Denton State School. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note that Exhibit 2 was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-08931 (2008). In that ruling, this office held that a numerical breakdown of department employees who have been suspended or terminated for abuse, neglect, or exploitation may be withheld under section 552.103 of the Government Code, as this information related to pending litigation involving the department. With regard to Exhibit 2 of the current request, which is identical to the information previously requested and ruled upon by this office, we conclude that, as

¹We 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.

we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, you must continue to rely on Open Records Letter No. 2008-08931 as a previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note that Exhibit 3 consists of a federal form CMS-2567, Statement of Deficiencies and Plan of Correction. Federal regulations require the release of this form, 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, .133; Open Records Decision No. 487 at 5-6 (1988).² 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, because the signature of the agency representative on the CMS-2567 form indicates that the provider has had a reasonable opportunity to review the report and offer comments, the department must release the submitted form to the requestor. However, we note that you have redacted information identifying individual patients, physicians, other medical practitioners, or other individuals from the CMS-2567 form. We agree that in releasing the submitted form, the department must withhold this identifying information under section 552.101 of the Government Code in conjunction with federal law.

You state that the remaining information at issue, Exhibit 1, is subject to section 552.101 of the Government Code. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 595.001 of the Health and Safety Code provides that "[r]ecords of the identity, diagnosis, evaluation, or treatment of a person that are maintained in connection with the performance of a program or activity relating to mental retardation are confidential and may be disclosed only for the purposes and under the circumstances authorized under Sections 595.003 and 595.004." Health & Safety Code § 595.001. You argue that section 595.001 applies to Exhibit 1 because it is "riddled with medical information necessary to probe the circumstances surrounding the client's death." Upon review, we find

²Section 401.133 of title 42 of the Code of Federal Regulations provides that "[t]he statement of deficiencies or report and any pertinent written statements furnished by the institution or facility on the statement of deficiencies shall be disclosed within 90 days following the completion of the survey by the State agency, but not to exceed 30 days following the receipt of the report by [the federal Centers for Medicare and Medicaid Services]." 42 C.F.R. § 401.133(a)(2).

that you have demonstrated the applicability of section 595.001 to Exhibit 1, and it must be withheld under section 552.101 of the Government Code.³

In summary, the department must withhold Exhibit 1 under section 552.101 of the Government Code in conjunction with section 595.001 of the Health and Safety Code. The department must continue to rely on Open Records Letter No. 2008-08931 with regard to Exhibit 2. Finally, the department must withhold the information identifying individual patients, physicians, other medical practitioners, or other individuals from the CMS-2567 form under section 552.101 of the Government Code in conjunction with federal law. The remainder of the CMS-2567 form 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). 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).

³As our ruling is dispositive, we need not address your remaining argument against disclosure.

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,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 315537

Enc. Submitted documents

c: Mr. Jesse Hyde
Dallas Observer
c/o Brett Norbraten
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(w/o enclosures)