



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

September 23, 2009

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

OR2009-13435

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# 356355.

The Texas Department of State Health Services (the "department") received a request for agreed orders and any other information concerning enforcement actions at six named hospitals.¹ You state you have released some of the requested information to the requestor. 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.

Initially, the department acknowledges, and we agree, that you failed to comply with the requirements of section 552.301 of the Government Code. *See* Gov't Code § 552.301(b) (governmental body must ask for decision from this office and state exceptions that apply within ten business days of receiving written request for information). A governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the

¹We note that the department received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also* Open Records Decision No. 663 (1999) (discussing tolling of deadlines during period in which governmental body is awaiting clarification).

governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Because section 552.101 can provide a compelling reason to overcome this presumption, we will address 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. 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 consists of notice of violations against facilities licensed by the department and includes the provisions of law the facilities are alleged to have violated and the nature of the alleged violations. As the notices are subject to the Act pursuant to section 577.013(e), the department may not withhold them

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.

Section 552.101 also encompasses information protected by other statutes, including the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

(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.

Occ. Code § 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 may only be released in accordance with the MPA. *See* Open Records Decision No. 598 (1991). You indicate that the information you have marked under section 159.002 of the Occupations Code 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 this information may only be released in accordance with the MPA.

Section 552.101 also encompasses section 261.201(a) of the Family Code, which provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You inform us that portions of the remaining information, which you have marked under section 261.201, relate to an investigation by the department of alleged abuse or neglect of a child in a facility licensed by the department. Based on your representations, we conclude that the marked information at issue was used or developed by the department in conducting an investigation under chapter 261 or in providing services as a result of such an investigation *See id.* § 261.103(a)(3) (requiring that report of suspected abuse or neglect be made to state agency that operates, licenses, certifies, or registers facility in which alleged abuse or neglect occurred). Therefore, this information is confidential under section 261.201 of the Family Code and may be disclosed only for purposes consistent with the Family Code and applicable federal or state law or under rules adopted by the department.

You indicate that the department has adopted section 1.207 of title 25 of the Texas Administrative Code to govern the release of this type of information. You state that section 1.207 references specific statutory exceptions that do not apply to the information you have marked in the Notice of Violation Letters at issue. Based on your representation that the department's rule regarding release of this information does not apply in this instance, the department must withhold this information under section 552.101 of the Government Code as information made confidential by law.

Next, you seek to withhold the remaining information you have marked 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"). You indicate that the remaining information you have marked has been taken directly from mental health records or from communications between a mental health professional and a patient. Based on your representations and our review, we conclude that the information we have marked is a mental health record which is subject to chapter 611. Therefore, this information may only be released in accordance with sections 611.004

and 611.0045 of the Health and Safety Code. However, we find that the department has failed to demonstrate how the remaining information at issue constitutes a mental health record subject to chapter 611. Therefore, none of the remaining information may be withheld on this basis.

You also argue that 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 notice of violations sent to the licensed facilities by the department are not records of a mental health facility as contemplated by section 576.005. As such, we conclude that none of the remaining information may 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 information you have marked under section 159.002 of the Occupations Code may only be released in accordance with the MPA. The department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The remaining information we have marked may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. The remaining submitted 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, 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,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/rl

Ref: ID# 356355

Enc. Submitted documents

c: Requestor
(w/o enclosures)