



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 8, 2008

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

OR2008-13805

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# 324039.

The Department of State Health Services (the "department") received a request for letters to providers from January 1, 2007 to the present sent to operators of general and special hospitals, as well as private psychiatric hospitals. You state some of the requested information has been or will be provided to the requestor. You claim the submitted letters are excepted from disclosure under section 552.101 of the Government Code.<sup>1</sup> 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 written comments regarding availability of requested information).

Initially, we note one of the submitted letters was created after the date the request was received. Thus, this information, which we have marked, is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

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<sup>1</sup>Although you also raise section 552.137 of the Government Code, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume that you no longer assert this exception. *See* Gov't Code §§ 552.301, .302.

Next, you inform us the submitted information is the subject of a previous determination. This office issued Open Records Letter No. 2005-04917 (2004), which serves as a previous determination under section 552.301(a) of the Government Code for the department with respect to information regarding a complaint and investigation concerning a hospital. In that ruling, we concluded the department must withhold information and materials obtained or compiled by the department in connection with a complaint and investigation concerning a hospital under section 241.051 of the Health and Safety Code without the necessity of requesting a ruling from this office. We noted, however, the information may only be withheld when none of the release provisions of sections 241.051(d) and (e) apply. In this instance, the requestor asserts a right of access to the requested letters pursuant to section 241.051(d)(5). Because the facts and circumstances here are not the same as those in the previous ruling, we conclude the department may not rely on Open Records Letter No. 2005-04917 to withhold the submitted letters. *See* Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when elements of law, fact, and circumstances have not changed, decision concludes specific, clearly delineated category of information is excepted, and governmental body is explicitly informed it need not seek a decision from this office to withhold information in response to future requests).

Because the submitted letters may not be withheld pursuant to the previous determination, the department was required to submit the responsive information to this office within fifteen business days of receiving the request. *See* Gov't Code § 552.301(e). You inform us the department received this request on July 21, 2008; however, you did not submit the requested information until September 16, 2008. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption 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). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). You raise section 552.101 of the Government Code. Because this section can provide a compelling reason to withhold information, we will consider your arguments under this exception.

Section 552.101 of the Government Code excepts from public 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. Chapter 241 of the Health and Safety Code governs the licensing of hospitals. Section 241.051 authorizes the department to make any inspection, survey, or investigation that it considers necessary, and provides in pertinent part:

(d) All information and materials obtained or compiled by the [Texas Department of Health<sup>2</sup>] in connection with a complaint and investigation concerning a hospital are confidential and not subject to disclosure under Section 552.001 et seq., Government Code, 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 hospital;

(2) the hospital that is the subject of the enforcement action, or the hospital's authorized representative;

(3) appropriate state or federal agencies that are authorized to inspect, survey, or investigate hospital services;

(4) law enforcement agencies; and

(5) persons engaged in bona fide research, if all individual-identifying and hospital-identifying information has been deleted.

(e) The following information is subject to disclosure in accordance with Section 552.001 et seq., Government Code:

(1) a notice of alleged violation against the hospital, which notice shall include the provisions of law which the hospital is alleged to have violated, and a general statement of the nature of the alleged violation;

(2) the pleadings in the administrative proceeding; and

(3) a final decision or order by the department.

Health & Safety Code § 241.051(d), (e). You state the submitted letters to providers pertain to investigations of complaints concerning the hospitals at issue in the letters. Thus, we agree the submitted letters are subject to section 241.051(d) of the Health and Safety Code.

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<sup>2</sup>We note the Texas Department of Health became part of the Texas Department of State Health Services on September 1, 2004. See <http://www.tdh.state.tx.us>; see also Acts 2003, 78th Leg., R.S., ch. 198, eff. Sept. 1, 2003.

As previously noted, however, the requestor asserts a right of access to the requested letters under section 241.051(d)(5). The requestor contends he is engaged in bona fide research regarding the requested information. The requestor further argues because the term "bona fide research" is not defined in the statute, the common definitions of these words should be broadly applied. In Open Records Decision No. 458 (1987), this office addressed a similar argument regarding a statute that also contained an exception to confidentiality based on bona fide research purposes where the term "bona fide research" was not defined. In that decision, we stated the agency charged with implementing the statute "should be accorded leeway in formulating its own interpretations" of the statute. Open Records Decision No. 458 at 4 (1987). We also stated the definition issue need not be resolved because the language of the statute plainly establishes that regardless of how the term is construed, "it is within the [governmental body's] discretion to decide whether and to what extent to release confidential information" for research purposes." *Id.* The decision further explained the statute states the governmental body "'may' disclose confidential information for [research] purposes, not that it must or shall do so," and "the word 'may' is generally regarded as permissive in character." *Id.* In this instance, we believe the same rationale regarding the discretionary nature of the exceptions to confidentiality applies to section 241.051(d). The department states the submitted letters do not contain any information that falls within the exception outlined in section 241.051(d)(5). Thus, because releasing confidential information under section 241.051 is discretionary and the department states none of the exceptions to confidentiality apply here, we conclude the requestor does not have a right of access to the submitted letters under section 241.051(d)(5). Accordingly, the submitted letters must be withheld under section 552.101 of the Government Code in conjunction with section 241.051 of the Health and Safety Code.

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).

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,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/jh

Ref: ID# 324039

Enc. Submitted documents

c: Mr. Doug Swanson  
Dallas Morning News  
508 Young Street  
Dallas, Texas 75202  
(w/o enclosures)