



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 18, 2011

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

OR2011-00838

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# 406211 (DSHS # 18203-2011).

The Texas Department of State Health Services (the "department") received a request for the facility reports for 2007 and 2008 for a specified end stage renal disease facility, along with fifteen categories of information related to a specific investigation of that facility conducted by the department. You state that some information has been, or will be, released to the requestor. You claim that portions of the remaining requested information are excepted from disclosure under sections 552.101 and 552.137 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Initially, we note, and you acknowledge, that the department failed to meet the deadlines prescribed by section 552.301 of the Government Code in requesting an open records decision from this office. *See* Gov't Code § 552.301(b), (e). The information at issue is therefore presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *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 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because sections 552.101 and 552.137 of the Government Code can each provide a compelling reason to withhold information, we will address your arguments under those sections against disclosure of the submitted information.

We next note that the submitted information contains a Centers for Medicare and Medicaid Services ("CMS") 2567 federal deficiency form. In Open Records Letter No. 2005-04917 (2005), we granted the department a previous determination finding, in part, that the identifying information of patients, physicians, other medical practitioners, or other individuals contained in a CMS-2567 form is confidential when the provider being evaluated has had a reasonable opportunity to review the report and other comments. *See* 42 U.S.C. § 1306(e), (f); 42 C.F.R. §§ 401.126,.133; *see also* Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under section 552.301(a)). You have marked some information in the federal form to be withheld pursuant to section 552.101 of the Government Code in conjunction with federal law in accordance with this previous determination. The department must withhold this marked 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, such as chapter 251 of the Health and Safety Code, which relates to end stage renal disease facilities. Section 251.015 provides:

(a) A medical review board shall advise the [Texas Board of Health] on minimum standards and rules to be adopted under this chapter.

(b) The medical review board shall review the information on quality of care provided in the annual report filed under Section 251.013(f) and other appropriate information provided to or compiled by the department with respect to an end stage renal disease facility. Based on the review, the medical review board may advise the department about the quality of care provided by a facility and recommend an appropriate corrective action plan under Section 251.061 or other enforcement proceedings against the facility.

(c) Information concerning the quality of care provided to or compiled by the department or medical review board and a recommendation of the medical review board are confidential. The information or recommendation may not be made available for public inspection, is not subject to disclosure under Chapter 552, Government Code, and is not subject to discovery, subpoena, or other compulsory legal process.

(d) The department, in its discretion, may release to a facility information relating to that facility that is made confidential under Subsection (c). Release of information to a facility under this subsection does not waive the confidentiality of that information or the privilege from compulsory legal process.

Health & Safety Code § 251.015. Section 251.061 of the Health and Safety Code provides, in relevant part:

(g) A corrective action plan is not confidential. Information contained in the plan may be excepted from required disclosure under [the Act], in accordance with that chapter or other applicable law.

Health & Safety Code § 251.061(g). You have marked information that you assert is confidential pursuant to section 251.015(c) of the Health and Safety Code. You represent that this information consists of quality of care information compiled by the department or the medical review board, or constitutes recommendations of the medical review board. As you note, the information at issue also contains a corrective action plan, which is not confidential under section 251.061(g). However, you state that the information marked in the corrective action plan also constitutes confidential quality of care information subject to section 251.015(c). Based on your representations and our review of the information at issue, we agree that the information you have marked is confidential under section 251.015(c) of the Health and Safety Code. Therefore, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 251.015(c) of the Health and Safety Code. We have marked additional information that must be withheld under this section.

Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information 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). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* includes information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has additionally determined that other types of information are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

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. Open Records Decision No. 455 at 4. 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. *Id.* 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.* The scope of information protected under constitutional privacy is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)). Because privacy is a personal right that lapses at death, the common-law and constitutional rights to privacy do not encompass information that relates only to a deceased individual. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 (1981).

You have marked patient-identifying information in the remaining documents that you assert is excepted from disclosure under section 552.101 in conjunction with common-law and constitutional privacy. We note, however, that some of the patients at issue are deceased. Accordingly, information pertaining to these individuals may not be withheld on the basis of either common-law or constitutional privacy. The department must withhold the information you have marked pertaining to living patients under section 552.101 in conjunction with common-law privacy.

Section 552.101 also encompasses the Medical Practices Act ("MPA"). Medical records are confidential under the MPA, subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides, in relevant 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). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created either by a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find you have failed to demonstrate how any 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.

Finally, you have marked e-mail addresses that you assert are excepted from disclosure under section 552.137 of the Government Code. This section excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses you have marked are not a type specifically excluded by section 552.137(c). Thus, unless the department receives consent for their

release, the marked e-mail addresses must be withheld under section 552.137 of the Government Code.<sup>1</sup> *See id.* § 552.137(b).

In summary, the department must withhold (1) the information marked by you in the federal CMS-2567 form under section 552.101 of the Government Code in conjunction with federal law in accordance with Open Records Letter No. 2005-04917, (2) the information marked under section 552.101 in conjunction with section 251.015(c) of the Health and Safety Code, (3) the identifying information of living patients under section 552.101 in conjunction with common-law privacy, and (4) the e-mail addresses marked under section 552.137. 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](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,



Misty Haberer Barham  
Assistant Attorney General  
Open Records Division

MHB/em

Ref: ID# 406211

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>1</sup>We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision.