



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 8, 2010

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

OR2010-18425

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# 402429.

The Texas Department of State Health Services (the "department") received a request for the dialysis facility reports and the state outcomes list for the year 2010. 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, a portion of which consists of a representative sample.¹ We have also received and considered comments submitted by the Texas Department of Aging and Disability Services ("DADS"). See Gov't Code § 552.304 (providing that an interested party may submit comments stating why information should or should not be released).

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.

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 id.* § 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. This section encompasses information protected by other statutes, including 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-

(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). The department cites to subsection 401.101 of title 42 of the Code of Federal Regulations and the Centers for Medicare and Medicaid Services' ("CMS") State Operations Manual for the proposition that section 1306(a)(1) applies to survey agencies. The department and DADS explain that the department is the Medicare state survey agency pursuant to the Social Security Act 1864 agreement between DADS and CMS. The submitted information consists of dialysis facility reports and the state outcomes list, and the department states that this information was obtained from CMS pursuant to the 1864 agreement. 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). The department explains that the state outcomes list and dialysis facility reports are not the type of report subject to limited disclosure under section 1306(e)(3). Based upon department's representations and our review, we agree that the submitted state outcomes list and dialysis facility reports are not "official reports" that fall within the purview of section 1306(e). We also agree that the dialysis facility reports and the state outcomes list consist of information obtained by the department as a Medicare intermediary in the course of carrying out its agreement with CMS. Accordingly, the department must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 1306(a)(1) of title 42 of the United States Code. As our ruling is dispositive, we need not address your remaining argument against disclosure.

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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/eeg

Ref: ID# 402429

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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