



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 3, 2009

Ms. Dawn Burton  
Assistant General Counsel  
Texas Department of State Health Services  
P.O. Box 149347  
Austin, Texas 78714-9347

OR2009-12491

Dear Ms. Burton:

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# 354348.

The Department of State Health Services (the "department") received two requests for a specified notice of violation. You state you have released portions of the requested information. You claim that the submitted information is 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 received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that an interested party may submit comments stating why information should or should not be released).

Initially, you state that the submitted information was released by the department in response to a previous request for information. Section 552.007 of the Government Code generally prohibits selective disclosure of information that a governmental body has voluntarily made available to any member of the public. *Id.* § 552.007. Section 552.007 provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See id.*; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision Nos. 490 (1988), 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential

by law). In this instance, the department raises section 552.101 of the Government Code, which governs information considered to be confidential by law. *See* Gov't Code § 552.101. Thus, regardless of whether the information at issue has been previously released, we must address whether the submitted information is made confidential by law and must now be withheld pursuant to section 552.101 of the Government Code.

Next, the department acknowledges, and we agree, that it failed to comply with the procedural requirements of section 552.301 of the Government Code. *See* Gov't Code § 552.301. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption the information is public and must be released, unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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 reason to withhold information exists where some other source of law makes the information confidential or where an exception designed to protect the interest of a third party is applicable. *See* Open Records Decision No. 150 at 2 (1977). You claim the submitted information is confidential under section 552.101 of the Government Code. Because section 552.101 can provide a compelling reason to overcome the presumption of openness, we will consider whether or not the submitted information is excepted under the Act.

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. You assert that the submitted information is excepted under section 577.013 of the Health and Safety Code. Section 552.101 encompasses section 577.013(d) of the Health and Safety Code, which provides as follows:

(d) All information and materials obtained or compiled by the department in connection with a complaint and investigation concerning a mental hospital licensed under this chapter are confidential 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 licensed mental hospital;
- (2) the licensed mental hospital that is the subject of the enforcement action, or the licensed mental hospital's authorized representative;

- (3) appropriate state or federal agencies that are authorized to inspect, survey, or investigate licensed mental hospital services;
- (4) law enforcement agencies; and
- (5) persons engaged in bona fide research, if all individual-identifying information and information identifying the licensed mental hospital has been deleted.

Health & Safety Code § 577.013(d). However, subsection (e) of section 577.013 provides that notice of the alleged violation against the licensed mental hospital, pleadings in the administrative hearing, and the final decision or order by the department are subject to disclosure under the Act. *Id.* § 577.013(e). The information at issue is the notice of violation against a facility licensed by the department and includes the provisions of law the facility is alleged to have violated and the nature of the alleged violation. As the notice is subject to the Act pursuant to section 577.013(e), the department may not withhold it under section 577.013(d). However, in accordance with section 577.013(e), we will address your remaining arguments under section 552.101 of the Government Code.

We next address your arguments under section 552.101 of the Government Code in conjunction with the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides, in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (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.

*Id.* § 159.002(a)-(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). Information taken directly from medical records and contained in other documents

can be withheld in accordance with the MPA. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). We also have concluded that when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). Medical records must be released on the personal representative of the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. After the death of a patient, medical records may be released only on the signed written consent of the deceased individual'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).

You state that some information in the notice of violation has been taken directly from medical records or from communications between a physician and patient. Based on your representations and our review of that information, we conclude that the information that we have marked is confidential under the MPA. Therefore, the marked information must be withheld under section 159.002 of the MPA unless the department receives the required written consent for release under sections 159.004 and 159.005 of the MPA.

Next, you assert that portions of the remaining information are confidential under section 611.002 of the Health and Safety Code. Section 552.101 also encompasses section 611.002, which is applicable to mental health records and provides in pertinent part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining "patient" and "professional"). Upon review, we find none of the remaining submitted information consists of mental health records. Accordingly, the department may not withhold any of the submitted information pursuant to section 611.002(a) of the Health and Safety Code.

You also argue that the some of the remaining submitted information is excepted under section 576.005 of the Health and Safety Code. Section 552.101 also encompasses section 576.005, which provides that "[r]ecords of a mental health facility that directly or indirectly identify a present, former, or proposed patient are confidential unless disclosure is permitted by other state law." *Id.* § 576.005. We note, however, that the notice of

violation, sent to the licensed facility by the department, is not a record of a mental health facility as contemplated by section 576.005. As such, we conclude that the submitted information may not be withheld under section 576.005 of the Health and Safety Code. *See* Open Records Decision No. 163 (1977) (construing predecessor statute).

In summary, the marked information may only be released in accordance with the MPA. The remaining information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Tamara Wilcox  
Assistant Attorney General  
Open Records Division

TW/dls

Ref: ID# 354348

Enc. Submitted documents

c: Requestor  
(w/o enclosures)