



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 28, 2008

Mr. Carey E. Smith
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2008-14648

Dear Mr. Smith:

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# 325921.

The Texas Health and Human Services Commission (the "commission") received a request for all information pertaining to a specified independent dispute resolution concerning a deceased individual and a nursing home. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Initially, we note that the commission has marked certain information submitted to this office as "public" and states that such information has been released to the requestor.² We also note that the commission has raised section 242.126(g) in its brief to this office. Section 242.126(g) requires the commission to make public on request investigation reports

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.

²The information that has been released includes documents labeled "Form DADS 3724" and "Form CMS 2567."

of abuse or neglect pertaining to a facility licensed under chapter 242, with redactions to protect the identity of certain individuals. *See* Health & Safety Code § 242.126(g)(1)(A)-(C); *see also* § 40 TAC 19.2010(a)(1). The commission does not inform us, however, and we are unable to discern, that the information that has been released to the requestor was released in accordance with section 242.126(g). Further, the commission has not identified any of the remaining submitted information as information falling under the requirements of section 242.126(g), nor do we find any other information within the submitted documents that appear to fall under this section. Accordingly, to the extent that the commission possesses information constituting an investigation report completed in accordance with section 242.126(g), we assume the commission has made this information available to the requestor.

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 section encompasses information made confidential by other statutes. Access to medical records is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the Occupations Code provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code §§ 159.002(b), (c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Further, information that is subject to the MPA also includes information that was obtained from medical records. *See* Occ. Code. § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991).

Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Medical records pertaining to a deceased patient may only be released upon the signed consent of the deceased's personal representative. *See id.* § 159.005(a)(5). Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked the medical records in the submitted information that are subject to the MPA. The commission may only disclose these records in accordance with the MPA. However, no portion of the remaining information

constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician for the purposes of the MPA. Accordingly, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses section 242.127 of the Health and Safety Code, which pertains to investigations of alleged or suspected abuse or neglect in convalescent or nursing homes and related facilities. Section 242.127 provides in pertinent part:

A report, record, or working paper used or developed in an investigation made under [subchapter E of chapter 242] . . . [is] confidential and may be disclosed only for purposes consistent with the rules adopted by the [Texas Department of Aging and Disability Services] or the designated agency.

Health & Safety Code § 242.127. The only entities authorized to conduct an investigation under subchapter E of chapter 242 are the Texas Department of Human Services (“DHS”) or the agency designated by a court to be responsible for the protection of a nursing home resident who is the subject of a report of abuse or neglect. *See id.* § 242.126; *see also id.* § 242.121 (defining “designated agency”).³ You state that the records at issue “pertain to an investigation conducted under the authority of chapter 242 of the Health and Safety Code into a complaint of abuse or neglect of a nursing facility resident.” The remaining information consists of working papers developed during the course of the investigation of the alleged abuse. Accordingly, we agree that the remaining information is confidential under section 242.127 of the Health and Safety Code and must be withheld under section 552.101 of the Government Code.⁴

In summary, the commission may only release the marked medical records in accordance with the access provisions of the MPA. The remaining information must be withheld under section 552.101 of the Government Code in conjunction with section 242.127 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

³We note that the Texas Health and Human Services Commission supervises the Texas Department of Aging and Disability Services. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 198, §§ 1.01-.03, 1.19(a)(2), 1.20(a)(3), 1.26, 2003 Tex. Gen. Laws 611, 611-14, 636-38, 641.

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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).

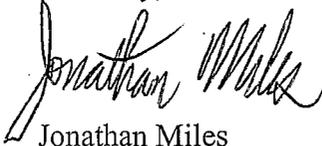
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/jh

Ref: ID# 325921

Enc. Submitted documents

c: Ms. Nancy Hunter
402 Sage Meadow Drive
Amarillo, Texas 79107
(w/o enclosures)