ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 7, 2010

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

OR2010-13554

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# 392936 (DSHS File no. 17300-2010).

The Texas Department of State Health Services (the "department") received a request for information pertaining to a specified investigation or any other investigation involving the Palladium for Surgery–Houston (the "facility"). You state that you will release some 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, as you acknowledge, the department failed to request a ruling or submit the responsive information within the statutory time periods prescribed by sections 552.301(b) and 552.301(e) of the Government Code. *See* Gov't Code § 552.301(b), (e). 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; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *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); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is

confidential by law. Open Records Decision No. 150 (1977). Because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will consider its applicability to the submitted information.

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. Section 552.101 encompasses confidentiality provisions such as section 161.032 of the Health and Safety Code, which provides in relevant part:

> (a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.
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> . . .
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> (c) Records, information, or reports of a medical committee . . . and records, information, or reports provided by a medical committee . . . to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under Chapter 552, Government Code.

Health & Safety Code § 161.032(a), (c). For purposes of this confidentiality provision, a "'medical committee' includes any committee, including a joint committee, of . . . a university medical school or health science center[.]" *Id.* § 161.031(a). The term also encompasses "a committee appointed ad hoc to conduct a specific investigation or established under state or federal law or rule or under the bylaws or rules of the organization or institution." *Id.* § 161.031(b). Section 161.0315 provides in relevant part that "[t]he governing body of a . . . university medical school or health science center . . . may form . . . a medical committee, as defined by section 161.031, to evaluate medical peer review committee and health care services[.]" *Id.* § 161.0315(a).

The precise scope of the "medical committee" provision has been the subject of a number of judicial decisions. *See Memorial Hosp.—The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996); *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988); *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1986); *Hood v. Phillips*, 554 S.W.2d 160 (Tex. 1977); *Texarkana Memorial Hosp., Inc. v. Jones*, 551 S.W.2d 33 (Tex. 1977); *McAllen Methodist Hosp. v. Ramirez*, 855 S.W.2d 195 (Tex. App.—Corpus Christi 1993), disapproved by, *Memorial Hosp—The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996); *Doctor's Hosp. v. West*, 765 S.W.2d 812 (Tex. App.—Houston [1st Dist.] 1988); *Goodspeed v. Street*, 747 S.W.2d 526 (Tex. App.—Fort Worth 1988). These cases establish that "documents generated by the committee in order to conduct open and thorough review" are confidential. This protection extends "to documents that have been prepared by or at the direction of the committee for committee purposes." *Jordan*, 701 S.W.2d at 647-48. Protection does not extend to documents "gratuitously submitted to a committee" or "created without committee impetus and purpose." *Id.* at 648; *see also* Open Records Decision No. 591 (1991)

(construing statutory predecessor to section 161.032 of the Health and Safety Code). We note that section 161.032 does not make confidential "records made or maintained in the regular course of business by a hospital[.]" Health & Safety Code § 161.032(f); *see Memorial Hosp.—The Woodlands*, 927 S.W.2d at 10 (stating that reference to statutory predecessor to section 160.007 in section 161.032 is clear signal that records should be accorded same treatment under both statutes in determining if they were made in ordinary course of business).

A portion of the submitted information, which you have marked, consists of records of the facility's Performance Enhancement Committee, which you contend is a medical committee. We understand the department obtained this information in the course of an investigation of the facility. *See* Health and Safety Code § 243.006 (allowing department to inspect an ambulatory surgical center "at reasonable times as necessary to assure compliance with" chapter 243 of the Health & Safety Code). Upon review, we agree the facility's Performance Enhancement Committee constitutes a medical committee as defined by section 161.031. Furthermore, we find the records at issue have maintained their confidentiality for purposes of section 161.032. *See* Attorney General Opinions H-836 (1976), H-242, M-713; Open Records Decision Nos. 655 (1997), 414 (1984) (concluding that information ordinarily may be transferred between governmental bodies that are subject to the Act without waiving exceptions to the public disclosure of that information or affecting its confidentiality). Therefore, we conclude the information you have marked under section 161.032 of the Health and Safety Code is confidential and must be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses section 1306(a) of title 42 of the United States Code, which provides:

> (1) No disclosure of any return or portion of a return (including information returns and other written statements) filed with the Commissioner of Internal Revenue under Title VIII of the Social Security Act [42 U.S.C.A. § 1001 et seq.] or under subchapter E of chapter 1 or subchapter A of chapter 9 of the Internal Revenue Code [of 1939], or under regulations made under authority thereof, which has been transmitted to the head of the applicable agency by the Commissioner of Internal Revenue, or of any file, record, report, or other paper, or any information, obtained at any time by the head of the applicable agency or by an officer or employee of the applicable agency in the course of discharging the duties of the head of the applicable agency under [chapter 7 of title 42 of the United States Code], and no disclosure of any such file, record, report, or other paper, or information, obtained at any time by any person from the head of the applicable agency or from any officer or employee of the applicable agency shall be made except as the head of the applicable agency may by regulations prescribe and except as otherwise provided by federal law.

> (2) For purposes of this subsection . . . the term "applicable agency" means—
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> > (A) the Social Security Administration, with respect to matter transmitted to or obtained by such administration or matter disclosed by such administration; or
> >
> > (B) the Department of Health and Human Services, with respect to matter transmitted to or obtained by such Department or matter disclosed by such Department.

42 U.S.C. § 1306(a). You explain the department is the Medicare state survey agency pursuant to an agreement with the Centers for Medicare and Medicaid Services ("CMS"). A portion of the remaining information, which you have marked, consists of forms you state were obtained under the Social Security Act, including two CMS-2567 forms. Federal regulations require the department to release official reports that evaluate the performance of a provider of services, 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 U.S.C. §§ 1306(e)-(f); 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 at 5 (1988); *see also* Health & Safety Code § 142.009(d)(6). You acknowledge, and we agree, that the two submitted CMS-2567 forms must be released with redactions in accordance with 42 U.S.C. §§ 1306(e)-(f) and 42 C.F.R. §§ 401.101, .105, .126, and .133. You state you either have already have released the information at issue with redactions or will do so. However, you contend the remaining RRB-1500, CMS-378, and CMS-1539 forms are not the type of reports subject to limited disclosure under section 1306(e)(3). Based upon your representations and our review, we agree these documents do not constitute "official reports" that fall within the purview of section 1306(e). Accordingly, with the exception of the two CMS-2567 that must be released with redactions pursuant to 42 U.S.C. § 1306(e)-(f), the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 1306(a) of title 42 of the United States Code.

Section 552.101 also encompasses 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). Upon review, we find a portion of the submitted information constitutes confidential medical records and information taken from medical records. Thus, the information we have marked may only be released in accordance with the MPA. ORD 598. However, you have not demonstrated how the remaining document at issue is a medical record for purposes of the MPA, or whether the information you have highlighted in that document was taken directly from a medical record. Therefore, the department may not withhold the remaining document at issue on the basis of the MPA.

You claim portions of the remaining information are excepted from disclosure under section 552.101 in conjunction with common-law privacy. The doctrine of common-law privacy excepts from public disclosure private information about an individual if the information (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). You seek to withhold information identifying patients of the facility, which you have marked, under common-law privacy. We note that generally, an individual's name or address is not private information under common-law privacy. *See* Open Records Decision No. 554 at 3 (1990) (disclosure of person's name, address, or telephone number not an invasion of privacy). However, in this instance, we agree this identifying information you have marked, as well as the additional identifying information we have marked, is highly intimate or embarrassing. We also agree this information is not of legitimate public interest. Therefore, the department must withhold the marked patient-identifying information under section 552.101 in conjunction with common-law privacy. You also seek to withhold the surgery dates and additional medical information for certain patients of the facility. This office has found certain kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy.

See Open Records Decision Nos. 470 (1987), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). In this instance, however, the individuals to whom these surgery dates and medical information pertain have already been de-identified. Consequently, as these individuals' privacy interests have already been protected, the department may not withhold the remaining information you have marked on the basis of common-law privacy.

You claim the surgery dates and remaining medical information you have marked are also subject to constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)). Upon review, you have not explained, nor can we discern, how the surgery dates and remaining medical information you have marked fall within the zones of privacy or implicate privacy interests for purposes of constitutional privacy. Furthermore, as noted above, any privacy interests the patients had in their surgical information has been protected under common-law privacy. Therefore, none of this information may be withheld under section 552.101 in conjunction with constitutional privacy.

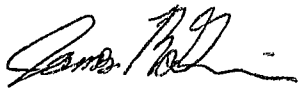
In summary, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code. The department must withhold or release the medical records we have marked in accordance with the MPA. With the exception of the submitted CMS-2567 forms, which must be released with redactions in accordance with 42 U.S.C. § 1306(e)-(f), the department must withhold the information you have marked under section 552.101 in conjunction with section 1306(a) of title 42 of the United States Code. The department must withhold the marked patient-identifying information under section 552.101 in conjunction with common-law privacy. The remaining information must be released.

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,



James McGuire
Assistant Attorney General
Open Records Division

JM/dls

Ref: ID# 392936

Enc. Submitted documents

c: Requestor
(w/o enclosures)